THE STATE OF NEW HAMPSHIRE

INSURANCE DEPARTMENT

In re Petition of Margaret McCarthy

Docket No. INS 13-038-AP

POST HEARING BRIEF BY ANTHEM BLUE CROSS AND BLUE SHIELD

In accordance with the directions of the Hearing Officer at the end of the May 14, 2014 adjudicative hearing in this contested matter, the undersigned Intervening Party, Anthem Blue Cross and Blue Shield ("Anthem"), hereby submits this post-hearing memorandum in support of a decision by the Hearing Officer rejecting Petitioner Margaret McCarthy's challenge to the Department Decision[1] in its entirety.

I. OVERVIEW OF REASONS THE PETITION SHOULD BE REJECTED

In summary, based on the Hearing Record, Petitioner McCarthy did not carry her burden of proving[2] that she sustained any injury as a direct result of the Department Decision

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[1] For purposes of this Post-Hearing Brief, "Department Decision" is defined as the July 31, 2013 decision by the New Hampshire Insurance Department ("NHID") recommending to the United States Department of Health and Human Services ("HHS") that, through its Center For Consumer Information and Insurance Oversight ("CCIIO"), HHS certify Anthem's proposed health plans that utilize the Pathway Provider Network ("Pathway") as qualified health plans ("QHPs") under the United States Patient Protection and Affordable Care Act ("ACA") to be offered on the New Hampshire Health Insurance Marketplace ("Exchange") beginning October 1, 2013. The Department Decision is the act or order by the Commissioner being challenged by the November 6, 2013 Petition For Hearing Pursuant To RSA 400-A:17 filed by Petitioner McCarthy ("Petition") and it was the subject of the NHID's May 14, 2014 adjudicative hearing ("Hearing"). See also pages 6-7 of the April 14, 2014 Reply Brief Upon Rehearing By Anthem Blue Cross And Blue Shield (Docket No. INS 13-038-AR).

[2] The burden of proof was correctly placed on Petitioner McCarthy under New Hampshire insurance law. Specifically, since the Department Decision at issue and being challenged by the Petition was a "recommendation" from the Commissioner to HHS that CCIIO certify the QHPs, not an approval of Anthem's

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and, further, she failed to establish that there were any network inadequacies with Anthem's Pathway Network in Strafford County as of the time of the Department Decision. Finally, Petitioner McCarthy wholly failed to establish that the NHID has the authority to provide the only relief her Petition seeks – namely, an Order requiring Anthem to add Frisbie Memorial Hospital and its affiliated providers (collectively herein "Frisbie") to the Pathway. For all of these reasons[3] discussed herein, the Petition should be denied in its entirety.

II. ANTHEM'S ARGUMENTS SUPPORTING THE DEPARTMENT DECISION

A. Petitioner McCarthy Was Not Injured By The Department Decision

1. At All Times Ms. McCarthy Has Had Reasonable Consumer Choices For Health Insurance

From the outset of these administrative proceedings, Anthem has maintained that Petitioner McCarthy's claims are meritless because they raise issues of ordinary consumer choice, not of redressable injury sustained as a result of the Department Decision. As Mr. Feldvebal testified, under Managed Care, access to providers is necessarily going to be limited under any particular health plan (see his testimony at page 117 of the Hearing

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proposed QHPs, the burden of proof for purposes of the Hearing was governed by INS 204.05(e), not INS 204.05(b).

[3] In addition to the arguments made herein regarding the Petitioner's failure to establish her claims, as governed by the Commissioner's March 28, 2014 Order And Notice Of Hearing ("3/28/14 Order") and his May 13, 2014 Order on Motion In Limine ("5/13/14 Order") (collectively these two Orders are referred to as "Hearing Officer's Orders"), Anthem hereby reasserts its arguments that the Petition should be denied because it was not filed timely in accordance with RSA 400-A:17 and because Ms. McCarthy did not establish aggrievement for purposes of standing to seek redress through an adjudicative hearing. These additional arguments are set forth in Anthem's April 3, 2014 Motion For Rehearing, its April 14, 2014 Reply Brief Upon Rehearing, and its April 15, 2014 Sur Reply Upon Rehearing (all filed in Docket No. INS 13-038-AR), which the Hearing Officer took official notice of at the May 14, 2014 Hearing, and they are reasserted in Anthem's May 7, 2014 Motion to Dismiss in this contested matter (Docket No. INS 13-038-AP).

