

STATE OF NEW HAMPSHIRE INSURANCE DEPARTMENT

IN RE: PETITION OF MARGARET MCCARTHY

DOCKET NO.: INS. 13-038-AP

FINAL ORDER

Background

The federal Affordable Care Act (ACA) requires most U.S. residents to secure health insurance. To facilitate the purchase of health insurance in New Hampshire to meet this mandate, there is a New Hampshire Health Insurance Marketplace (Marketplace)¹ where New Hampshire consumers can purchase standardized health insurance plans and can qualify for federal subsidies to help with the cost of insurance. Federal subsidies are not available to consumers who purchase health insurance outside the Marketplace.

In New Hampshire, Anthem Blue Cross Blue Shield (Anthem) was the only health insurer that chose to offer insurance policies on New Hampshire's Marketplace in 2014. In accordance with the requirements of the ACA and state law,² Anthem filed its Marketplace health insurance products with the Department for review. The Department in turn, reviewed these plans, including review of the adequacy of Anthem's proposed provider network for plans to be sold on the Marketplace, called the "Pathway Network." The Pathway Network did not include Frisbie Memorial Hospital or Frisbie Hospital doctors and providers.

The Department reviewed the Pathway Network to determine whether it was "sufficient in numbers, types and geographic location of providers to ensure that all services to covered persons will be accessible without unreasonable delay."³ On July 31, 2013, the Department recommended to the United States Department of Health and Human Services, through the Center for Consumer Information and Insurance Oversight (CCIIO), that the Anthem plans utilizing the Pathway Network of providers, should be certified by CCIIO as "Qualified Health Plans" (QHPs) that could be offered for sale on the Marketplace, because the plans did satisfy state requirements including state requirements related to the adequacy of the Pathway Network.⁴

¹ Marketplaces can either be created and operated by the state (state-based Marketplace) or can be created and operated through a partnership between the state and the federal government (partnership Marketplace) or can be entirely federally created and operated (federally-facilitated Marketplace). A Marketplace is also known as an "Exchange." New Hampshire has established a partnership Marketplace or Exchange known as the New Hampshire Health Insurance Marketplace, or New Hampshire Marketplace. See RSA Chapter 420-N:8 Federally-Facilitated Exchange, Authority of the Commissioner.

² RSA 420-N:8, I

³ RSA 420-J:7, I and Ins 2701.04(a). The Commissioner's authority to regulate network adequacy is established in RSA 420-J:7 and the rules promulgated under authority of this statute, at Ins 2700.

⁴ This July 31 act of recommending to CCIIO that the Anthem Marketplace plans and Pathway Network should be certified as QHPs will be referred to as the "July 31 recommendation."

Procedural History

On November 6, 2013, Margaret McCarthy (the Petitioner) and Frisbie Memorial Hospital (Frisbie) requested a hearing to challenge the Department's approval of the Pathway Network, and to object that the Network did not include Frisbie providers. For relief, the Petitioner and Frisbie sought an order from the Department that would require Anthem to permit Frisbie and its providers to participate in the Pathway Network under the same terms and conditions as the other Pathway providers.

On December 11, 2013, I issued an Order finding neither Frisbie nor the Petitioner had standing to challenge the Department's July 31 determination. After rehearing, I issued a further order on March 28, 2014, affirming my prior determination that Frisbie did not have standing. However, as to Petitioner McCarthy, based on additional allegations in a supplemental filing I found that she had established standing under RSA 400-A:17, II(b) sufficient to challenge the Department's recommendation to CCIIO concerning the Anthem Pathway Network. This determination was based on the Petitioner's assertion that (1) she would qualify for a federal subsidy if she purchased insurance from the Marketplace (and thus would pay less for insurance than what she would pay purchasing insurance elsewhere); (2) the Pathway Network in Strafford county where she resides, did not meet state network adequacy standards because it did not include Frisbie and (3) she was harmed by the Department's July 31 recommendation because she was forced to choose between what she contends is a more expensive plan outside the Marketplace with an adequate network and a less expensive, Marketplace subsidized plan, utilizing a provider network that is inadequate.

After I issued the March 28 Order, Anthem filed a Motion to Intervene in the administrative hearing, which was granted without objection. Anthem also requested rehearing to reconsider the timeliness of Petitioner McCarthy's request for hearing under RSA 400-A:17,III and the ruling that the Petitioner had standing. By order of April 30, 2013, I found the Petitioner's request for hearing was timely, affirmed that she had standing, and set the matter for adjudicative hearing on May 14, 2014, at 9:00 am.

On May 6, 2013, the Department filed a Motion in Limine to exclude evidence related to inadequacy of the Network with respect to any unnamed, non-party consumers or medical providers. On May 13, I ruled that since the Petitioner had been granted a hearing to show that Anthem's Network can only be adequate if it includes Frisbie and its providers, the Petitioner would be limited to providing evidence relevant to any deficiencies existing in the Pathway Network in Strafford County where she resides and that could be addressed if Frisbie was included in the Pathway Network. Evidence as to violations in other counties and violations that impact other consumers (but not the Petitioner) would not be relevant and therefore, would not be permitted.

An administrative hearing was conducted on May 14, 2014, at which the Petitioner was given the opportunity to challenge the Department's July 31 determination to CCIIO as to the

sufficiency of the Pathway Network, and to establish that Anthem's Pathway Network could only be found to be adequate if it included Frisbie Hospital and its providers.

Petitioner's Objection Regarding Burden of Proof

The Petitioner has filed an "Objection Regarding Burden of Proof."⁵ As characterized by the Petitioner the objection is:

The Commissioner's ruling on Ms. McCarthy's burden of proof prohibited her from arguing that the Anthem Pathway Network, or 'narrow network,' is inadequate in other counties of the State of New Hampshire; and the ruling was relied upon at the hearing to restrict Ms. McCarthy from eliciting testimony or arguing that Anthem failed to fulfill the basic procedural requirements of N.H. Admin. R. Ins. 2701 regarding network adequacy.

Objection Regarding Burden of Proof, paragraph 2, page 2.

