

THE STATE OF NEW HAMPSHIRE

INSURANCE DEPARTMENT

In re Petition of Margaret McCarthy

Docket No. INS 13-038-AP

**OBJECTION BY ANTHEM BLUE CROSS AND BLUE SHIELD  
TO THE ADMISSIBILITY OF PETITIONER McCARTHY'S  
EXHIBITS MARKED FOR IDENTIFICATION ONLY**

In accordance with the directions of the Hearing Officer at the end of the May 14, 2014 adjudicative Hearing, the undersigned Intervening Party, Anthem Blue Cross and Blue Shield ("Anthem"), hereby objects to the admission of the documents marked by Petitioner Margaret McCarthy as McCarthy Exhibits 1 through 13 (for identification only) into evidence as full exhibits for purposes of the Hearing.<sup>1</sup>

**I. GENERAL OBJECTIONS**

Anthem objects to all of the documents marked for identification (Nos. 1-13) for several reasons. First, none of these documents were ever formally offered for introduction into evidence and it would be too late and prejudicial to Anthem to permit the Petitioner to

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<sup>1</sup>Although Petitioner McCarthy's counsel marked Exhibits 1 through 13 for identification only at the Hearing, copies of those documents were not provided to Anthem's counsel until May 16, 2014, two days post-Hearing (upon Anthem's counsel's follow up request).

Of further specific note, although it objects to Exhibit 10 for the reasons stated herein, Anthem submits that, consistent with the Commissioner's March 28, 2014 Order And Notice Of Hearing and his May 13, 2014 Order on Motion In Limine (collectively "Hearing Officer's Orders"), the Hearing Officer can and should take official notice of and consider the NHID's January 14, 2014 production in response to the RSA 91-A Request by Petitioner McCarthy's counsel insofar as those materials relate to Anthem's Pathway Network in Strafford County. See the Hearing Officer's Orders and RSA 541-A:33.

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do so now by way of post hearing briefing. It is of important note that any and all remarks of the Petitioner's counsel at the Hearing—and in any post-hearing submissions---regarding what he would like to introduce are not evidentiary in nature and Mr. Eggleton's general commentary at the Hearing--as well as his anticipated argument in his post-hearing brief--about why he thinks evidence relating to places outside and beyond Strafford County should be permitted is insufficient to constitute the requisite oral offer to introduce a specific document or documents into evidence. In the absence of an identifiable statement on the Record requesting that a particular document be admitted into evidence accompanied by a recitation of the specific factual or legal bases for admissibility of that offered document, no actual offer to introduce is made that can be challenged in any informed way by the other parties and that in turn can be considered by the Hearing Officer. RSA 541-A:33. The Hearing Transcript demonstrates that Petitioner's counsel made no such appropriate offers—orally or otherwise—at the Hearing and consequently, there are no preserved offers, by which the Hearing Officer can consider the admissibility of any of these marked materials.<sup>2</sup>

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<sup>2</sup> Anthem acknowledges that the Hearing Officer indicated that the rules of evidence would not apply to the Hearing (see page 11 of the Hearing Transcript) and that there was extended discussion among counsel and the Hearing Officer about the materials marked for identification only. However, in disregard of the Hearing Officer's direction at the May 8, 2014 pre-argument conference, none of the materials marked by the Petitioner for identification were provided to Anthem prior to or at the Hearing. See the following exchange at page 15 of the Hearing Transcript: Hearing Officer Sevigny: "Does everyone have your exhibits?" Attorney Eggleton: "I can go through them one at a time and send them out. They have copies of all the exhibits, or **at least they have notice of all the exhibits prior to this Hearing ...**" (Emphasis added.) In fact, in contrast to the NHID's exhibits and Anthem's exhibits, which were all made full exhibits by agreement (see page 33 of the Hearing Transcript), the Petitioner's materials marked for identification were neither provided to Anthem's counsel nor formally offered into evidence at the Hearing with copies to counsel. Even putting aside this procedural irregularity, there can be no question that Anthem was prejudiced by not receiving the materials in a timely fashion. Frankly, it appears that the Petitioner's counsel was strategically intent to avoid making any attempts to actually introduce Exhibits 1-13 during the Hearing (where there would have been an immediate opportunity for Anthem to understand the basis for the attempted introduction and to respond on the Record). In short,