Transcript). Further, whether or not a particular provider participates in a particular network can be affected by decisions other than those made by the health carrier and/or the NHID -- e.g., the provider may choose not to participate; the provider may switch practices, move out of state, retire and/or close his/her practice for any number of other reasons. The bottom line is that New Hampshire law cannot, and does not, mandate that a health carrier must contract with any particular provider (see, e.g., page 7 of the Commissioner's December 11, 2013 Order) and correspondingly it cannot guarantee that any particular member, like Ms. McCarthy, will have access to any particular provider indefinitely or at any given point in time (see Commissioner's December 11, 2013 Order). Rather, the ACA and New Hampshire law seek to provide for reasonable access to health care services and the evidence in this contested case establishes that Ms. McCarthy had multiple options for securing individual health insurance -- on or off the Exchange -- and -- with or without access to Frisbie and its affiliated providers -- for 2014.

By Petitioner McCarthy's own testimony, it was established that she sustained no injury as a result of the Department Decision. In fact, Ms. McCarthy has had several options that have afforded her the opportunity to balance affordability and access to care so as to best fit her own circumstances. Due to the personal consumer choices she has made, Ms. McCarthy's Anthem Lumenos HSA Plan (Contract No. YGD0456M20167) ("Current Health Coverage"), which continues to provide her preference for access to health care services from Frisbie, will remain in effect only until August 1, 2014, at which time she will have the choice of purchasing new coverage through Anthem on the Exchange or purchasing a new

policy off the Exchange through Anthem, Assurant Health or another health carrier. As Ms. McCarthy testified at the Hearing, her Current Health Coverage has been in place since August 2011 without any change (see the Petitioner's testimony at page 80 of the Hearing Transcript) and through that coverage, she has always been able to secure health care services without difficulty (see the Petitioner's testimony at page 81 of the Hearing Transcript).[4] In this regard, on or about September 16, 2013, Ms. McCarthy confirmed through Anthem's Customer Service that Anthem's new Pathway Network did not apply to her Current Health Coverage (see the Petitioner's testimony at page 49 of the Hearing Transcript). Therefore, she was free to continue to seek care through Frisbie while that coverage remains in effect. Initially, Ms. McCarthy testified that she will have a five month gap in coverage (that includes Frisbie) between the expiration of her Current Health Coverage on August 1, 2014 and January 1, 2015, the date when Harvard Pilgrim, Minuteman and perhaps other health carriers will begin offering individual health policies on the Exchange (see the Petitioner's testimony at page 54-56 and 68 of the Hearing Transcript). On cross examination, however, she admitted that, prior to December 1, 2013, Anthem provided her the opportunity to early renew her Current Health Coverage and thereby extend that coverage to December 1, 2014 (see the Petitioner's testimony at page 84 of the Hearing Transcript). Further, Ms. McCarthy admitted that, had she made the consumer choice to

[4]In fact, Ms. McCarthy acknowledged that she is not claiming that Anthem violated her Current Health Coverage nor is she alleging that Anthem violated any provider agreement with Frisbie. By mid-September 2013, from reading media accounts, Ms. McCarthy became aware of the Department Decision and the fact that Anthem's Pathway Network did not include Frisbie (see Anthem Exhibit 2 and the Petitioner's testimony at pages 48-50 and 88-89 of the Hearing Transcript).

extend her Current Health Coverage, she would have had only a one month gap in coverage before at least Harvard Pilgrim and Minuteman coverage options would be available to her (see the Petitioner's testimony at pages 84-85 of the Hearing Transcript). Further, although Ms. McCarthy could not recall one way or another receiving a second opportunity to extend her Current Health Coverage through to January 1, 2015, NHID Exhibit I and the testimony of NHID's Director of Compliance, Michael Wilkey[5], verified that Ms. McCarthy, if she had so chosen, could have extended her Current Health Coverage -- with continued access to Frisbie -- through January 1, 2015. Consequently, from her own testimony, it is clearly established that Ms. McCarthy has sustained no injury because she had the opportunity to make sure that the Department Decision continued to be inapplicable to her by choosing to early renew and extend her Current Health Coverage through to 2015 -- when at least two other health carriers are to offer QHPs on the Exchange.[6]