The Petitioner states that her original Petition did not request a hearing only as to the issue of whether the Pathway Network was inadequate as to the Petitioner and in Strafford County because it excluded Frisbie Hospital, but also as to whether the Network was inadequate for other members of the public in other counties due to the exclusion of other providers. The Petitioner requested a hearing:

[O]n whether the Anthem plans approved by the Department and offered on the Marketplace meet the requirements of federal⁶ and New Hampshire law for, among other things, network adequacy, including distance and time to access providers, wait times for health care, and more. Such a hearing must detail the process by which Anthem arrived at its network inclusion decisions, provide Petitioners and the public with the full breadth of information the Department considered in approving the Anthem "narrow network plans," and permit the

⁵ Counsel for the Petitioner at hearing stated he was prepared to offer an objection on the issue of the Petitioner's Burden of Proof orally, or could present it in writing after the hearing. Transcript at 13-14. Anthem and the Department both challenge the Objection as filed by the Petitioner, and assert this Objection is at best, a thinly veiled attempt to reargue the issue of standing. The arguments presented in the Objection are in fact, not related to the Petitioner's burden of proof. However, to provide the Petitioner every possible opportunity to present all relevant legal arguments, I accept this pleading and will address the issues raised.

⁶ Although the Petitioner's original Petition appears to challenge the adequacy of the Pathway Network under federal standards, and she has asked to have two exhibits related to Anthem's compliance with federal Essential Community Providers requirements marked and introduced, the issue of compliance with federal law has not been raised or discussed by the Petitioner at hearing or in any pleading filed after the hearing, and the Petitioner has not requested any find or ruling concerning federal requirements. The Petitioner's focus has been exclusively on compliance with state standards, specifically, state administrative rule Ins 2700. Therefore I will not address compliance with federal requirements in this order.

excluded hospitals, at a minimum, to participate in the Anthem networks, if willing, at rates offered to other providers.

Petition, paragraph 18, page 5.

The Petitioner characterizes this right as her right to a hearing to challenge the Pathway Network “writ large.”

I stated in my March 28 Order that the Petitioner was granted a hearing pursuant to RSA 400-A:17 “to give her the opportunity to demonstrate that Anthem’s network can only be adequate within the meaning of applicable network adequacy standards if it includes Frisbie.” The Petitioner was not granted a hearing to challenge the adequacy of the Network on behalf of a broader class of persons, that is, any consumer in New Hampshire or any hospital or provider. Nor was the Petitioner granted a hearing to challenge the exclusion of other providers in other counties in New Hampshire or any failure on the part of Anthem to meet general procedural requirements that do not relate to the exclusion of Frisbie.

The Petitioner was instead given the opportunity to prove her allegation that she herself was harmed by the Department’s recommendation to CCIIO that the Anthem Pathway Network in Stafford County was adequate, despite the exclusion of Frisbie, and to confirm that she therefore, had standing to raise these issues. The denial of the Petitioner’s request for a hearing to challenge the Pathway Network “writ large” was affirmed in my Order on the Department’s Motion in Limine issued on May 13, 2014, which stated that the Petitioner would not be permitted a hearing on these broader issues. The Petitioner did not appeal either the March 28, or the May 13, Order.

I first must consider whether the Petitioner’s failure to appeal—within 30 days in accordance with RSA 541—my Order of March 28 or May 13 denying her the right to a hearing “writ large” prevents her from now raising this issue. While RSA 400-A:24 does provide that an appeal shall be taken in accordance with RSA 541, the failure to seek reconsideration within 30 days may not be fatal. Appeal of Northern New England Telephone Operations, LLC, 165 N.H. 267, 271-272 (2013). I turn therefore, to the Petitioner’s claim she should be permitted to present evidence as to inadequacies in the Pathway Network that do not affect her personally.

To have the right to a hearing to challenge an act of the Department, a person must show that she is harmed by that act. A hearing will then be granted to give that petitioner an opportunity to show she “would be so aggrieved if [her] grounds are established.” RSA 400-A:17,IV. The Petitioner has not presented any facts in her Petition to show she has been aggrieved by inadequacies in the Pathway Network in counties other than Strafford County. The Petitioner can point to no statute, rule, or holding that permits her the right to a hearing to challenge an act that has caused her no direct injury.

Nor do the cases cited by the Petitioner establish that once an individual has shown she has standing to challenge a state action, she then has the right to represent the interests of others

and to challenge state acts that have not resulted in any direct harm to that individual. Petitioner cites Sierra Club v. Morton, 405 U.S. 727 (1972). But in that case, the court denied the Sierra Club the right to contest the actions of federal officials. The court held that “a mere ‘interest in a problem’ ... is not sufficient by itself to render the organization ‘adversely affected’ or ‘aggrieved’ within the meaning of the APA.” Id. at 739. Only days ago, the New Hampshire Supreme Court in Duncan v. State of New Hampshire, --- A.3d ----, 2014 WL 4241774 (N.H.) similarly ruled that a special interest that is generalized is not sufficient to confer standing absent a definite and concrete injury to the individual. Id. at 7. It ruled that a state statute attempting to confer standing on taxpayers, without requiring them to demonstrate that any of their “personal rights were impaired or prejudiced, violated Part II, Article 74 of the State constitution. Id. at 12-13. The court stated that neither a “special interest” in education nor the “speculation” that state legislation would result in loss of money to local school districts was a sufficient basis to find the plaintiffs had standing. Id. at 8. Nor can standing be “measured by the intensity of the litigant’s interest or the fervor of his advocacy.” Id. at 13.

I do not find the any of the other cases cited by the Petitioner (Lujan v. Defenders of Wildlife, 504 U.S. 555(1992); Massachusetts v. EPA, 549 U.S. 497 (2007); Sugar Cane Growers Cooperative of Fla. v. Veneman, 289 F.3d 89, C.A.D.C. 2002)) relevant or persuasive. None of the cases cited by the Petitioner convince me that the Petitioner has a right to a hearing to challenge aspects of a state action that has caused her no harm.

Our court has long held that to establish standing in the context of an administrative appeal, a person must show that the action being challenged has or will have a direct effect on that person’s legally protected interest. In re. Union Telephone Co., 160 N.H. 309, 313 (2010); Appeal of Campaign for Ratepayers Rights, 142 N.H. 629 (1998); Appeal of Richards, 134 N.H. 148 (1991). A generalized interest or concern absent any direct impact as a result of the challenged action, will not confer on a party the right to challenge the act of a state or city official. Caspersen v. Town of Lyme, 139 N.H. 637, 640-41 (1995)(a general interest in a diverse community was not sufficient to sustain standing to challenge the alleged exclusionary effect of a zoning ordinance); Goldstein v. Town of Bedford, 154 N.H. 393, 395 (2006).

Even in the context of a class action, the New Hampshire Supreme Court has not permitted class representatives to raise legal challenges if that representative is not himself impacted by the alleged injury. In the recent case of Eby v. State, --- A.3d ----, 2014 WL 2688413 (N.H.), a class representative found to have standing to challenge the constitutionality of a tax as disproportional/unreasonable or in violation of the uniformity requirement, did not have standing to also challenge the law on other constitutional grounds, where such alleged violations did not impact that class representative.