Second, even if the Hearing Officer were somehow to conclude that the Petitioner did orally offer Exhibits 1-13 into evidence, no foundation was ever laid for the reliability and relevance of any of the materials marked for identification. In addition and most glaring is the fact there was never any effort by the Petitioner to elicit testimony relating to the content of those materials and/or the fact(s) that they purport to establish, thereby making it impossible for the Hearing Officer to determine the potential relevance of the same. Specifically, the Petitioner never made inquiry of Ms. McCarthy, Mr. Feldvebal or Mr. Wilkey regarding the subject of any of the materials marked for identification; she never called or subpoenaed any other lay or expert witness(es) to testify about those subjects; and she never called any other person available at the Hearing to testify on these subjects.<sup>3</sup> In short, the Petitioner did not put on even a bare of bones foundation for the admissibility of any of the materials her counsel marked for identification.

Further, although the Hearing Officer indicated that the rules of evidence would not apply to the Hearing, he also advised that he would “accept oral offers of proof as necessary to determine whether the evidence is credible or relevant ... [and] if evidence is excluded, ...a written offer of proof for the record ...” See page 11 of the Hearing Transcript. As such, although the Hearing Officer intended to proceed without the strict formality of evidentiary rules, he nonetheless clearly expected that any party offering evidence would make a

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having failed to make any specific oral offers to introduce any of the materials marked for identification, the Petitioner should not now be permitted to seek their introduction through the back door.

<sup>3</sup>For example, Mr. Felgar, the Chief Executive Officer of Frisbie Memorial Hospital was in attendance at the Hearing as were Anthem’s Vice President Robert J. Noonan and Anthem Executive Counsel Maria Proulx.

threshold oral offer of proof, as the other parties are entitled to know on the Record what the bases are for any offer of evidence and to have the full and fair opportunity to assert their opposition to the same on the Record. In fact, to permit a party, like the Petitioner here, to proceed otherwise would necessarily work prejudice on the other parties, who are entitled to know the basis for the relevance of such proffered evidence. To permit a party to proceed otherwise would force the other parties to guess at what the offering party might claim makes a particular item relevant and admissible to the issues at hand. To be sure, the Hearing Transcript here does not indicate that the Hearing Officer endorsed a process that would permit previously undisclosed materials to be marked for identification--without copies being provided to the other parties; to not be used at all during the evidentiary portion of the Hearing; and nonetheless to be deemed admissible thereafter based only on counsel argument in a post hearing offer of proof. This strategy employed by the Petitioner should not be countenanced by the Hearing Officer,<sup>4</sup> as Petitioner's counsel's remarks and arguments do not constitute evidence that can form the basis of any factual findings by the Hearing Officer.

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<sup>4</sup>To be sure, the inappropriateness of this strategy was discussed at the Pre-Hearing Conference when counsel for the NHID and counsel for Anthem pointed out to the Hearing Officer that Ms. McCarthy's burden of proving injury in fact and specific inadequacies in the Pathway Network in Strafford County would have to be established by evidence, including expert testimony, as opposed to argument by her counsel. Those concerns were reiterated by NHID's counsel at page 232-233 of the Hearing Transcript. The fact that the Petitioner's counsel never formally offered his marked materials into evidence and never attempted to elicit testimony regarding the subjects of these materials through any witness demonstrates that the Petitioner's strategy was to avoid giving the NHID and Anthem any opportunity to challenge their admissibility at the Hearing and instead to secure the opportunity to cobble together arguments supporting the alleged probative value of her materials through briefing after the Hearing. This assessment is supported by Mr. Eggleton's initial comment following the Hearing Officer's introductory remarks: "... I wanted to make sure that [the Hearing Officer keeping the Hearing open] included the ability to submit a post-trial memorandum" (see pages 12-13 of the Hearing Transcript) and his later remark at pages 29-30 of the Hearing Transcript: "So maybe we'll consider the Exhibits admitted for identification purposes. Will make our arguments based on that. And then, as part of our post-trial memorandum, we can exchange memoranda concerning the relevance of the exhibits in question ..."