Petitioner McCarthy's second option to maintain health coverage that provided her access to Frisbie in 2014 was to purchase an individual health plan -- off the Exchange -- with Assurant Health. Specifically, contrary to her direct testimony claiming that, once her Current Health Coverage expires this summer, her only options will be to purchase a new Anthem policy with access to Frisbie at a much higher cost or to purchase coverage without

[5]See Mr. Wilkey's testimony at pages 189-192 of the Hearing Transcript.

[6] To be sure, since the Petitioner put on no evidence about what the actual premium cost would have been had she opted to early renew and extend her Current Health Coverage through to January 1, 2015, she cannot argue, and there is no basis for the Hearing Officer to find, that such cost would have been higher than the cost of the net premium—after reduction for any unquantified subsidy, for which Ms. McCarthy might have qualified—of coverage she could have purchased on the Exchange for 2014.

access to Frisbie through the Exchange (see the Petitioner's testimony at page 55-56 of the Hearing Transcript), on cross examination, Ms. McCarthy admitted that she also has had the option to purchase insurance coverage from Assurant Health that would permit her to continue to access health services from Frisbie[7] (see the Petitioner's testimony at page 82-83 of the Hearing Transcript).

Sensing the critical importance of this viable coverage option that Ms. McCarthy admitted she had, her counsel made a hasty offer of proof that was later demonstrated to be false. Specifically, Mr. Eggleton represented to the Hearing Officer that Mr. Felgar, the Chief Executive Officer of Frisbie Memorial Hospital, would testify under oath that Frisbie did not participate with Assurant Health (see pages 91-94 of the Hearing Transcript). However, NHID Exhibits J and J1 as well as Mr. Wilkey's testimony at pages 189-195 of the Hearing Transcript establish that, in 2013 and 2014, Frisbie was in fact a participating provider with Assurant Health and therefore purchasing coverage through Assurant was an option for Ms. McCarthy. Significantly, given that Ms. McCarthy admitted that she was aware of Assurant, but chose not to investigate such coverage (see the Petitioner's testimony at pages 83-84 of the Hearing Transcript), the Petitioner was unable to put on any evidence regarding what the premium cost of Assurant coverage would have been for the Petitioner in 2014. Consequently, there is no way for the Petitioner to argue, and more importantly, no

[7]To be sure, Ms. McCarthy testified that all of her health care providers are located in Rochester, where the evidence demonstrated there are nine or more PCPs within 15 miles of her home, including one that is closer to her home than her current PCP, and further Wentworth Douglas Hospital is only 11 miles from her home. See the Petitioner's testimony at pages 77-78 and 80 of the Hearing Transcript.

basis for the Hearing Officer to conclude, that the net premium – i.e., after reduction for a subsidy -- Ms. McCarthy would have paid had she purchased coverage on the Exchange would have been less than the premium she would have paid for Assurant coverage off the Exchange. Clearly, then, the Petitioner cannot, and has not, proven that she sustained any economic loss by choosing to forego coverage on the Exchange allegedly because Frisbie was not included in the Pathway Network.

2. The Injury Alleged By Petitioner McCarthy Did Not Result From The Department Decision.

At various junctures during these lengthy administrative proceedings (Docket Nos. INS 13-038-AR and INS 13-038-AP), the Petitioner's characterization of her own alleged injury has changed. However, it has always been premised on the underlying fact that Frisbie is not included in Anthem's Pathway Network. See, e.g., Paragraph 21 of the Petition and the discussion at Footnote 2 on page 2 of Anthem's March 11, 2014 Second Supplemental Brief.