The First Circuit in IMS Health Inc. v. Ayotte, 550 F.3d 42 (1st Cir.2008), has also addressed this issue. The court considered whether “data miners” who had standing to challenge one aspect of the state’s Prescription Information Law, could also challenge other aspects of the law on behalf of third parties. The First Circuit ruled that the data miner plaintiffs did not have the right to raise First Amendment arguments on behalf of pharmaceutical companies, doctors or

other third parties, but could assert only their own claims as to how the law infringed their own rights. Id. at 50.

Furthermore, even if the Petitioner did have the right as a class representative to raise arguments or legal challenges without regard to a lack of injury to her, I have no authority to allow the Petitioner to act in this representative capacity. The legislature has not provided for redress of the rights of interested parties in an administrative hearing by way of a class action but by the right to intervene. RSA 541-A:32. Absent legislative authority, I decline to act to create an alternative means for the Petitioner to represent the interests of other consumers who have not requested a hearing to complain of inadequacies in the network in other counties and have not intervened in this matter. As I stated in my prior Order of May 13, concerns as to the rights of those third parties as articulated in Petition of Burling, 139 N.H. 266 (1994) must be considered. It would be inappropriate to allow the Petitioner to act in a representative capacity to adjudicate claims that do not relate to her own injury without any guidelines to address the rights of those parties whom the Petitioner would represent in such an action.

Decisions in other states support the rejection of a class representative approach in administrative proceedings.⁷ The Petitioner has not convinced me that she has a legal right to represent the rights of other consumers, nor is she an association asserting the rights of its members. She therefore, has not established she has the right to present evidence of alleged deficiencies in the Pathway Network that do not impact or directly harm her.

The Petitioner established her standing to appeal the Department's determination as to the issue that she alleged caused her aggrievement. She has been permitted to present any relevant evidence to show what she has alleged, namely, that the Pathway Network was inadequate in Strafford County because it excluded Frisbie, and that as a result, she has been forced to purchase insurance outside the Marketplace and has paid more for this insurance. Evidence unrelated to these issues is irrelevant and immaterial and therefore properly excluded under Ins 203.01(d)(4). Therefore, I reject the Petitioner's arguments contained in her pleading titled Objection Regarding Burden of Proof.

The Petitioner has the burden of proof in this hearing to present evidence that proves, by a preponderance of the evidence, that:

1. The Pathway Network does not meet network adequacy standards and can only be made adequate by including Frisbie and its providers;

⁷ See Sullivan v. Com., Ins. Dept., 408 A.2d 1174 (1979) upholding the Pennsylvania insurance commissioner's rejection of a petitioners' assertion of class status in an administrative proceeding, and stating "we do not think the right to assert class standing in an administrative proceeding should be inferred in the absence of a statute or rule specifically conferring and defining such a right." Id. at 1176. See also Medley Investors, Ltd. v. Lewis, 465 So.2d 1305 (1985) upholding a Florida comptroller's rejection of an individual's class action petition in an administrative refund proceeding, in which the court held "appellants have not alleged that they constitute a trade or professional association. Such a group has standing to request a formal hearing pursuant to section 120.57(1) if certain requirements are met." Id. at 1307.

2. The Petitioner was eligible for a federal subsidy, and would pay more for insurance purchased outside the Marketplace; and,
3. The July 31 determination caused the Petitioner to be forced to choose between purchasing a lower cost plan on the Marketplace with an inadequate network and a more expensive plan outside the Marketplace with an adequate network.

Only if the Petitioner has established by a preponderance of the evidence these facts, would the burden of proof shift to the Department.

Standing⁸

I previously found that the Petitioner:

[H]as standing to challenge the adequacy of Anthem’s network because she has alleged that she has had to choose between a subsidized plan utilizing a provider network she asserts is inadequate and a more expensive plan with an adequate network. I am scheduling a hearing to give her the opportunity to demonstrate that Anthem’s network can only be adequate within the meaning of applicable network adequacy standards if it includes Frisbie.

Order of March 28.

The Petitioner therefore, needed to demonstrate at the hearing, that the Anthem Pathway Network is inadequate. The prospect of paying higher premiums for an insurance plan with a broader network would not, by itself, be enough to confer standing absent an inadequacy in the Pathway Network. And if the Petitioner cannot show she is eligible for a subsidy on the Marketplace, she may be unable to demonstrate an economic injury.

The Petitioner has standing only provisionally. Standing is a factual determination that may be subject to de novo review and if reviewed, “the party challenging the administrative action cannot rest on unsubstantiated allegations, but must sufficiently demonstrate his or her right to claim relief.” Golf Course Investors of NH, LLC v. Town of Jaffrey, 161 N.H. 675, 680 (2011).

Legal Argument Presented by the Petitioner

I now consider the Petitioner’s arguments as to the Pathway Network. The Petitioner challenges the Department’s review of the Pathway Network and the July 31 recommendation to CCIIO. She asserts two theories to support her assertion that the Pathway Network is inadequate in Strafford County because it excludes Frisbie:

⁸ I will not revisit the timeliness of the Petitioner’s request for hearing under RSA 400-A:17,III.

1. The Department failed to require Anthem to file information mandated by Ins 2700 and its own instructions to insurers. If that information had been filed, it would have shown that the network was inadequate without Frisbie.
2. The Department erred in permitting Anthem to use its existing population of insureds in its geographic accessibility analysis⁹ as a “proxy” for those who would be purchasing Marketplace plans. Had the Department required Anthem to develop instead a projected population of insureds based on income levels and educational attainment, the geographic analysis would have shown that the network was inadequate without Frisbie.

Prior to addressing each theory, I will discuss my findings as to the statute and rules governing the sufficiency of provider networks, and the process used by the Department in reviewing the Pathway network.

General Standard for Network Review

RSA 420-J:7 requires that an insurer “maintain a network of primary care providers, specialists, institutional providers, and other ancillary health care personnel that is sufficient in numbers, types and geographic location of providers to ensure that all covered health care services are accessible to covered persons without unreasonable delay.” This basic standard is repeated in the administrative rules adopted in accordance with RSA 420-J:7,II to govern network adequacy. Ins 2701.04(a) establishes this statutory mandate as the “basic access requirement” which must be met by insurers. Ins 2701.04(b) provides that an insurer is deemed compliant with this mandate—that is, the insurer is found to be maintaining a plan with sufficient access to covered persons for all covered health care services without unreasonable delay—if the network “meets all of the standards contained in Ins 2701.02 through 2701.09.”

