

December 6, 2013

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**VIA ELECTRONIC MAIL &
FIRST CLASS MAIL**

Chiara Dolcino, Esq.
N.H. Insurance Department
21 South Fruit Street, Suite 14
Concord, NH 03301

Re: *In Re: Petition of Frisbie Memorial Hospital et al.*
Docket No. _____

Dear Ms. Dolcino:

Enclosed please find for filing with the Department, Petitioners' Reply to Brief of Anthem Regarding Aggrievement, relative to the above-referenced matter.

Very truly yours,

John A. Malmberg / jame
John A. Malmberg

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JAM/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' REPLY TO BRIEF OF ANTHEM
REGARDING AGGRIEVEMENT**

Frisbie Memorial Hospital (“Frisbie”) and Margaret McCarthy (collectively the “Petitioners”) reply to the Brief of Anthem Blue Cross Blue Shield (“Anthem”) as follows:

- I. **The Petition is not time barred, because no due process was held, no order of the Department was issued that could have provided Petitioners with notice of the Department’s decision, and publicity surrounding the nature of Anthem’s Qualified Health Plans policies is insufficient to commence the running of any limitation on the Petitioners’ right to be heard.**

RSA 400-A:17, III requires a petitioner to request a hearing from the Insurance Department (the “Department”) within 30 days “after such person knew or reasonably should have known of such act, impending act, failure, report, rule, regulation, or order[.]” *Id.* The act or failure in this instance occurred on or sometime before July 31, 2013, the date upon which the Department approved Anthem’s proposed health plans for the New Hampshire Health Insurance Marketplace (the “Marketplace”) for submission to the U.S. Secretary of Health and Humans Services as Qualified Health Plans (“QHPs”) under the Patient Protection and Affordable Care Act (the “ACA”). Other than vague references to having approved QHPs in an August 1, 2013 press release (included with the Petition), there was no public notice of any kind from the Department that detailed the kind, quality and nature of the plans approved. Nor has there—even yet—been any

public scrutiny of the network adequacy of the plans available on the Marketplace, because the Department has considered Anthem's network adequacy data to be confidential. The only data concerning the nature of the Anthem QHPs comes from the Healthcare.gov website, or from Anthem's own pronouncements in marketing and to the New Hampshire Legislature, none of which include any network adequacy documentation, and which are not themselves sufficient to trigger the limitation on Petitioners' right of appeal. The Petitioners cannot be barred from seeking a hearing when they had no knowledge of the act or failure when it occurred. In fact, to this day they remain—like the rest of the public—unclear as to the substance of the Department's decision, the Department's reasoning, the data, documents and evidence upon which the Department made its decision, and whether Anthem's health plans conform with New Hampshire's network adequacy requirements.

II. Frisbie is aggrieved because the decision of the Department will detrimentally impact its ability to compete in its service area, cause patients satisfied with its services and physicians to sever those relationships, and materially reduce its income from patient services for patients covered by Anthem's Qualified Health Plans.

In its Brief, Anthem suggests that Frisbie has no direct injury in fact as a consequence of the Department's decision to approve a QHP for the Marketplace that omitted Frisbie from its list of providers. Anthem overlooks *In re Union Telephone Co.*, 160 N.H. 309, 313 (2010) (“[B]ecause [Petitioner] will face competition in its service area as a result of the PUC's orders, [Petitioner] has standing to appeal them[.]”). At present, Frisbie has a significant number of patients who, if prevented from using Frisbie by Anthem, would likely turn to Wentworth Douglass Hospital in Dover for services. The Department's approval of Anthem's QHPs permits Anthem to offer plans on the

Marketplace that exclude Frisbie. Thus, Frisbie will not merely face competition in its service area for these Anthem-covered patients; the Department's decision will prevent Frisbie from being able to compete at all for these patients. This is clearly an injury in fact sufficient to justify the "person aggrieved" standard of RSA 400-A:17.¹

III. Mrs. McCarthy is aggrieved because the decision of the Department will either force her to sever her relationships with her Frisbie-associated physicians, or require her to enroll in a more expensive plan not available on the New Hampshire Health Insurance Marketplace, and not subject to subsidy support under the ACA.

Mrs. McCarthy has two options when her health plan runs out next year. She can enroll in a more expensive plan that allows her to stay with her Frisbie affiliated physicians, but that plan, in addition to being more expensive, is not available on the Marketplace. Consequently, she would not be entitled to receive more than \$2,200 in subsidies only available for Marketplace plans. Thus, her effective out of pocket costs for a plan that permits her to use her Frisbie providers going forward are substantially more, only because of the Department's decision to approve a narrow network that omitted her providers. That is unquestionably an injury in fact.

In the alternative, Mrs. McCarthy can sever the medical relationships she has built up over many years and seek care at Wentworth Douglass Hospital or from providers even further away. Anthem argues that "it is... pure speculation that Anthem's QHP plan requires individuals to travel an excessive distance or wait excessive amounts of time for treatment." *See* Anthem Brief at n. 8. Anthem proves the Petitioners' point. The Department is required by the ACA to apply a vigorous set of standards for whether the

¹ Anthem's suggestion that this is merely a private contractual matter is a red herring. The Department has the authority to approve plans based upon, among other things, network adequacy. Since no person other than staff of Anthem and the Department has ever seen Anthem's data concerning network adequacy, let alone scrutinized it, Anthem's argument that network adequacy has been achieved, *see* Brief of Anthem, n. 4, cannot be assessed.

network offered under the QHPs is adequate. *See* N.H. Admin. R. Ins. 2702-07 (defining geographic, kind of service, and waiting time for access to care standards). Outside Anthem and the Department, no one knows whether Anthem's QHPs meet these requirements, because the Department never made Anthem's plans available for public review.

What Anthem has stated publicly is that the so-called narrow network is required because the low reimbursement rates would only be acceptable to providers if Anthem could deliver higher patient volume to make up the difference. Anthem is of course wrong about this. Frisbie, whose quality scores are equal to or better than many providers on Anthem's narrow network, is ready, willing and able to accept rates paid by Anthem to other providers on the narrow network, regardless of any Anthem promise to deliver more patients. But setting that aside, there is no public evidence concerning whether Anthem or the Department gave *any* thought to what higher patient volume would do to patient waiting times at the providers in the narrow network. It may be assumed that waiting times will only rise as providers try to manage the influx of patients—with repercussions for primary, specialty and emergency care. Not only will Mrs. McCarthy's doctor-patient relationships be severed, requiring her to establish new ones; she will have to drive further, and likely wait longer for appointments, than she does today.

These outcomes having been engendered by the Department's approval of the Anthem QHPs, the Department's decision has directly, materially and adversely affected Mrs. McCarthy's medical care, finances and access. She demonstrates the necessary "injury in fact" to obtain a hearing from the Department.

Conclusion

Because Frisbie and Mrs. McCarthy can demonstrate the necessary injury in fact, they each have standing to seek a hearing from the Department under RSA 400-A:17.

Respectfully submitted

Frisbie Memorial Hospital
Margaret McCarthy

By and through their attorneys,

Date: December 6, 2013

By: 

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