

Orr&Reno

January 10, 2014

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VIA HAND-DELIVERY

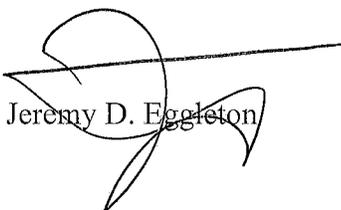
Jennifer J. Patterson
Life, Accident & Health Legal Counsel
State of New Hampshire, Insurance Department
21 South Fruit Street, Suite 14
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Re: *In Re: Petition of Frisbie Memorial Hospital et al.*
Docket No. _____

Dear Attorney Patterson:

Enclosed please find for filing with the Department, Petitioners' Request for Rehearing, relative to the above-referenced matter.

Very truly yours,


Jeremy D. Eggleton

Lawrence A. Kelly
(Of Counsel)

Neil F. Castaldo
(Of Counsel)

JDE/mem
Enclosure
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THE STATE OF NEW HAMPSHIRE

INSURANCE DEPARTMENT

In re Petition of Frisbie Memorial Hospital *et al.*

Docket No. _____

PETITIONERS' REQUEST FOR REHEARING

Frisbie Memorial Hospital (“Frisbie”) and Margaret McCarthy (collectively the “Petitioners”) request reconsideration or a rehearing on the NH Insurance Department’s December 11, 2013 Order (the “Order”) on their Petition for Hearing pursuant to RSA 400-A:17, for the following reasons:

I. The Department Overlooked Petitioners’ Challenge To The Network Adequacy Of Anthem’s Marketplace Plans.

In the Order, the Department stated: “Petitioners do not allege that Anthem’s network does not meet these standards[.]” Order at 5. This is incorrect. The Petitioners are seeking a full, fair and public adjudicative hearing under RSA 400-A:17, II because (a) they believe that Anthem’s plans do not meet network adequacy standards; (b) without any kind of public access to Anthem’s submissions, they—along with the rest of the New Hampshire public—are without any means of determining whether Anthem’s plans meet network adequacy standards; and (c) network adequate plans would require the participation of Frisbie.

It is true, and indeed, *the basic premise of the Petitioners’ request*, that without any data, and without access to Anthem’s submissions, there is no record upon which they—or the public—can determine whether Anthem’s plans are network adequate. *See* Petition at ¶18. But the Department cannot state that Petitioners have not produced evidence that Anthem’s plans are not network adequate and simultaneously deny the

Petitioners the only means of obtaining that data and having it evaluated in a forum that would permit full due process—*i.e.*, judicial review. The fact of the matter is that only Anthem and the Department know whether Anthem’s plans are network adequate at this time, and Anthem’s resistance to the Petition suggests that if public scrutiny is actually focused on the details of its plans, serious questions will be raised about network adequacy. For that reason, Petitioners ask the Department to reconsider its Order and provide Petitioners with a public adjudicative hearing after full disclosure of all documents concerning the adequacy of Anthem’s narrow network submitted to or created by the Department.

An adjudicative hearing will enable Petitioners and the public to scrutinize and question Anthem’s plans for network adequacy, determine whether the exclusion of Frisbie breaches network adequacy requirements, and subject the Department’s decision to judicial review, if necessary. An adjudicative hearing is necessary to ensure compliance with state requirements for health insurance plans and the proper application of the Patient Protection and Affordable Care Act (the “ACA”) in the best interest of the people of New Hampshire.

II. The Department’s Decision Concerning Aggrievement Sets A Bar For Standing That Is Not Consistent With The Requirements Of Due Process.

The Department’s analysis of Petitioners’ standing was summarized by its assertion that “a person cannot be found to be ‘aggrieved’ where reversal of the challenged decision will not correct the alleged harm.” Order at 6. In this case, the Department approved Anthem health plans for inclusion on the New Hampshire Health Insurance Marketplace (the “Marketplace”). Plans that were approved omitted Frisbie as well as other providers. It is Petitioners’ contention that the omission of Frisbie (and of

other providers) may have rendered Anthem's plans *not* network adequate. While it is admittedly impossible to test that assertion without public access to the documentation that Anthem submitted to justify the network adequacy of its plans, the Department's failure to hold a public hearing at the time it was evaluating the network adequacy of Anthem's plans was unfair to the Petitioners and to the public. In fact, before Anthem announced its plans, the public did not even know a narrow network was under consideration.