## II. ANTHEM'S OBJECTIONS TO SPECIFIC MATERIALS MARKED BY PETITIONER MCCARTHY FOR IDENTIFICATION ONLY

1. In addition to the General Objections, **McCarthy Exhibit 1 for identification only** is objected to because, although it was part of the NHID's file relating to the review of Anthem's proposed QHPs (see Bates Nos. 002-003 of the NHID's January 2014 production in response to Petitioner's counsel's RSA 91-A Request), the document on its face does not provide any specific information relevant to the May – July 2013 timeframe, during which Anthem's proposed QHPs were under review by the NHID. Therefore, it cannot be demonstrated to provide any information of probative value relating to the issue of Ms. McCarthy's alleged injury and/or the reasonableness of the NHID's July 31, 2013 decision recommending Anthem's proposed QHPs for certification ("Department Decision"). To the contrary, the document speaks primarily about health carrier reporting that, with regard to any certified QHP, would not be due until March 1, 2014 at the earliest and about eventual compliance with Essential Community Provider ("ECP") requirements that, per the document, would not be required to be demonstrated until the October 1, 2013 – September 30, 2014 timeframe. Further, the Petitioner did not elicit testimony from any lay or expert witness supporting the relevance of this document to any injury the Petitioner alleges to have sustained and/or any deficiency in the Pathway Network in Strafford County as of the time of the Department Decision.

2. In addition to the General Objections, **McCarthy Exhibit 2 for identification only** is objected to because Petitioner McCarthy's counsel agreed that it would be replaced by NHID Exhibits A2 and B2. See pages 38-39 and 43 of the Hearing Transcript.

3. In addition to the General Objections, **McCarthy Exhibit 3 for identification only** is objected to insofar as it is duplicative and redundant of NHID Exhibit A (at pages 61-63). INS 203.01. It is also inadmissible to the extent that it seeks to introduce statistical data from counties other than Strafford County, as such information falls outside and beyond the scope of evidence permitted by the Hearing Officer'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") (these two Orders are collectively referred to as "Hearing Officer Orders").<sup>5</sup>

4-5. In addition to the General Objections, **McCarthy Exhibits 4 and 5 for identification only** are objected to because, on their face, neither document refutes the fact that Anthem properly submitted the requisite information complying with the federal Essential Care Providers ("ECPs") requirements<sup>6</sup> and that, based on all of the information submitted by the NHID, the United States Department of Human Health and Services ("HHS") through its Center For Consumer Information and Insurance Oversight ("CCIIO") certified Anthem's proposed QHPs and its Pathway Network for offering on the Exchange in

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<sup>5</sup>Of note, to the extent that the Hearing Officer would consider admitting this Exhibit into evidence, it should be noted that the data relating to counties other than Strafford County actually verifies Anthem's compliance with the Geographic Accessibility of PCPs in those other counties.

<sup>6</sup> The Hearing Officer can take official notice of his January 14, 2014 letter to Petitioner's counsel advising of his decision on the Petitioner's RSA 91-A Request, which advised that the ECP templates would not be produced because CMS considered them confidential.

2014. Further, the Petitioner did not seek to lay any evidentiary foundation about these documents from any witness and in particular did not question Mr. Wilkey about the subject of them.

6. In addition to the General Objections, McCarthy Exhibit 6 for identification only is objected to because the document does not by its own terms describe what it is, when it was created, or for what purpose(s) it was created and used during the NHID review of Anthem's proposed QHPs. Further, its contents do not permit any conclusion to be drawn regarding the final results of the NHID's review of Anthem's proposed QHPs or the reasonableness of the Department Decision. Finally, the Petitioner failed to lay any evidentiary foundation for this document from any witness and in particular did not question Mr. Wilkey or any other witness about the subject of this document.

7. In addition to the General Objections, McCarthy Exhibit 7 for identification only is objected to because its contents alone do not permit any conclusion to be drawn regarding the final results of the NHID's review of Anthem's proposed QHPs or the reasonableness of the Department Decision. Finally, the Petitioner failed to lay any evidentiary foundation for this document from any witness and in particular did not question Mr. Wilkey or any other witness about the subject of this document.

8. In addition to the General Objections, McCarthy Exhibit 8 for identification only is objected to because no reliable basis has been provided for the Hearing Officer to correlate the "estimates" of county populations set forth in this document with any credible

projection of the eventual membership in Anthem's QHPs on the Exchange. Specifically, the so-called "dwelling unit method" described at page 2 of the document was not demonstrated by any lay or expert testimony to be consistent with any appropriate method of calculation of Anthem's membership. In fact, at page 1 of the document, it is acknowledged that "it is likely that if OPE<sup>7</sup> staff would estimate one municipality on an individual basis, the resulting estimate would be different than the one contained herein" and further that "users of these figures should be aware that many of the data used to calculate the estimates were collected by local governmental units for purposes other than accounting for population change." Without testimony attesting to the accuracy and reliability of the counting method utilized in the document and correlating it to Anthem's Pathway membership through expert testimony, this document cannot be said to provide reliable information that is relevant to the issues in this contested matter.

