

STATE OF NEW HAMPSHIRE  
INSURANCE DEPARTMENT

**In re Petition of Margaret McCarthy**

**INS 13-038-AP**

**NHID'S REVISED REQUESTS FOR FINDINGS OF FACT  
AND RULINGS OF LAW**

The New Hampshire Insurance Department (“NHID”) by and through its Staff Advocate, Richard McCaffrey, submits the following Revised Requests for Findings of Fact and Rulings of Law in the above-referenced matter.

**I. The NHID Properly Exercised Its Discretion in Limiting Its Review of Anthem’s Pathway to Ins Part 2701’s Geographical Accessibility Standards.**

1. FACT: In March of 2010, the President of the United States signed into law the Patient Protection and Affordable Care Act (“ACA”). (Feldvebel testimony, transcript of May 14, 2014 Adjudicative Hearing (“transcript”) at p. 114, l. 2-4.)
2. FACT/LAW: Among other things, the ACA provided for the creation of health insurance exchanges where consumers could buy health insurance and, if they qualified, obtain financial assistance through a tax subsidy to pay for the insurance premiums. (Feldvebel testimony, transcript at p. 123, l. 1-6.)
3. FACT: In response to the ACA, New Hampshire enacted RSA Chapter 420-N, “Federal Health Care Reform 2010.” (Feldvebel testimony, transcript at p. 123, l. 1-19.)
4. FACT: The effective date of RSA Chapter 420-N was June 18, 2012. (Feldvebel testimony, transcript at p. 122, l. 12-16.)

5. LAW: RSA 420-N:8, I provides, in pertinent part, that: “In the event a federally-facilitated exchange is established for New Hampshire, the commissioner shall retain authority with respect to insurance products sold in New Hampshire on the federally-facilitated exchange to the maximum extent possible by law as provided in title XXXVII, including but not limited to . . . network adequacy. . . .”

6. FACT: A federally-facilitated exchange was, in fact, subsequently created in New Hampshire. More specifically and pursuant to RSA Chapter 420-N, New Hampshire chose to “enter into a plan management partnership with the Federally Facilitated Exchange that [would] be established for New Hampshire, which [would] be known as the New Hampshire Health Insurance Marketplace, or New Hampshire Marketplace.” (Bulletin at NHID Exh. F at p. 224.)

7. FACT/LAW: New Hampshire’s insurance laws governing network adequacy are set forth in RSA 420-J:7, “Managed Care Law,” and Ins Part 2701, “Network Adequacy.” (Feldvebel testimony, transcript at p. 113, l. 4-9.)

8. FACT/LAW: RSA 420-N:8, I directed the Insurance Commissioner to retain authority over network adequacy to the fullest extent allowed by law, but RSA Chapter 420-N did not amend or otherwise change New Hampshire’s network adequacy laws as set forth in RSA 420-J:7 and Ins Part 2701. (Feldvebel testimony, transcript at p. 124, l. 8-23; p. 125, l. 1-4.)

9. FACT/LAW: RSA 420-J:7 and Ins Part 2701 became effective in 1998 and 2002, respectively, several years before the United States’ enactment of the ACA and New Hampshire’s enactment of RSA Chapter 420-N. (Feldvebel testimony, transcript at p. 113, l. 17-20; p. 114, l. 17-21.)

10. LAW: The purpose of RSA Chapter 420-J is to “ensure regulatory and quality consistency” so as to “enable consumers to make informed decisions” in choosing among health plans that “limit covered persons' choices of providers.” (RSA 420-J:1.)

11. LAW: Section 7 of RSA Chapter 420-J, “Network Adequacy,” requires any health carrier offering a health insurance plan that is network-based to “maintain a network that is sufficient in numbers, types, and geographic location of providers to ensure that all services to covered persons will be accessible without unreasonable delay.” (RSA 420-J:7, I.)

12. LAW: Although RSA 420-J:7 requires that consumers have access to “all services,” it does not require access to providers outside the network. In other words, the “heart” of Ins Part 2701 is the geographical accessibility to medical providers. (Feldvebel testimony, transcript at p. 118, l. 13-15.)

13. LAW: Nothing in RSA Chapter 420-J requires a health insurance carrier to contract with a particular provider, even if that provider meets the carrier’s credentialing standards: “[n]othing in this section shall be construed to require a health carrier to select a health care professional as a participating provider solely because the health care professional meets the health carrier's credentialing verification standards, or to prevent a health carrier from utilizing separate or additional criteria in selecting the health care professionals with whom it contracts.” (RSA 420-J:4, VI.)

14. LAW: No provision of RSA Chapter 420-J gives a consumer the right to access medical providers that the health insurance carrier has not included in its provider network.

15. LAW: Network adequacy standards do not require that an insurance carrier contract with any particular medical provider, or that any particular enrolled person have access to any particular carrier. (March 28, 2014 Order and Notice of Hearing at p. 3.)

16. LAW: The NHID has no authority to order an insurance carrier to contract with any particular hospital or medical provider. (March 28, 2014 Order and Notice of Hearing at p. 6.)

17. FACT: In order to provide guidance for health insurance carriers regarding the legal standards and timeframes for obtaining federal approval to sell plans on the federally-facilitated exchange for the 2014 plan year, the NHID issued Bulletin No. INS 13-007-AB (“Bulletin”) on April 10, 2013. (Bulletin at NHID Exh. F at pp. 224-234.)