The undisputed evidence in the Record establishes that the decision to exclude Frisbie from the Pathway Network was made by Anthem <u>before</u> the NHID reviewed and recommended Anthem's proposed QHPs for certification by way of the Department Decision. Specifically, see Paragraph 5 of Anthem Exhibit 1, in which Vice President Robert J. Noonan attests to the fact that "Anthem made the decision not to contract with Frisbie in connection with its Pathway Network and Frisbie was aware of this decision well before the Department issued its July 31, 2013 approval of Anthem's QHPs for offering on the

Exchange." As stated hereinabove, by definition, Managed Care contemplates that not all providers will be included in any particular network and whether or not Anthem contracts with a particular provider, like Frisbie, for the Pathway Network is a matter of private business dealings between Anthem and the provider. The NHID does not have the authority to require Anthem to contract with any provider, including Frisbie; and the Petitioner has never provided any law to the contrary. Under these circumstances, Ms. McCarthy has not established that the exclusion of Frisbie from the Pathway Network was caused by any action of the NHID, including its Department Decision.

Further, even if it were to be assumed, for argument sake, that the injury alleged by Ms. McCarthy was on some level connected to the Department Decision, the evidence has established that the Department Decision was only a recommendation to the federal government. It was CCIIO that had ultimate authority to accept or reject that recommendation and it was CCIIO, not the NHID, that certified Anthem's proposed QHPs for offering on the Exchange in 2014.

For all these reasons, Petitioner McCarthy has proven neither injury in fact nor any harm caused to her by the Department Decision.[8]

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[8]The disturbing lack of credibility to the Petitioner's assertion that she was in fact injured by the Department Decision is highlighted by the fact that, despite presenting at the Hearing as a knowledgeable and articulate witness regarding New Hampshire's health insurance landscape and in particular, the implementation of the Exchange and its affects, Petitioner McCarthy chose not to early renew her Current Health Coverage and chose not to apply for a subsidy and coverage on the Exchange. Further, despite her concerns that she would have to switch providers if she chose to purchase coverage on the Exchange (see page 50 of the Hearing Transcript) and despite telling a news reporter and testifying at the Hearing that, even if she could renew her Current Health Coverage, she would not do so in August 2014 because Anthem had no plans she was interested in (see the Petitioner's testimony at page 67 of the Hearing Transcript), Ms. McCarthy did not apply for coverage with any other health carrier, including with Assurant, which she knew offered coverage that would permit her to

B. Petitioner McCarthy Did Not Establish Any Pathway Network Inadequacies In Strafford County, Let Alone Any Inadequacies That Would Be Resolved By The Inclusion Of Frisbie.

First, the Petition fails because Petitioner McCarthy did not carry her burden to prove the one claim that she, as a consumer, was found to have standing to pursue—namely, that she had been injured by the Department Decision because Anthem's Pathway Network was inadequate in Strafford County without the inclusion of Frisbie. See the Hearing Officer's Orders. It is Anthem's position that, to carry her burden, the Petitioner would had to have put on testimony by one or more qualified health care experts with education, training and experience in the areas of managed care, network adequacy and the federal and state laws pertaining to those subjects, including the ACA. In fact, the Petitioner did not put on any witness—lay or expert---to address, interpret and give probative testimony relating to the ACA mandates, the network adequacy standards, the reasonableness of the NHID's approach to reviewing proposed QHPs prospectively for the Exchange effective October 1, 2013, and the network adequacy of Anthem's proposed QHPs in the absence of any enrolled membership as of the Department Decision. Likewise, the Petitioner offered no documents into evidence that would allow the Hearing Officer to form the basis for any reliable finding

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continue to access her Frisbie providers (see the Petitioner's testimony at page 82 of the Hearing Transcript). Also, she never investigated what alternatives she might have—e.g, she never determined whether the laboratory that she currently uses participates with Wentworth Douglas Hospital from the Pathway Network and she never looked into whether there were any Wentworth Douglas Hospital affiliated laboratories closer to her home (see the Petitioner's testimony at pages 85-86 of the Hearing Transcript). In other words, despite her professed concerns and her claims of injury, the Petitioner's own testimony demonstrates that she did not take the steps that one would expect to be taken by such a well informed and knowledgeable person if she truly believed she had been harmed by the Department Decision.

that Anthem's proposed QHPs had any Strafford County deficiency that had Frisbie been in the Pathway Network would have prevented injury to Ms. McCarthy.[9] Having failed to put on any expert testimony, the Petitioner's claims that the Department Decision was flawed as it pertained to Stafford County are improperly left to speculation and attorney argument, and the Petition should be denied.