Moreover, Frisbie has concerns that Anthem's objectives—driving up volume to a smaller number of providers—will result in substantially longer waiting times for patients to obtain provider access than are permitted under New Hampshire law and the ACA. Waiting time is a measure of accessibility under N.H. Admin. R. Ins. 2701.07(a), which states: "Standard waiting times for appointments shall be measured from the initial request for an appointment and shall meet NCQA requirements." Under the NCQA, waiting times for an initial appointment with a primary care provider are required to be no longer than thirty days, and no longer than ten days for a behavior health provider. Based upon public statements by in network providers and simple reason, there is a question whether Anthem's plans will meet this standard. *See* Exhibit 1, Fleisher, Chris, "D-H May See Unexpected Patient Influx, Official: Limit on Providers Adds to Uncertainty in N.H.," Valley News, September 18, 2013.

Moreover, NCQA requires ratios of providers to patients for primary, specialty and behavioral health care that are directly related to a patient's ability to access a given provider. *See* NCQA HP Standards and Guidelines, Standard Q15, Element A (Accessibility of Services), Standard Q14, Elements B, C (Availability of Practitioners).

No information has ever been disclosed to Petitioners or the public concerning whether Anthem's Marketplace available plans meet these ratios, or whether Anthem has even performed the kind of network adequacy analysis—through questionnaires and research—that would enable the Department and the public to verify that its plans are in fact network adequate. The ratio of providers to patients is important because it bears a direct relationship to the amount of time a patient will have to wait to obtain health care under Anthem's Marketplace-available plans or even if the proposed network has the capacity to absorb additional patients. As noted, Frisbie has taken note of statements by providers which are part of Anthem's narrow network that they have concerns about the increased volume of patients they may be serving under the Marketplace-available plans, and whether they will be able to handle the increase in volume. Exhibit 1. These concerns have a direct bearing on provider accessibility, and have never been evaluated publicly.

Although the complete absence of public information about this issue makes it impossible to assess with any certainty, Frisbie and Mrs. McCarthy believe that public evaluation by the Department in an adjudicatory setting of network adequacy data will reveal that Anthem's Marketplace available plans are not network adequate, and that in order to become network adequate, Anthem's Marketplace-available plans will need to include Frisbie. Thus, the Department's decision to approve Anthem's Marketplace-available plans without any public disclosure injured Frisbie directly by permitting Anthem to omit Frisbie when Frisbie may have been required to be part of Anthem's network as a matter of law; and it injured Ms. McCarthy because the omission of Frisbie due to the Department's erroneous approval of Anthem's plans as network adequate will

force her to switch medical providers, or pay more in order to keep her current Frisbie-based medical providers. Accordingly, reversal of the Department's decision to approve Anthem's Marketplace-available plans without Frisbie *would* provide Frisbie and Ms. McCarthy with very real, substantive relief. If, as the Department suggests, that is the definition of aggrievement, then the Petitioners have been duly aggrieved by the Department's decisions to (a) approve Anthem's Marketplace available plans; and (b) to approve Anthem's Marketplace available plans without an adjudicative public hearing, the results of which the Petitioners could challenge through the appellate process.

The bottom line is that the Department has made a decision that has had the effect of omitting a third of New Hampshire's hospitals from a health insurance network intended to insure tens of thousands of citizens, and preventing these citizens from accessing their current providers. The Department's rationale that this was a decision between Anthem and the providers, *see* Order at 8, skirts the Department's serious obligations to ensure that the ACA is correctly implemented—and implemented in a way that furthers the ACA's overall goal of providing affordable, accessible, quality health care for all citizens.

It should be noted in this context that Anthem is the sole provider making plans available on the Marketplace in 2014. It is well within the power of the Department under the ACA and the associated New Hampshire statutes and regulations to ensure that a private for-profit insurance company with a monopoly over health insurance for a significant sector of the population provides health insurance covering services that are reasonably accessible to New Hampshire citizens. As it stands, a patient like Ms. McCarthy has no Marketplace available alternative to Anthem's plans. In the absence of

any competition in that regard, the Department has a duty to ensure that Anthem's decisions are not injuring critical community hospitals and individual New Hampshire citizens.