Further, to the extent that this document provides population estimates for counties other than Strafford County, it is beyond and outside the scope of evidence permitted by the Hearing Officer's Orders.

9. In addition to the General Objections, **McCarthy Exhibit 9 for identification only** is objected to because the information is so generic in nature as to lack any probative value regarding the matters at issue. Further, the Petitioner failed to elicit any testimony, including any expert testimony, regarding how the statistical data contained in this document

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<sup>7</sup> At page 1 of the document, OPE is stated to stand for the New Hampshire Office of Energy and Planning.

was calculated and/or how it would compare with similar calculations performed for purposes of requirements under New Hampshire insurance law and, in particular, under network adequacy standards.<sup>8</sup> Further, there is no basis set forth in Exhibit F or otherwise in New Hampshire's insurance laws, and, in particular, its network adequacy standards, that would permit the use of the information contained in this particular document for the purposes that Petitioner's counsel apparently intends to argue its supports. Finally, there is nothing in this document that is relevant or probative on the issue of whether Ms. McCarthy sustained injury in fact as a result of the Department Decision and/or that it offers any probative value relating to whether the Pathway Network has any deficiencies in Strafford County---and certainly relating to any deficiencies that the inclusion of Frisbie in the Pathway Network would resolve.

10. In addition to the General Objections, McCarthy Exhibit 10 for identification only is objected to insofar as it seeks to introduce documentation of data relating to counties other than Strafford County, as such information falls outside and beyond the scope of evidence permitted by the Hearing Officer's Orders. This Exhibit is also objected to because Petitioner's counsel agreed that her use, if any, of these materials would only be in rebuttal to evidence presented by the NHID and/or Anthem (see page 31 of the Hearing transcript) and at no time did the Petitioner offer any of these materials marked for identification as rebuttal evidence-- either during the cross examination of the NHID's

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<sup>8</sup>It is indeterminable whether any of this information would provide a basis for determining whether any Anthem member would qualify for a federal subsidy, and if so, in what amount, in connection with coverage on the Exchange.

witnesses or through any oral offer of proof. Nonetheless, as stated in Footnote 1 above, Anthem submits that the Hearing Officer should take official notice of and consider the materials (Bates Nos. 001-404) produced by the NHID in response to Petitioner's counsel's RSA 91-A Request insofar as those materials relate to Anthem's Pathway Network in Strafford County. See the Hearing Officer's Orders and RSA 541-A:33.

11. In addition to the General Objections, McCarthy Exhibit 11 for identification only is objected to because consideration of any of the information contained in the news article, which is nothing more than one reporter's take on a conversation that he purportedly had with an Anthem representative in February 2014, would be inherently unreliable. For example, based on the article alone, it would be impossible for the Hearing Officer to determine if, in talking to the reporter, the identified employee was intending to, or in fact had the authority to, speak on behalf of Anthem about any subjects relating to the matters at issue in this contested case. Further, no foundation was laid by the Petitioner supporting the admissibility of this document. In particular, Ms. McCarthy did not call as a witness the article's author, the Anthem employee referred to in the article, or any other person with personal knowledge of the topics discussed in the article. Further, the Petitioner never identified what portion of the news article she would intend to offer as being probative on any issue under the Hearing Officer's Orders; and on its face, the content of the news article is merely the author's paraphrased slant on unrecorded responses to unknown questions. Nothing in the article can be deemed to be an admission on Anthem's part nor can it be used to permit Petitioner's counsel to engage in unscrutinized extrapolation. Any

attempt to make a leap from such a media piece to any credible theory as to how and why the Department Decision was allegedly wrong would be dangerous and unreliable.

