THE STATE OF NEW HAMPSHIRE

INSURANCE DEPARTMENT

In re Petition of Frisbie Memorial Hospital et al.

Docket No. _____

BRIEF OF ANTHEM BLUE CROSS BLUE SHIELD
RE: AGGRIEVEMENT

Pursuant to the invitation of General Counsel Chiara Dolcino, Anthem Blue Cross Blue Shield ("Anthem") hereby submits this brief addressing the issue of whether the Petitioners, Frisbie Memorial Hospital ("Frisbie") and Margaret McCarthy, in their November 6, 2013 Petition For Hearing Pursuant to RSA 400-A:17 ("Petition") have demonstrated a legal interest sufficient to give one and/or the other standing as an aggrieved party for purposes of an adjudicative hearing under Section II of RSA 400-A:17. As discussed herein, neither Petitioner can establish aggrievement. As a preliminary matter, however, it should be noted that the Petition itself is clearly time barred under Section III of RSA 400-A:17 and should be denied on that basis alone. [1]

Currently at issue is the July 31, 2013 decision by the New Hampshire Insurance Department ("the Department") to recommend to the United States Department of Health and Human Services ("HHS") that it certify Anthem's proposed health benefit plans that will

[1] See Attorney Docino's November 14, 2013 letter. This brief does not address the Department's discretionary authority to hold a public informational hearing under Section I of RSA 400-A:17. It is also not meant to address the accuracy and/or merit of the Petition other than to note that, at the heart of the Petitioners' complaints, is a private contract issue between Frisbie and Anthem, and an adjudicative hearing before the Department is not a forum that can provide the relief being sought.

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, or Exchange, beginning October 1, 2013 ("Department Decision"). Anthem's proposed plans were subsequently approved by the federal Centers for Medicare and Medicaid Services.[2]

Frisbie and Ms. McCarthy have now petitioned this Department, pursuant to RSA 400-A:17, II, for an adjudicative hearing to challenge the Department's Decision and to seek an order requiring Anthem to permit Frisbie – and purportedly any other New Hampshire hospital – to participate in Anthem's Pathway network which will be utilized by individuals that purchase QHPs. In doing so, Frisbie thinly claims that somehow it has been aggrieved by the Department Decision because Anthem chose not to contract with Frisbie in connection with the QHPs it will offer on the Exchange.[3] The gist of Frisbie's complaint is that it is dissatisfied that Anthem did not provide Frisbie with the opportunity to participate in the Pathway network, but it cites to no legal authority—because there is none—that would require Anthem to contract with and include Frisbie in the Pathway network (just as no hospital, including Frisbie, could be compelled to participate in the Pathway network) (See Petition for Hearing, ¶ 16). Ms. McCarthy's assertion is even more tangential. Despite admitting that she herself "may drive to a hospital in Dover" to access care with participating

[2] The covered period for Anthem's QHPs does not begin until January 1, 2014.

[3] Otherwise, Frisbie's participating Facility Agreement with Anthem, effective October 13, 2013, relating to group plans off the Exchange remains in effect.

Anthem providers,[4] (See Petition for Hearing, ¶ 16), Ms. McCarthy nonetheless purports to represent a theoretical and unidentified group of individuals who might be aggrieved because they will have to give up providers associated with Frisbie in order to obtain insurance on the Exchange. Even if, arguendo, the above allegations were accepted as true, they do not establish aggrievement under New Hampshire law.[5]

In Appeal of Thermo-Fisher Scientific, 160 N.H. 670, 672 (2010), the New Hampshire Supreme Court considered "the plain and ordinary meaning of the term 'aggrieved.'" The Court reasoned that "[t]he relevant definition of 'aggrieved' is having a grievance; specif[ically]: suffering from an infringement or denial of *legal rights*." (Emphasis added; internal quotation marks omitted.) Id. at 672-73.

The New Hampshire Supreme Court has also described aggrievement as an "injury in fact" or a "direct definite interest." Specifically, in Appeal of Union Tel. Co., 160 N.H. 309, 313 (2010), the court reasoned that, in order to show aggrievement, "a party must

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[4] For example, Wentworth Douglass Hospital in Dover, a participating facility in the Pathway network, is located only approximately eight (8) miles from Frisbie. In addition, New Hampshire Insurance Regulation 2700 does not require that Anthem meet the geographic access standards for each individual enrolled in an Anthem health plan, but rather that Anthem meet those standards for "at least 90 percent of the enrolled population.

[5] The petitioners also claim that the Department violated basic due process requirements in that they were not given the opportunity to participate in a hearing as to the determination that Anthem's QHP network satisfies network requirements. (See Petition for Hearing, ¶¶ 6 and 19) On its face, this claim is without merit, as procedural due process rights are not triggered where, as here, the government acts generally. "[P]rocedural due process imposes constraints on governmental decisions which deprive *individuals* of liberty or property." (Emphasis added; internal quotation marks omitted.) Collins v. Univ. of N.H., 746 F. Supp. 2d 358, 368 (D.N.H. 2010), aff'd, 664 F.3d 8 (1st Cir. 2011). Procedural due process does not require a hearing when the government acts in a legislative, or broadly rule-making or policy-forming, capacity. O'Neill v. Nantucket, 711 F.2d 469, 472 (1st Cir. Mass. 1983). Further, under New Hampshire law, the Department is not required to hold any type of hearing prior to reviewing and approving a payor's network adequacy filings. See New Hampshire Insurance Regulation 2700.