In denying Petitioners the right to an adjudicative hearing, the Department is suggesting that a private for-profit health insurance company—alone—has the power to determine whether patients can see their preferred providers, whether patients can see providers within reasonable wait times and geographical distances, and whether, at the end of the day, community hospitals that serve distinct portions of the New Hampshire public will survive financially in the new health insurance marketplace. It is inconsistent with the interests of the people of New Hampshire to cede this power to a for-profit insurance company headquartered in another state by declining to give the public, including affected providers like Frisbie, meaningful participation in public oversight proceedings. At the very least, an adjudicative hearing is necessary.

III. The Department's Decision To Hold A Public Hearing Pursuant to RSA 400-A:17, I Is An Inadequate Substitute For An Adjudicative Hearing Under RSA 400-A:17, II.

In the Order, the Department stated its intention to hold a public hearing pursuant to RSA 400-A:17, I, concerning the network adequacy of Anthem's Marketplace available plans. Order at 8-9. While the Petitioners appreciate the opportunity to testify at such a hearing, the hearing format under RSA 400-A:17, I is discretionary in nature and provides no avenue for any person to appeal any decision that the Department makes as a consequence of that hearing. It would be a hearing to evaluate the network adequacy of Anthem's Marketplace available plans, without any means of enforcing Anthem's compliance with the ACA and New Hampshire law. If the Petitioners conclude after

reviewing Anthem's network adequacy submissions—assuming they have the opportunity to do so—that Anthem's plans are, in fact, not network adequate, they will have no means of ensuring that the Department's approval of Anthem's plans be subject to judicial review. That is a critical element of due process.

Conclusion

The Department approved Anthem's Marketplace available plans when these plans may well not have met network adequacy standards. Frisbie believes that a public analysis of the network adequacy of Anthem's Marketplace-available plans will confirm as much. Therefore, the Department's decision directly injured Frisbie by permitting Anthem to omit Frisbie from its network, making it impossible for Frisbie to compete with providers who are part of Anthem's Marketplace available plan network. The Department's decision had a direct financial impact on Frisbie, and it directly impacted Ms. McCarthy by presenting her with two options: to lose her current medical providers, or to pay more to keep them than she would have if Frisbie were included in Anthem's Marketplace available plans, as it should have been.

Because Frisbie and Ms. McCarthy can demonstrate the necessary injury in fact, they each have standing to seek a hearing from the Department under RSA 400-A:17, and the Petitioners request a rehearing or reconsideration of their Petition for an adjudicative hearing.

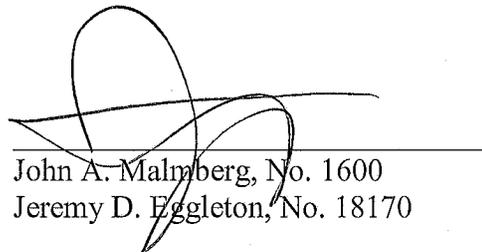
Respectfully submitted

Frisbie Memorial Hospital
Margaret McCarthy

By and through their attorneys,

Date: January 10, 2014

By:



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EXHIBIT 1

Valley News

D-H May See Unexpected Patient Influx

Official: Limit on Providers Adds to Uncertainty in N.H.

By Chris Fleisher

Valley News Staff Writer

Wednesday, September 18, 2013

Lebanon — A Dartmouth-Hitchcock official said she is anxious about the receiving a larger influx of patients than the Lebanon-based health care provider could handle when the coverage available on the New Hampshire health insurance marketplace goes into effect next year.

The online marketplaces, a key provision of the 2010 Affordable Care Act, are where small businesses and individuals who are not offered insurance through their employers may purchase health insurance starting Oct. 1.

Anthem Blue Cross and Blue Shield in New Hampshire, the only company that will offer insurance plans on New Hampshire's marketplace for the first year, said it would include just 16 of the state's 26 acute care hospitals in the network of providers covered.

Dartmouth-Hitchcock will be part of Anthem's network, but three other Upper Valley hospitals will not, making it more expensive for patients who buy plans on the exchange to receive care at those "out-of-network" providers.