12. In addition to the General Objections, McCarthy Exhibit 12 for identification only is objected to on the same basis that Anthem objected to McCarthy Exhibits 8 and 11 above. Further, the majority of this document contains information that is clearly irrelevant to the issues in this hearing.<sup>9</sup> Even with regard to the lone section that in theory might be argued to be generally related to the matters at issue in the Hearing<sup>10</sup>, the document demonstrates that the content cannot be said to be probative of the issues at hand. For example, the document states at page 8 that the “indicators in this report are presented using an adaptation of the County Health Ranking’s approach.” Of course, the Petitioner did not present any lay or expert testimony to explain what the County Health Ranking’s approach is and/or how it would provide a reliable and probative approach to analyzing any of the issues in this matter.<sup>11</sup> Further, by its own terms, this document was not prepared for the purpose of assessing any particular health plan or the adequacy of any health carrier’s network in New Hampshire or in any county thereof.<sup>12</sup> In addition, the document

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<sup>9</sup>See, e.g., those sections identified at pages 4-5 regarding demographics, health behaviors, quality of care, community and environment, mortality, mental health, healthy days, cancers, cardiovascular diseases and risk factors, asthma, unintentional injury, poisoning deaths and dental disease in children.

<sup>10</sup>See access to care section at page 39-40 of the document.

<sup>11</sup>All this document indicates is that the County Health Ranking’s approach comes from a 2010 publication out of the University of Wisconsin Population Health Institute. See footnote 1 at page 8 of the document.

<sup>12</sup>To the contrary, at page 9 of the document, it is indicated that the “aim with this report” was to provide a profile of the state and regions to set priorities to improve health status.” The document goes on to acknowledge at page 9 that “there are gaps in the report ... and additional analysis by public health region will

acknowledges that the geographic data presented does not necessarily match up with any particular county: “While the boundaries of many of these new public health regions are similar to New Hampshire’s counties, many cross county boundaries.” See document at page 10. The document goes on to further acknowledge that “rankings do not take into account sampling error or other sources of statistical variation.” See document at page 10.<sup>13</sup> Finally, the data upon which the access to care narrative is based is not from 2012 or 2013, and since it represents some sort of aggregation of information from all the counties in the state, it necessarily improperly provides information that is beyond the scope of evidence permissible under the Hearing Officer’s Orders.

13. In addition to the General Objections, McCarthy Exhibit 12 for identification only is objected to for the following reasons: first, page 1 of the document is completely unidentifiable beyond a cryptic and unhelpful caption “Pay or Mix by Practice”; and second, other than five columns, the document provides no self-explanatory information. Also, it is undated, and the author and purpose for which it was prepared are nowhere to be found. In addition, the Petitioner offered no testimony to provide a foundation for the document and/or to otherwise explain what it purports to show or how it is reliable and relevant to the issues in this contested matter.

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be completed in the future.” Of course, this caveat provides yet another reason why expert testimony would be required to explain the basis and contents of this document and its relevance to this contested matter.

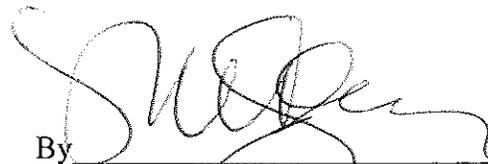
<sup>13</sup>Anecdotally, the document does state at page 6 that New Hampshire has consistently been a leader on measures of health and wellbeing when compared to other states; it has been rated the most livable state based on income, jobs, crime and health measures; and fifth in the nation for having a strong health system. Also the document demonstrates New Hampshire’s high ranking in several categories under Key Indicators At A Glance at pages 12-15.

Further, with regard to pages 2-3, which seem to be unrelated to page 1 of the document, Anthem submits that any list of providers as of March 2014 is entirely irrelevant to the issues of network adequacy as of the time of the Department Decision. These pages do not identify the source of this document; who created it and for what purposes; and it provides no explanation of how its author defined a "practice closed to new patients." Significantly, the Petitioner offered no testimony regarding these pages as well.

Clearly, these pages are so vague that they are unreliable and it would be impossible for the Hearing Officer to determine whether they provide any information relevant to and probative of the issues at the Hearing.

WHEREFORE, for all the foregoing reasons, Anthem objects to the admission into evidence of any of the materials that Petitioner McCarthy marked for identification only.

Dated: June 4, 2014



By

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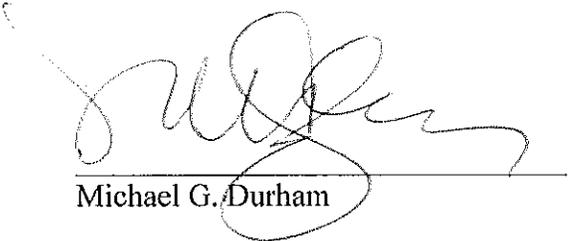
## CERTIFICATION

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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