demonstrate that its rights may be directly affected by the [administrative agency] decision, or in other words, that [it] has suffered or will suffer an injury in fact." (Internal quotation marks omitted). In Caspersen v. Town of Lyme, 139 N.H. 637, 640 (1995), the Court held that "[a]ggrievement is found when the appellant *shows a direct definite interest in the outcome of the proceedings*... The existence of this interest, and the resultant standing to appeal, is a factual determination in each case." (Citation omitted; emphasis added). The Caspersen Court's analysis of whether the plaintiffs in that case established aggrievement is instructive. The plaintiffs in Caspersen challenged a zoning ordinance prohibiting lot sizes of less than 50 acres in certain districts, arguing that the ordinance was exclusionary in that it effectively precluded development of low or moderate income housing on their property in those districts. However, the plaintiffs admitted that they were not in the construction business and had no intention to provide low or moderate income housing on their land. Based on the facts presented, the Caspersen Court determined that the plaintiffs' "general interest in a diverse community is not sufficient to sustain their standing on this issue." Id. at 640-41. In other words, although in theory, the ordinance might adversely impact the plaintiffs, it did not work any direct injury in fact on them. See also Appeal of Richards, 134 N.H. 148, 156-157 (1991) ("No individual or group of individuals has standing to appeal when the alleged injury caused by an administrative agency's action affects the public in general, particularly when the affected public interest is represented by an authorized official or agent of the State... This is simply another way of formulating the 'injury in fact' or 'direct effect' requirement.") (citation omitted).

Simply stated, in order to establish aggrievement for purposes of requiring the Department to hold an adjudicative hearing, the Petitioners are each required to establish the existence of a legal right they hold that has been denied or infringed upon as a direct result of the Department Decision. In fact, neither Frisbie nor Ms. McCarthy has identified the type of direct injury in fact arising from the Department Decision that is mandated by New Hampshire law to show aggrievement for the purpose of standing. Instead, the criticisms raised by Frisbie– that it was improper for Anthem to decide not to contract with Frisbie on the Exchange—is at best a private contract dispute. In turn, the concerns raised by Ms. McCarthy--that, should she eventually seek individual coverage on the Exchange, she necessarily would be harmed because she could no longer seek services at Frisbie that would be covered by Anthem – are merely theoretical and would not under any circumstances represent the direct loss of reasonable access to quality healthcare. Similar to Caspersen, while the Petitioners here may have a "general interest" in the Department Decision recommending Anthem's proposed plans for HHS certification as QHPs, that general interest is not sufficient to demonstrate "injury in fact" or a "direct definite interest" that rises to the level of legal aggrievement.

As to Frisbie's assertion that its exclusion from Anthem's network on the Exchange, as endorsed by the Department and certified by HHS, constitutes aggrievement for standing purposes, Frisbie cannot be considered aggrieved by this decision, as it does not – in the absence of a contract with Anthem – have a legal right to participate in Anthem's networks. Stated directly, Frisbie would not automatically be included in Anthem's Pathway network

even if the Department were to reconsider its decision regarding the adequacy of that network.[6] In fact, if Anthem's Pathway network were at some point found to be deficient, Anthem would not be required to resolve any identified deficiency by contracting with any particular additional providers. Instead, Anthem would have the right to address any such network inadequacy through the inclusion of providers other than Frisbie in its Pathway network.

Further with regard to Ms. McCarthy, she is not claiming a denial of access to health care, but rather is complaining merely of a possible change in some of the participating providers available to her. In fact, if Ms. McCarthy wants to ensure that she be able to seek covered health care services at Frisbie, she has several options available to her. For example, she retains the right to renew her current individual plan with Anthem for an additional year through November 30, 2014 or in the alternative, she can purchase an individual health insurance plan outside the Exchange with another payor.[7&8] Accordingly, Ms. McCarthy has not and cannot show that she is aggrieved.

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[6] It should be noted that Frisbie will continue to participate in an Anthem network that serves 90% of Anthem's membership.

[7] For example, Assurant offers such individual coverage.

[8] The Petition alleges that "[a]lthough Ms. McCarthy may drive may drive to a hospital in Dover that participates in the plans, other individuals in New Hampshire may also be required by the available QHP's to drive farther than the State's network adequacy requirements permit, or to wait for care longer than network adequacy requirements permit..." (See Petition for Hearing, ¶ 16). This demonstrates that, although Ms. McCarthy brings this Petition in a representative capacity, she herself does not in fact represent those individuals allegedly aggrieved by the Department Decision. It is therefore pure speculation that Anthem's QHP plan requires individuals to travel an excessive distance or wait an excessive amount of time for treatment. In addition, New Hampshire Insurance Regulation 2700 does not require that Anthem meet the geographic

In summary, while Frisbie and Ms. McCarthy may have a "general interest" in seeing Frisbie included in Anthem's Pathway network, neither has a legal right requiring such inclusion. See Caspersen, supra, 139 N.H. at 640. As such, they cannot establish aggrievement. What Frisbie and Ms. McCarthy are really complaining about is dissatisfaction with Anthem's decision not to contract with Frisbie in connection with the QHPs offered on the Exchange. These are matters of private contract and the Department should not countenance the Petitioners' attempts to bootstrap a thinly veiled private dispute with Anthem into an attack on the Department Decision by way of an adjudicative hearing.

Should the Department require further input on these standing issues following submission of Frisbie and Ms. McCarthy's brief, Anthem would be willing to provide additional views to the Department.

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