The network was narrower than Dartmouth-Hitchcock officials anticipated, and now they are waiting to see whether patients who once saw doctors at one of the out-of-network hospitals will switch to Dartmouth-Hitchcock, said Robin Kilfeather-Mackey, Dartmouth Hitchcock's chief financial officer.

"We weren't necessarily expecting a network as narrow as what Anthem designed and therefore (wonder) is there going to be some unexpected steerage (of patients toward Dartmouth-Hitchcock)," Kilfeather-Mackey said during a forum on health reform at Dartmouth-Hitchcock Medical Center Tuesday evening. "Are there going to be patients that wouldn't normally come to Dartmouth-Hitchcock, now coming to Dartmouth-Hitchcock?"

The three Upper Valley hospitals not included in Anthem's network are Alice Peck Day in Lebanon, Valley Regional in Claremont and Cottage Hospital in Woodsville. Officials at each hospital have expressed outrage at being excluded and said Anthem never consulted them about the decision.

Open enrollment for health insurance begins in less than two weeks and the plans will go into effect in January, leaving little time for hospitals to prepare for a sudden influx, or exodus, of patients.

"It's really not enough time for us to build more access," Kilfeather-Mackey said. "That takes a much longer time than we have to get prepared for it. So we're going to be watching 2014 very carefully in understanding what access challenges we have."

The narrow network will not affect seniors on Medicare, Anthem customers who receive health insurance through their employer, nor individuals who bought plans prior to March 23, 2010, Anthem said. The new network will apply to all individuals who purchase health plans, either on or off the exchange, as well as small businesses that buy insurance on the so-called "SHOP" (Small Business Health Option Program) exchange.

Anthem officials said last week that 11 insurance plan options will be offered on New Hampshire's marketplace, also called an "insurance exchange," and that more details on the cost would be forthcoming this week. The New Hampshire Insurance Department signed off on Anthem's proposed plans earlier this summer, and Tuesday evening, Anthem announced that it had received federal approval as well.

In a statement, Anthem president Lisa Guertin said the federal approval was "an important day for our state" and promised to keep consumers informed about their options.

"While the implementation of the Affordable Care Act is an exciting time for New Hampshire, people do have a lot of questions," Guertin said. "So in addition to the upcoming campaign, we've developed an informational flyer which provides some key facts about our new products, pricing examples and other information aimed at consumers."

Around 40 people attended Tuesday's forum organized by New Hampshire Businesses for Social Responsibility. The audience included a number of small business owners who had questions about what Anthem's narrow hospital network would mean for them and their employees.

Tom and Deb Strickland employ five people through their business, Sequoya Technologies, a technology firm in Peterborough, N.H. Their local hospital, Monadnock Community Hospital, was among the 10 excluded from Anthem's network.

The Stricklands currently offer health insurance to their employees, but have seen their rates rise by 20 and 30 percent in recent years. In 2009, their insurance rates went up 60 percent, they said.

They were hoping to find more affordable options through the insurance marketplace, but are concerned about what they've heard so far. Deb Strickland said they were hoping that there would be more than one company to choose from.

"I don't know what kind of a marketplace it is when there's only one dozen eggs in the store," she said.

Harvard Pilgrim Health Care has pledged to offer plans on the exchange in 2015. Until then, patients and health care providers would have to wait and see whether Anthem's network will be sufficient to handle the demand, Kilfeather-Mackey said. Dartmouth-Hitchcock would have to be careful not to get ahead of itself by building new buildings or hiring staff to keep up with an influx of patients next year, as the pendulum could swing in the other direction by 2015.

"We don't want to build something in our system that we'd have to unwind one year later," she said.

Nevertheless, Kilfeather-Mackey remained positive about the prospects for health reform under the Affordable Care Act.

Aspects of the law encourage cooperation among institutions and coordinating care in ways that Dartmouth-Hitchcock has advocated for years. As an example of the types of partnerships Dartmouth-Hitchcock is exploring, Kilfeather-Mackey pointed to a recent initiative with Elliot Health System in Manchester and Harvard Pilgrim. The partnership, called ElevateHealth, aims to improve coordinating care for patients and lower insurance premiums.

"We are really an organization that is pretty excited about the disruption that the ACA has caused," she said.

Chris Fleisher can be reached at 603-727-3229 or cfleisher@vnews.com.

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