The rule however, provides an exception to the obligation to satisfy the basic access requirement and the obligations imposed in Ins 2701.04(a) and (b). Ins 2701.04(c) states that insurers are required to maintain a plan that satisfies network requirements only in those counties in which there are at least 1,000 persons participating in the plan. Ins 2701.04(c) states: “[t]he basic access requirement in Ins 2701.04(a) shall be met in each county or hospital service area in which the health carrier has 1000 or more covered persons.”

As to those counties in which the insurer has 1,000 enrolled insureds utilizing its network, the insurer is required to file an annual health care certification of compliance report for each of

⁹ Ins 2701.06 establishes standards for “geographic accessibility.” “Geographic accessibility” is the distance or travel times for covered persons under normal conditions, from their place of residence to the various medical providers in the plan network. Insurers that are subject to the reporting requirements under the rule must file reports to certify they comply with the rule. These reports include a network adequacy report, which provides information on geographic accessibility derived from various network accessibility analysis systems used by insurers to analyze this data. The data obtained from these analysis systems are called “GeoAccess Reports.”

the health benefit plans that the carrier offers in the state. Ins 2701.09(a). This report is due on March 1 of each year. Ins 2701.09(f). In this report the insurer certifies it is in compliance with the requirements of the rule. It also requires certification from the insurer that it has completed a network adequacy report meeting the rule requirements of Ins 2701.06(b), (c) and (d). Ins 2701.09(a). If there is any noncompliance in the insurer's network, the certification must note that noncompliance.¹⁰ Ins 2701.09(a).

Application of RSA 420-J:7 and Ins 2700 to the Department's Review of the Pathway Network

The legislature has made clear in RSA Chapter 420-N that the state retains authority to regulate the business of insurance within New Hampshire, including regulation of the adequacy of insurer provider networks. See RSA 420-N:1; RSA 420-N:7,II and IV(d); and RSA 420-N:8,I. The Department therefore, has authority to review the adequacy of networks for sale on the Marketplace.¹¹

The regulatory oversight provided for in RSA 420-J:7 is the review of an annual compliance report that the insurer is required to file to demonstrate compliance with the statute. In this filing, the insurer confirms that it has maintained a network of providers and health care personnel that is sufficient in numbers, types and geographic location of providers to ensure that all health care services are accessible to its covered members without unreasonable delay. The rule follows the statute's approach by establishing standards to evaluate whether the numbers, types and geographic location of providers are adequate for the plan's actual enrolled members.

Thus, the regulatory approach in the rule is to require the insurer to report in March as to its past compliance with the rule for existing members. The rule does not require the insurer to anticipate if the network will be adequate for a class of insureds it expects will purchase the policy in the upcoming year. There is no reporting requirement and no projections are required for a new network that has no members. In fact the rule exempts the insurer from compliance with the rule in any county where there are 1,000 or fewer enrollees.

The responsibilities imposed as a result of the ACA presented the Department with a unique challenge that was not anticipated or compatible with this retrospective review established in RSA 420-J and Ins 2700. The Department was required make a recommendation to CCIIO on or before the federally imposed deadline of July 31, 2013, as to whether or not the Anthem plans met state standards and should be found by CCIIO to be QHPs.

As a result of this July 31, 2013 deadline, the Department's review of Anthem's Pathway network occurred months before any plan was available for purchase on the Marketplace, and

¹⁰ If there is any noncompliance, the insurer may obtain an exception to the standards for geographic accessibility required by Ins 2701.06(b), (c) and (d) if the insurer demonstrates it satisfies Ins 2701.06(e).

¹¹ The authority is on the proviso that state standards do not conflict with federal requirements.

before March of 2014, when Anthem would be required to file its annual report to confirm that its Pathway network complied with network standards. Further, the review of Anthem's Pathway network would be required before Anthem had a single enrollee in its plans utilizing the Pathway Network of providers.

Therefore, at the time Anthem submitted its plans for review by the Department, it was subject to Ins 2700¹² but it was not required to satisfy the basic access requirement (or comply with the provisions of Ins 2700) in any county until 1,000 enrollees in its Marketplace plans had purchased coverage in that county. Therefore, the Pathway Network was in compliance with Ins 2700.

However, to satisfy the directive in RSA 420-N:8,I, and provide for a meaningful review of the Pathway network in accordance with the intent of the law, rules and Department Bulletin INS 13-007-AB (Exhibit F) the Department determined that regardless of the Anthem's exemption from the requirement of Ins 2700, Anthem must demonstrate that it met the standards for geographic accessibility set forth in Ins 2701.06 and submit GeoAccess reports¹³ to demonstrate that these standards would be met in the Pathway Network. The Department acted reasonably and within its authority under RSA 400-A:3, to require that Anthem demonstrate its Pathway Network met the Standards for Geographic Accessibility in Ins 2701.06.

The testimony of the Deputy Commissioner was that the geographic accessibility standards set forth in Ins 2701.06, specifying the distance or travel time between providers and insureds, were the heart of the requirements in Ins 2700. Transcript at 119. And because there was no population of consumers yet insured under plans using the Pathway network, Anthem filed its GeoAccess reports analyzing distance and travel time using Anthem's then existing population of insureds.

Petitioner's Theory #1: The Department Failed to Require Anthem to File Required Information

The Petitioner asserts that the Department wrongfully failed to obtain information from Anthem that was required to be filed under the provisions of Ins 2700 and the Department's own instructions to health care insurers. The Petitioner has not convinced me that Anthem was required to submit additional data under the rule. Ins 2701.04(c) would exempt Anthem from the provisions of the rule and a demonstration that the Pathway Network met the "basic access requirement." The Petitioner acknowledges in her Closing Argument and Memorandum of Law the contention of the Department and Anthem that Ins 2701.04(c) exempts Anthem from filing the information the Petitioner claims must be filed and that it would be impossible to provide

¹² See Ins 2701.02: "These rules shall apply to all insurers offering or issuing policies of health insurance in the state of New Hampshire that provide managed care services to persons covered under those policies of insurance."

¹³ See footnote 7.

data based on an enrolled population that does not exist.¹⁴ Yet the Petitioner fails to present any cogent argument as to why Ins 2701.04(c) does not exempt Anthem from filing this information or how, as a practical matter, Anthem could have provided data it did not have.