The evidence at the Hearing established that the NHID's review of Anthem's proposed QHPs was reasonable under the unique circumstances surrounding the 2013 implementation of the Exchange. Specifically, the mandates of the ACA pertaining to the creation and startup of the Exchange thrust a challenging task on the NHID because its existing network adequacy rules, which came into effect several years before the ACA, did not entirely fit the job of reviewing proposed QHPs before they were offered and sold on the Exchange. In the absence of any new federal or state law providing specific guidance regarding the prospective review of network adequacy for Exchange plans, part of the conundrum that the NHID faced, according to Deputy Commissioner Feldvebal, was attempting to apply New Hampshire's network adequacy standards, which were written for

[9]In support for this point, Anthem incorporates here its Objection By Anthem Blue Cross And Blue Shield To The Admissibility Of Petitioner McCarthy's Exhibits Marked For Identification Only, which was separately filed today in accordance with the Hearing Officer's directions at the Hearing. In particular, Anthem restates its arguments therein that Ms. McCarthy's Exhibits 8, 9 and 12 are documents containing general information and data that cannot be applied directly, by analogy, or by wishful attorney argument, to the adequacy of Anthem's network which supports its proposed QHPs and/or the reasonableness of the Department Decision, if at all, without the benefit of expert testimony. Consequently, although Anthem asserts that none of the Petitioner's marked materials should be admitted as evidence (other than Exhibit 10, which the Hearing Officer should take official notice of to the extent those materials relate to Strafford County), in the event that the Hearing Officer decides to admit any or all of Exhibits 1-10 into evidence, Anthem submits that none of them establish the Petitioner's claims by a preponderance of the evidence.

retrospective review of health carriers' plans, prospectively for the purposes of reviewing proposed QHPs and making QHP recommendations to the federal government. (See Mr. Feldvebal's testimony at pages 113-114, 125 and 136 of the Hearing Transcript.) Under these unchartered circumstances, the NHID reasonably utilized its network adequacy framework in INS 2701 with modification in connection with its review of Anthem's proposed QHPs. See Mr. Feldvebal's testimony at page 158 of the Hearing Transcript.[10]

For purposes of Anthem's May 31, 2013 network adequacy filing for the Pathway Network and its June 24, 2013 supplemental network adequacy filing, the NHID realized that some of the traditional network adequacy requirements, including those relating to customer surveys and wait times for appointments,[11] could not be evaluated or enforced in connection with the prospective review of Anthem's proposed QHPs in the May – July 2013 review period because there was no enrolled membership before January 1, 2014 (see Mr. Feldvebal's testimony at page 176 of the Hearing Transcript). Both RSA 420-N and NHID Exhibit F provided the NHID with discretion and leeway in applying network adequacy standards prospectively to Anthem's proposed QHPs (see Mr. Feldvebal's testimony at pages 172-173 of the Hearing Transcript), and, as such, in reviewing Anthem's proposed QHPs, the

[10]Of note, Anthem provided all information and documentation requested by the NHID in connection with Anthem's proposed QHPs and its submissions supporting the Pathway Network. See Mr. Feldvebal's testimony at page 179 of the Hearing Transcript and Mr. Wilkey's testimony at page 236 of the Hearing Transcript.

[11] It was established through evidence at the Hearing that, at the time Anthem's proposed QHPS were under its review, the NHID was fully aware that Anthem met the requirements and had the highest accreditation status of Excellent from the National Committee for Quality Assurance ("NCQA"). Given Anthem's accreditation, the NHID's conclusion that Anthem met network adequacy for purposes of INS 2701.07 was reasonable. See NHID Exhibit G and Mr. Feldvebal's testimony at pages 137, 145-148, 176 and 180 of the Hearing Transcript.