For example, the Petitioner states that Anthem should have submitted an “access map” required by Ins 2701.09(g)(3), showing the location/address of every enrolled member – despite the fact that Anthem had no enrolled members using the Pathway network at that time. Nevertheless, the Petitioner insists that this information, which does not exist, “is of critical importance in this case because the location of members of the Anthem Exchange-available Pathway network is determinative of whether or not Anthem has demonstrated compliance with Ins. 2701.06(b)(1).” Petitioner’s Closing Argument and Memorandum of Law at page 6. The Petitioner states that Anthem’s submission of a map showing its current population of insureds is unacceptable because it is “unlikely that Anthem’s 19,034 population of existing members as of 2013 is an accurate proxy for potential new members.”

The Petitioner points to no law or rule that requires Anthem to submit the map she demands, or that requires Anthem to provide a projection or analysis to determine what impact the removal of Frisbie from its network might have. Neither does RSA 420-J:7 or Ins 2700 impose upon the Department any obligation to obtain this information. The Department is not required to engage in any analysis as suggested by the Petitioner, or to gather evidence to confirm or rebut such theories. See Insurance Services Office v. Whaland, 117 N.H. 712, 719 (1977)(“there are no investigative duties imposed on the commissioner and as such he is not required to make an investigation or to gather evidence to confirm or rebut the proposed schedule in making his determination to approve or disapprove.”)(citation omitted).

Similarly, the Petitioner points to Anthem’s failure to satisfy Ins 2701.06(b)(2), which requires a consumer survey to demonstrate that the primary care provider network “is offering a level of service that meets the members’ needs.” Despite the fact that there were no members in the Pathway Network, the Petitioner insists that “Anthem was required to conduct such surveys annually for its policies and plans and should have had the results of such a survey available for Strafford County.” Closing Argument and Memorandum of Law at page 9. Again, the Petitioner cites no law, rule, or case that supports this assertion.

The Petitioner states that Anthem should have submitted evidence of compliance with Ins 2701.07, which requires a showing that the waiting times for appointments (measured from the initial request for an appointment) meet standards set by the National Committee for Quality

¹⁴ See Petitioner’s Closing Argument and Memorandum of Law at page at 5: “Anthem’s and the Department’s argument that no waiting time data existed because there were no members of the narrow network plan in the summer of 2013 is a diversion.” Petitioner’s Closing Argument and Memorandum of Law at page 6: “Anthem and the Department will argue that Anthem had no members at the time it submitted its proposed narrow network for scrutiny by the Department and therefore could not provide the necessary information.” Petitioner’s Closing Argument and Memorandum of Law at page 9: “Anthem and the Department will likely argue, again, that no data existed for members of its narrow network because none existed at the time Anthem filed its submissions in 2013.”

Assurance (NCQA).¹⁵ Again there is no explanation as to how this information could have been provided if there were no members and no appointments made. Again, the Petitioner has provided no legal authority to show that Anthem or the Department was required to engage in the Petitioner's proposed alternative analysis.

The Petitioner states that the Department admitted that it obtained no analysis as to the driving time associated with access to two open panel providers as is required by Ins. 2701.06(b)(I). But the rule states that at least 2 open panel primary care providers must be within 15 miles or 40 minutes average driving time of at least 90 percent of the enrolled population. Therefore, it was not necessary for Anthem to submit driving time data. Anthem submitted data demonstrating that 90% of Anthem's current population were within an average distance of between 2.4 and 3 miles of a primary care provider. NHID Exhibit #1. In any case, given the 2.4-3 mile distance, it is unlikely that driving time, if calculated, would have exceeded the 40 minute threshold.

I will not continue to review each argument presented by the Petitioner concerning every piece of alleged missing information. I find that not only is Anthem exempt from providing this additional information, but the data the Petitioner claims should have been submitted under the rule either could not have been provided or would have been information of little value. The Petitioner has not shown that the Department failed to require Anthem to file information mandated by Ins 2700 and its own instructions to insurers as set forth in Bulletin INS 13-007-AB.

Petitioner's Theory #2: Anthem's Use of Existing Insured Population in Geo-Access Analysis

The Petitioner argues that Anthem's use of its then current population of insureds in its Geo-Access analysis was not an accurate proxy for the new members who would be purchasing Marketplace plans in October of 2013. The Petitioner argues that instead of using current Anthem enrollees as the "covered lives" against which to measure geographic access, the Department should have required Anthem "to submit data concerning the locations of its 2013 member pool and any data it had compiled regarding the likely location of its target population for the narrow network." The Petitioner claims that consumers purchasing policies on the Marketplace are more likely to be "poor, unemployed and undereducated" and "based upon the demographics of the towns of Stafford County" would be more likely to live in the northern part of Stafford County. Thus, the Department should have required Anthem to produce this data or come up with some form of analysis, based on income and educational attainment, to create a projected population of Marketplace insureds, against which the adequacy of the Pathway Network then should have been measured.

¹⁵ The Department presented an NCQA certificate into evidence to show that Anthem achieved the highest accreditation status of "Excellent" for the period of March 21, 2012 through March 21, 2015. Exhibit G. The Petitioner states this certificate cannot be found to satisfy Ins 2701.07 because the Department did not produce this certificate in response to a right-to-know request for all documents relied upon in review of the Anthem Pathway Network and the certificate does not relate to the Pathway Network. Because I find the wait time data is not data that Anthem is required to produce, it is not necessary to address this issue.

First, as discussed above, the Petitioner has not presented any legal argument that convinces me that the Department was required to obtain this information from Anthem, or that Anthem or the Department is required to conduct this sort of investigation or analysis. See Insurance Services Office at 719. The Petitioner asserts that her suggested approach is more in keeping with the intent of the ACA, but the Petitioner does not present any requirement in state or federal law that mandates or even suggests the Department require or itself conduct this type of analysis or investigation.

The Petitioner provided no testimony or convincing evidence to support her theory that consumers purchasing policies on the Exchange are more likely to be poor, unemployed and undereducated and live in the northern part of Stafford County. She has produced no expert to testify as to any correlation between income, education or employment and the projected purchase of private insurance on the Marketplace. The testimony of the only witness for the Petitioner, the Petitioner herself, does not support the theory that Marketplace enrollees are more likely to be poor, undereducated, unemployed and living in Northern Stafford County.

Two reports and a third document¹⁶ were offered to support the Petitioner's claim that an analysis should have been required to create a projected population of Marketplace insureds, one based on income and educational attainment. These were however, introduced without any testimony to explain their import or relevance. Without this testimony it is not possible for me to apply this information or rely on the data these Exhibits contain. I cannot with any confidence, draw any conclusion from the Exhibits as to whether certain consumers from certain communities in Stafford County would or would not purchase insurance on the Marketplace, or to what extent they would do so. I cannot determine whether or to what extent, Marketplace enrollees will be more poor, unemployed or undereducated than the current Anthem population, or whether or to what degree they will be more likely to live in northern regions of Stafford County. These Exhibits are not persuasive in proving the theory of the Petitioner.

Findings as to Petitioner's Theories

The Petitioner has failed in a further regard as to both of her theories. The Petitioner has asserted that the Department "could have- and should have" required Anthem to file alternative or additional data, and had Anthem done so, then this data would show the market was inadequate.¹⁷ But it is only speculation on the part of the Petitioner that this information

¹⁶ See McCarthy Exhibits 8, 9 and 12. Further discussion of the admissibility of these exhibits is infra.

¹⁷ See e.g. Petitioners Closing Argument and Memorandum of Law at page 10: "Thus, it is likely- although unverifiable given that Anthem failed to produce individual member location data- that even if its narrow network members were distributed proportionately throughout each town in the County, at least ten percent of them would not be within the 15 mile standard." Also at page 9: "But even assuming that the then-existing pool of 19,034 members of Anthem plans is an accurate proxy for the whole county, the suggestion that 100% of the member population would be within fifteen miles of two primary care providers accepting patients cannot be

would have shown that the Pathway Network was inadequate.¹⁸ The Petitioner has failed to present the necessary evidence to establish by a preponderance of the evidence that the Pathway Network *is inadequate*. The Petitioner cannot meet her burden of proof by presenting only supposition and speculation. The Petitioner cannot assert that Anthem failed to produce and the Department failed to require information which, if it had been produced, would have then shown the network is inadequate. The Petitioner—not Anthem and not the Department—has the burden of proof.

Simply put, the Petitioner has not established that the Pathway Network was inadequate. In fact, there is a dearth of evidence provided by the Petitioner. The entirety of the Petitioner’s case consists of 13 exhibits and the testimony of the Petitioner. The Petitioner presented no other witnesses. The testimony of the Petitioner comprises in total, only 12 pages of almost 200 pages of testimony.

What testimony was provided by the Petitioner did not show any actual inadequacies in the Pathway Network. The Petitioner was shown to live well within the required time or distance from necessary providers. The Petitioner admitted in testimony that she lived within 11 miles of a hospital and within 15 miles of 9 primary care providers in the Pathway Network. Transcript at 76-78 and Exhibit H. The Petitioner did not present any evidence that she has encountered any provider in the Pathway Network that was not accepting patients, or that she had difficulty obtaining an appointment with, or experienced significant wait time for an appointment with, any Pathway Provider. She did not present any expert to challenge the accuracy of the GeoAccess Report submitted by Anthem, or the efficacy of the analysis underlying these reports. Quite simply, the Petitioner’s case consisted only of speculation; speculation as to what information that was not submitted by Anthem *would* have shown, or speculation (presented by her counsel) as to the accuracy of the information that was submitted.¹⁹

Under these circumstances, I find that the action of the Department to require Anthem to file GeoAccess reports using its current population of insureds and the Department’s review of

correct.” And at page 8: “This spread of providers is woefully inadequate given that the location where the majority of the actual members of the narrow network will be living is, more likely than not, the northern part of Strafford County.”

¹⁸ See e.g. Petitioners Closing Argument and Memorandum of Law at page 10: “These requirements were never fulfilled- and had they been, they likely would have shown Anthem’s narrow network to be inadequate in Strafford County.” See also page 13: “The failure to require Anthem to complete its submission requirements has obscured what are almost certainly substantive gaps in its network in northern Strafford County.”

¹⁹ See e.g. Petitioners Closing Argument and Memorandum of Law at page 10: “Thus, it is likely- although unverifiable given that Anthem failed to produce individual member location data- that even if its narrow network members were distributed proportionately throughout each town in the County, at least ten percent of them would not be within the 15 mile standard.” Also at page 9: “But even assuming that the then-existing pool of 19,034 members of Anthem plans is an accurate proxy for the whole county, the suggestion that 100% of the member population would be within fifteen miles of two primary care providers accepting patients cannot be correct.” And at page 8: “This spread of providers is woefully inadequate given that the location where the majority of the actual members of the narrow network will be living is, more likely than not, the northern part of Strafford County.”

these reports to ensure that the Pathway Network met the standards for geographic accessibility set forth in Ins 2701.06, was reasonable and authorized by RSA 400-A:3.

Ruling on Petitioner's Objection on Evidentiary Rulings at Hearing (Petitioner's Statement of Exceptions Regarding Evidentiary Rulings)

There were 18 objections raised by counsel for the NHID and Anthem, only two of which I sustained.

In response to 16 of the 18 objections, Petitioner's counsel rephrased his question, did not present any response to address the objection, or simply decided to move on without any further discussion or any actual ruling on the objection. See objections by Anthem's counsel at Transcript pages 54, 112, 152, 153(2), 158(2), 160, 162-63, 168-69 and 227; and objections by NHID's counsel at pages 163 and 168-69. The Petitioner however, discussed two of these exchanges in her Petitioner's State of Exceptions Regarding Evidentiary Rulings and therefore, I will address each before moving to the two objections that I did sustain.

In the Transcript at page 158, during cross examination of Deputy Commissioner Feldvebel, Petitioner's counsel asked a question related to the number of hospitals in Manchester. Anthem's counsel objected. I advised Petitioner's counsel he was "straying from Strafford County and issues to do with Strafford County" and he needed to indicate relevancy. Anthem's counsel then stated the basis for his objection: the question on cross examination went beyond the witnesses' direct testimony. Petitioner's counsel stated he would move on. The Petitioner himself decided not to pursue this line of questioning.

Similarly the Petitioner objects to another interaction during his cross examination of the Deputy Commissioner at Transcript 168-169. Petitioner's counsel asked if it was appropriate for the Department to be "pulling the managed care regulation off the shelf to use under these circumstances." This elicited an objection from the Department's counsel as to the form of the question, and from Anthem's counsel that this cross examination was beyond the scope of the witness's direct testimony and was not relevant. I advised "You need to keep it relevant, please." At which point, Petitioner's counsel chose not to explain the relevancy of the question, but moved on without further comment. Again in this case, it was Petitioner's counsel that chose to move on and conduct other cross-examination.