NHID reasonably decided to apply existing network adequacy standards under INS 2701 unless doing so would be inconsistent with and/or prevent application of federal law, including the ACA's goal of providing more affordable individual health coverage for offering on the Exchange in 2014. See Exhibit F and Mr. Feldvebal's testimony at pages 172-175 of the Hearing Transcript.

Under all the circumstances as of the May-July 2013 review timeframe, it was reasonable for the NHID to look for health carriers, including Anthem, to show that their QHPs met network adequacy standards for their existing population outside the Exchange, see Mr. Feldvebal's testimony at page 126 of the Hearing Transcript, and it was reasonable for the NHID to decide, given the absence of data regarding the eventual Pathway membership, to focus its network adequacy review on the geographic accessibility standards. See Mr. Feldvebal's testimony at page 178 of the Hearing Transcript. These decisions were particularly reasonable because the basic access requirement set forth in INS 2701.04(a) does not apply unless and until a health carrier, like Anthem, has a 1,000 or more covered persons in any particular county[12] and since at no time before January 1, 2014 did Anthem have a 1,000 or more covered persons in Strafford County in its QHPs on the Exchange,[13] strictly speaking, the basic access requirement did not apply to Anthem's proposed Pathway Network. See Mr. Feldvebal's testimony at pages 176-177 of the Hearing Transcript.

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[12] See INS 2701.04(c); Mr. Feldvebal's testimony at pages 126 and 176 of the Hearing Transcript; and Mr. Wilkey's testimony at page 236 of the Hearing Transcript.

[13] See Mr. Feldvebal's testimony at pages 176-177 of the Hearing Transcript.

With regard to geographic accessibility, neither the ACA nor New Hampshire law has ever required that all providers be allowed to participate in a health carrier's network. Under INS 2701.06, the standards for geographic accessibility are satisfied if the distance or travel times set forth therein are met for at least 90% of the enrolled population within a particular county. Therefore, New Hampshire law did not require at any time, including at the time of the Department Decision, that Anthem's Pathway Network meet an adequacy standard related to the address or location of any one particular person, including Petitioner McCarthy. NHID Exhibits A, A1, B and B2, which are the Geographic Access Reports submitted by Anthem and reviewed by the NHID, demonstrate compliance with the required geographic accessibility of all providers identified in INS 2701.06 in Strafford County. See Mr. Wilkey's testimony at pages 213, 216-217, and 235 of the Hearing Transcript.

Finally, Petitioner McCarthy put on absolutely no evidence concerning the process that CCIIO conducted as part of its certification of Anthem's QHPs for offering on the Exchange in 2014 and, in particular, she put on no evidence that would suggest that Anthem did not comply with all 2014 federal requirements concerning Essential Community Providers ("ECPs").[14] In the absence of any evidence to the contrary, it was reasonable for the NHID from its review to conclude in the Department Decision, and for the Hearing

[14]The Hearing Officer can take official notice of his own January 14, 2014 letter to Petitioner's counsel, in which he makes note of the fact that the federal Centers for Medicare and Medicaid Services ("CMS") "objected to the release of the proprietary template programs, in particular, the templates the Department used to determine compliance with federal essential community provider ("ECP") requirements."

Officer to find, that, through its submission of the required CMS templates, Anthem fully complied with the federal ECP requirements.

C. Petitioner McCarthy Failed To Establish That The Hearing Officer Has The Authority To Provide The Relief Sought By Her Petition.

The Petition should be denied for the additional reason that Petitioner McCarthy presented no evidence, let alone did she establish, that in the event she proved an injury in fact as a result of inadequacies related to the Pathway Network in Strafford County that the inclusion of Frisbie would resolve, the Hearing Officer has the regulatory authority to provide the relief sought in her Petition -- i.e., an Order requiring Anthem to permit Frisbie to participate in the Pathway Network in 2014. In fact, the Petitioner put on no evidence, and did not cite to any legal authority, supporting her claim for such an Order. To the contrary, consistent with the Hearing Officer's unchallenged conclusions at pages 5, 7 and 8 of his December 11, 2013 Order and page 8 of his March 28, 2014 Order And Notice Of Hearing, Mr. Feldvebal testified that RSA 420-J:7 and INS 2701 do not authorize the Hearing Officer to require a health carrier to contract with any particular provider (see Mr. Feldvebal's testimony at page 127 of the Hearing Transcript).[15]

[15]Although Petitioner McCarthy's counsel elicited testimony from the NHID's witnesses regarding what authority the Hearing Officer would have in the event a network inadequacy was found, none of those remedies would provide the redress Ms. McCarthy is seeking -- i.e., she wants to be able to continue to access health care services with Frisbie. In fact, the primary remedy identified by Mr. Feldvebal – "to prohibit [Anthem] from actively marketing that product in that county" (see Mr. Feldvebal's testimony at pages 126-127 of the Hearing Transcript), obviously would not accomplish Ms. McCarthy's stated goal because, if Anthem were precluded from marketing its QHPs in Strafford County, applying for a subsidy and purchasing Exchange coverage that included her Frisbie providers in 2014 would not be an option for her. Likewise, a potential decertification, which Petitioner's counsel discussed with Mr. Wilkey at pages 222-223 of the Hearing Transcript would not, if it occurred, provide Ms. McCarthy with the relief she is seeking.

Separate and apart from whether any network deficiency existed in Strafford County as of the Department Decision (in fact, none was established at the Hearing), it is correct to say that, once Anthem's QHPs were sold on the Exchange, "to the extent there was a deficiency under New Hampshire law ... [the NHID] would, as ... market conduct regulators, work ... to see that the remedy was created." See Mr. Wilkey's testimony at page 223 of the Hearing Transcript. Of course, as Mr. Feldvebal also testified regarding this point, "when we're doing market conduct review, we are always looking in the rearview mirror. We are looking at how an insurer has behaved with respect to its insured population over a period of time ... to find out whether there has been compliance or not in the past." See Mr. Feldvebal's testimony at page 132 of the Hearing Transcript. As such, this type of enforcement action would typically be available following a retrospective review, not a prospective review like the NHID's May-July 2013 review leading up to the Department Decision.[16]

[16]To be sure, Anthem addressed these various arguments regarding the NHID's enforcement authority in its prior filings under Docket No. INS 13-038-RA, including in Footnote 7 at page 6 its Second Supplemental Brief by Anthem Blue Cross and Blue Shield re Aggrievement, which states in pertinent part: "... the fact that the Petitioners are without standing to challenge the Department's Decision does not mean that Anthem's QHPs are permitted to operate without regulation ... the Department can initiate a market conduct exam under RSA 400-A:37, which permits the Commissioner to require an insurer to correct any non-compliance ... In short, separate and apart from the results of adjudicative hearing, the Commissioner has enforcement authority to address network adequacy by way of a corrective plan or the imposition of penalty period as the Commissioner's denial order so clearly sets forth, however, those enforcement powers do not include the authority to order an insurer, including Anthem, to contract with any particular provider, including Frisbie, and they do not include the authority to guarantee that any particular enrolled person, including Ms. McCarthy, will have access to any particular health care providers." Here, then, the bottom line is that although New Hampshire insurance laws provide the NHID with certain enforcement authority under the market conduct provisions (as discussed during the Hearing), there is no statutory and/or regulatory authority for the Hearing Officer to provide the only remedy that the Petition seeks -- an Order requiring Anthem to include Frisbie in the Pathway Network for 2014.

WHEREFORE, for all the foregoing reasons, Petitioner McCarthy has failed to establish that she has been injured directly by the Department Decision; she has failed to establish any inadequacies in the Pathway Network, let alone any deficiency existing as of the time of the Department Decision; and she has failed to prove that the Hearing Officer has the authority to order the only relief sought in her Petition. Consequently, the Petition should be denied in its entirety.

Dated: June 4, 2014

By_____

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CERTIFICATION

This is to certify that a copy of the foregoing was emailed, sent via facsimile and/or mailed, postage prepaid, on the above-written date, to:

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