As to the objections I did sustain, the first occurs on page 156 of the Hearing Transcript. I sustained an objection to a question on cross examination by the Petitioner, concerning testimony of the Deputy Commissioner on the pricing and negotiation dynamics specific to the negotiation of the Pathway Network. Anthem's counsel objected to this question, asserting it mischaracterized the witness's prior testimony. Review of the Transcript confirms that there was confusion as to this matter. Compare Transcript at 111 and 156-157. After the objection was sustained, counsel for the Petitioner asked the witness to explain his prior testimony, and continued with his cross examination. The Deputy Commissioner was able to explain that he

had no knowledge about the transactions between Anthem and the hospital in question. See Transcript at 157. The sustained objection did not result in any “misleading advantage” as Petitioner claims, and the Petitioner was not prevented from conducting a complete cross examination concerning any contradictions with regard to this issue. The Petitioner was able to test the “nature and content” of the Deputy Commissioner’s “knowledge and testimony” (Petitioner Statement of Exceptions at 2-3). My ruling was proper.

The second ruling that sustained an objection occurs in the Transcript at page 231. Counsel for the Petitioner sought testimony from Director Wilkey as to whether the Department asked Anthem for any study or analysis on wait-times. Both the Department and Anthem objected on multiple grounds, including that the question would result in unduly repetitious evidence. I sustained the objection and this ruling was proper given that Director Wilkey had already testified that the Department had not considered any wait time data because it considered this information of little value given the prospective look at the network. Transcript 230. In addition, the Deputy Commissioner had also already testified that the Department had not looked at wait time data. Transcript at 137. Ironically, as to this issue, the Department and the Petitioner both agree that the Department did not consider or obtain wait time data in the review of the Pathway Network, so it is difficult to see what value would have been derived from permitting the witness again to be questioned on this issue. It was proper to sustain the objection under Ins 203.01(d)(4) and the Petitioner can show no harm resulting from this ruling.

Ruling on Admissibility of Exhibits

Each party has requested that its exhibits be introduced into evidence. The parties agree that the Department’s exhibits and Anthem’s exhibits are admissible. Transcript at 15-16. Accordingly, Anthem Exhibits Number 1 and 2 the Department’s Exhibits A through J-1 are admitted into evidence as full exhibits.

The admission of the McCarthy exhibits, Number 1 through 13, are subject to objection for procedural reasons and specifically as to each proposed exhibit.

As a general matter, I shall accept any relevant evidence and exclude irrelevant, immaterial or unduly repetitious evidence. Ins 203.01(d)(4). The more formal rules of evidence do not apply to in the context of administrative hearings. RSA 541-A:33,II.

Both Anthem and the Department object that none of the documents were formally offered by counsel requesting that it be admitted through a recitation of the specific factual or legal basis for admissibility. More to the point, they object that the Petitioner did not elicit any testimony relating to the content of the documents or the facts they purport to establish, thereby making it impossible for the hearing officer to determine relevance and reliability of the documents or their probative value to the issue of the adequacy of the Network in Strafford County.

Perhaps there was some confusion related to admission of exhibits. Some of the documents marked by the Petitioner are duplicative of those introduced by the Department, e.g. Exhibit 3 is duplicative or redundant of Department Exhibit A. Transcript 61-63. Anthem itself submits that the hearing officer should take official notice and consider Exhibit 10, which is the entirety of the documents produced by the Department in its January 14, 2014 Response to an RSA 91-A request, but only insofar as those materials relate to Anthem's Pathway Network in Strafford County. See Anthem's Objection at page 1, footnote 1 and page 10, paragraph 10

While Anthem and the Department make some excellent points, I am going to admit all of the McCarthy exhibits into evidence with one inconsequential and consented to exception. Exhibit 2 is not admitted because with the agreement of Petitioner McCarthy's counsel, it was replaced by NHID Exhibits A2 and B2. Transcript at 38-39 and 43.

However, in the absence of testimony as to their relevance, provenance, accuracy or reliability, I am going to accord the Petitioner's admitted documents the weight that I think they deserve, which is relatively little. Particularly problematic are Petitioner's Exhibits 8 and 9 which were prepared by the Office of Energy and Planning and New Hampshire Employment Security and purport to show the population estimates and figures on income and unemployment rates and Exhibit 12 which was prepared by the Division of Public Health Services. Without testimony, and opportunity for cross examination, to explain the accuracy and reliability of this information or to relate it to issues of the adequacy of the network in Strafford County, it is difficult to give these documents any significant weight. McCarthy Exhibit 11, the newspaper article, which is clearly hearsay, is similarly entitled to very little weight and cannot be considered for the truth of statements made in the article.

In addition, to the extent that any of these exhibits include information that does not relate to deficiencies existing in Strafford County that can only be addressed if Frisbie is included in the Anthem network, I will not consider that information. See May 13, 2014, Order on Motion in Limine.

I would also note that it is hard for me to justify giving an exhibit any more import than the Petitioner does. Some exhibits the Petitioner presents were not only introduced without any testimony discussing their relevance, but they were also never even referenced again in support by the Petitioner's counsel in any argument or pleading.²⁰ In summary, except for Exhibit 2, all of Petitioner McCarthy exhibits will be admitted into evidence as full exhibits.

²⁰ For example, at hearing the Petitioner marked for identification Exhibit 6 stating "Petitioner's 6 is a network adequacy comparison chart. Transcript at 40. The only other reference of this exhibit is in the Petitioner's Motion for Entry of Exhibits, At hearing, the Petitioner did not otherwise refer to Exhibit 6, nor does the Petitioner mention Exhibit 6 in any post hearing pleading including the Petitioner's Closing Argument and Memorandum of Law or the Petitioner's Request for Findings and Rulings.

Ruling on Petitioner's Offers of Proof

The Petitioner made two offers of proof. The first offer of proof is that Mr. Felgar, CEO of Frisbie Hospital, would testify that Frisbie did not have a contract with Assurant Health in 2013 or 2014, and that, therefore, Assurant Health was not a coverage option for Ms. McCarthy during those years. Transcript at 91-94. Later, Director Wilkey testified that the Assurant website listed Frisbie as a provider in the Assurant network, and Exhibit J was offered in support. Transcript 189-190. Counsel for the Petitioner indicated the offer of proof may need to be modified, in light of the testimony from Director Wilkey, and possible confusion concerning whether and to what extent Assurant contracts with Frisbie, and he requested an opportunity to examine the Exhibit in order to determine the extent to which Frisbie providers were available in the Assurant network. Transcript at 193-199. Ultimately, Counsel for the Petitioner agreed to cross examine Director Wilkey on this issue. Transcript at 199. Later Director Wilkey testified as to the inclusion of Dr. Geller as a provider in the Assurant network and Exhibit J-1 was introduced. Transcript at 219-222. There were no questions presented to Director Wilkey on cross-examination as to the Assurant Network. Transcript at 222-233.

The second offer of proof was that Mr. Felgar would testify that Dr. Terry Bennett had "no privileges" at Frisbie. Transcript at 91. Later, the Offer of Proof was modified to an offer of proof that Dr. Bennett had "no useable privileges." Transcript at 92. Still later, counsel for the Petitioner repeated that the offer of proof was that Dr. Terry Bennett has "no privileges at Frisbie Hospital." At which point Mr. Felgar, who was in the audience stated "excuse me ... that's not correct. He has no ... " Petitioner's counsel was offered an opportunity to clarify, and stated he would need to first speak to his client. Transcript at 244-245.

At the end of the hearing I indicated the parties should file with me a list of all exhibits and offers of proof. Transcript at 244. The Petitioner's Motion for Entry of Exhibits did not reference any offer of proof, nor did Petitioner's Request for Findings of Fact and Rulings of Law reference the offer of proof concerning Dr. Bennett's privileges or Frisbie's participation in the Assurant network. Anthem has filed an Objection to Petitioner's Offers of Proof, urging I reject both as either confusing and without merit.

The Petitioner did not discuss the import of these offers of proof in any post hearing pleading, or rely on them in any way in requests for finding or rulings. Again, it is hard for me to justify giving these offers of proof any more import than the Petitioner does. I am persuaded by the arguments of Anthem as to the unreliability of these offers of proof, and the confusion as to what facts they are intended to show. I therefore reject them as unreliable and confusing.

Ruling on Request Under RSA 541-A:33,V—Official Notice

Anthem in one of its six pleadings filed on June 4, 2014, submitted a Statement of Matters For Official Notice in which it requests that the Hearing Officer pursuant to RSA 541-A:33 and Ins

204.19, take official notice of nine facts or documents. RSA 541-A:33,V authorizes a presiding officer to take official notice of among other things, facts that would be subject to judicial notice in the courts and the record of other proceedings before an agency. Based on the foregoing, I grant the Requests to the extent stated below:

Requests 1, 2 and 3 are granted.

Request 4 is granted in that I take official notice of the fact that the NHID replied to Petitioner McCarthy's counsel's RSA 91-A Request by a letter dated January 14, 2014, along with the production of certain documents Bates numbers 001-404.

Request 5 is granted.

Request 6 is granted to the extent that the letter of January 14, 2014, reflected my determination pursuant to RSA 420-J:11.

Request 7 is granted.

Request 8 is granted.

Request 9 is denied.

Rulings on Requests for Findings of Fact and Rulings of Law

Department's Requests:

Granted: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 (but striking "In other words,"), 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 68, and 69.

Denied: 70, 71, 72, 73, and 74

Denied as worded and/or to the extent inconsistent with the findings in the proposed decision: 22 and 30.

Not addressed as a result of the determination that the Petitioner did not show the Pathway network was inadequate: 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, and 67.

Petitioner's Requests:

Granted: 2, 3, 4, 5, 6, 7, 8, 29, 30, 32, and 33.

Denied: 1, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 31, 34, and 35.

Denied as worded and/or to the extent inconsistent with the findings in the proposed decision: 9 and 18.

Anthem's Requests:

Granted: 1, 2, 3, 4, 5, 6, 7, 8, 10, 12, 13, 14, 15, 16, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58 (Because the Petitioner has not established that the Pathway Network is inadequate, she has not demonstrated she is aggrieved and she therefore, does not have standing to appeal the July 31 determination), 67, 68, 69, and 72.

Denied: 17, 20, and 29.

Denied as worded and/or to the extent inconsistent with the findings in the proposed decision: 9, 11, and 83.

Not addressed as a result of the determination that the Petitioner did not show the Pathway network was inadequate: 44, 45, 46, 47, 48, 59, 60, 61, 62, 63, 64, 65, 66, 70, 71, 73, 74, 75, 76, 77, 78, 79, 80, 81, and 82.

Conclusion

Based on the evidence before me, the Petitioner has not met her burden of proof. She has not shown that the Anthem Pathway Network is inadequate because it does not include Frisbie.

The Petitioner has not put forth any evidence that indicates the Department failed in its review of the Pathway Network or that Anthem was required to submit any additional or different data as part of its submission for review of its Marketplace plans. The Petitioner has only speculated that if the Department had required Anthem to file additional or different data, then this additional or different data likely would have shown the Pathway Network was inadequate.

Because the Petitioner has not established that the Pathway Network is inadequate, I need not reach the merits of whether she suffered an injury as a result of the July 31 determination of the Department. Nor do I reach the issue of what relief the Department would have authority to grant the Petitioner or whether relief that could be granted would address the Petitioner's alleged aggrievement. I have previously ruled, however, that the Department cannot order Anthem to permit Frisbie to participate in its Marketplace-available QHPs according to the same terms and conditions as other providers. I have serious concerns that the Petitioner meets her burden of proof in regard to these elements of her case, but because I conclude that the Petitioner has not shown the Pathway Network is inadequate, I issue no ruling and will not address any finding of fact or ruling of law that relates to these issues.

I will close with these observations. Under our current laws and managed care system, insurance companies and medical providers negotiate and enter into contracts to create provider networks. So long as those networks meet state standards, they are lawful, even if as a result, a longstanding and trusted medical provider is no longer included in that network. In the upcoming year, the Petitioner and other consumers will benefit from increased choice in plans and networks offered on the Marketplace as additional insurers have applied to sell policies beginning in November: Anthem Blue Cross Blue Shield, Assurant Health, Harvard Pilgrim Health Care of New England, and two co-ops: Massachusetts-based Minuteman Health and Maine Community Health.²¹ Frisbie will be included in more than one of the networks associated with these insurers.²² In addition, the Department is actively engaged in developing a new network adequacy rule that will replace Ins 2700.²³ The new rule will reflect the changes in the insurance marketplace since the implementation of the ACA and will continue to ensure that appropriate network standards are in place to give all consumers access to necessary medical care.

As to the Petition filed by Margaret McCarthy that seeks an order requiring Anthem to permit Frisbie to participate in its Marketplace-available QHPs according to the same terms and conditions as other providers, that Petition is denied.

SO ORDERED.

NEW HAMPSHIRE INSURANCE DEPARTMENT



Date: September 2, 2014

Roger Sevigny, Commissioner

²¹ See Department Press Release of June 10, 2014, available on its website.

²² See the Department's August 25, 2014, PowerPoint presentation, *Network Adequacy: Public Information Release Marketplace Issuer Networks for the 2015 Plan Year New Hampshire Insurance Department*, available on the Department's website.

²³ See Department Press Release issued on April 23, 2014, and July 7, 2014.