18. FACT: The Bulletin advised carriers that before they could sell health insurance plans on the federally-facilitated exchange, the plans first had to be certified as Qualified Health Plans (“QHPs”). (Bulletin at NHID Exh. F at p. 224.)

19. FACT: The Bulletin also articulated the legal standards, both state and federal, that the NHID would apply in its plan review. With respect to network adequacy, the Bulletin advised carriers that the review was governed by RSA Chapter 420-J and Ins Part 2701, as well as the federal standards contained in Section 2702(c) of the Public Health Services Act and 45 C.F.R. 156.230 and 156.235. (Bulletin at NHID Exh. F, at pp. 224-225; pp. 227-228.)

20. LAW: Ins Part 2701, as originally adopted, was intended to serve as a market conduct standard, meaning that the NHID had authority to review, retrospectively, whether existing managed care provider networks were adequate with respect to an existing population of covered persons. (*See* Feldvebel testimony, *generally*.)

21. LAW: Ins Part 2701, as originally adopted, only applies to managed care plans that have 1,000 or more existing covered persons. (Ins 2701.04(c).)
  
22. LAW: Where the NHID determines a health insurer's provider network is inadequate in a particular service area (for example, Strafford County), the NHID's remedy is to order the carrier to cease marketing insurance in the service area. (Feldvebel testimony, transcript at p. 169, l. 22-23; p. 170, l. 1-5.)
  
23. FACT: The federally-facilitated exchange opened for enrollment on October 1, 2013. (Feldvebel testimony, transcript at p. 144, l. 13-18.)
  
24. FACT: The deadline for health insurers to file QHP submissions, including proposed provider networks, with the NHID for plan year 2014 was June 1, 2013, four months *before* the federally-facilitated exchange opened for enrollment. (Bulletin at NHID Exh. F at p. 225.)
  
25. FACT: As it turned out, the only health insurer to file QHP submissions for plan year 2014 was Anthem Blue Cross and Blue Shield ("Anthem"), although the NHID was not aware at the time it issued the Bulletin that Anthem would be the only carrier to file QHP submissions. (Feldvebel testimony, transcript at p. 143, l. 12-16.)
  
26. FACT: Anthem branded the provider network associated with its QHPs for plan year 2014 the "Pathway Network."
  
27. FACT/LAW: In evaluating the adequacy of the Pathway Network, the NHID was faced with a unique situation where the existing regulatory framework did not fit the requirements of the ACA and RSA Chapter 420-N. (Feldvebel testimony, transcript at p. 174, l. 12-18.) For

example, a strict application of Ins 2701.04(c) would have required the NHID to find the Pathway Network adequate for plan year 2014 as a matter of law, because Anthem's plans had less than 1,000 covered persons in every New Hampshire county on June 1, 2013, the deadline for health insurers, like Anthem, to file their QHP submissions. (*See* Ins. 2701.04(c).) Indeed, because the federally-facilitated exchange had yet to open for enrollment, Anthem's plans had *zero* covered persons.

28. LAW: The Bulletin provided, among other things, that: "In reviewing proposed QHPs, the NHID will apply all state regulatory standards except those that are inconsistent with and would prevent the application of [the ACA]." (Bulletin at Exh. F, p. 225; *see also* RSA 420-N:8, I, *quoted supra*, in pertinent part.)

29. FACT/LAW: Due to the *prospective* nature of the NHID's review of the adequacy of Anthem's Pathway Network filings, the NHID's network adequacy review focused exclusively on Ins Part 2701's geographic accessibility standards. (Feldvebel testimony, transcript at p. 137, l. 4-9.)

30. FACT/LAW: A strict application of Ins Part 2701 would have led to an absurd result—namely, with zero covered lives at the time of the filing of plan submissions, the NHID would effectively have been precluded from exercising any regulatory oversight over provider networks. The NHID properly exercised its discretion in limiting its review of network adequacy to Ins Part 2701's geographic accessibility standards. (*See* Feldvebel testimony, transcript at pp. 173-178.)

## II. Ins 2701.06 Sets Forth New Hampshire's Geographic Accessibility Standards.

31. LAW: Ins 2701.06(a), "Standards for Geographic Accessibility," provides that: "[g]eographic access standards shall be measured in terms of distance or travel times for covered persons under normal conditions from their place of residence."

32. LAW: Subpart (b) of Ins 2701.06 sets forth the distance and time standards for primary care providers; Subpart (c) of Ins 2701.06 sets forth the distance and time standards for "key specialty care practitioners"; and Subpart (d) of Ins 2701.06 sets forth the distance and time standards for "institutional providers and providers of certain other specialty services."

33. LAW: Ins 2701.06(b), (c) and (d) each specifically provides that the geographic accessibility standards are met if 90 percent or more of the enrolled population is within the distance or time specified in each respective subpart. Ins 2701.06 does not require that 100 percent of the enrolled population be within the distance or time standards set forth in Ins 2701.06(b), (c) and (d).

34. LAW: The final subpart of Ins 2701.06, Subpart (e), sets forth the exceptions to the standards for geographic accessibility in Ins 2701.06(b), (c) and (d).

35. FACT: Ins Part 2701, including the time and distance standards set forth in Ins 2701.06(b), (c) and (d), was developed through a working group comprised of all the stakeholders who had an interest in the network adequacy rule, including the New Hampshire Hospital Association, the New Hampshire Medical Society, physicians, community health clinics, mental health providers, insurers and consumer advocates. (Feldvebel testimony, transcript at p. 115, l. 10-18.)

**III. Anthem's Pathway Network Met or Exceeded Ins Part 2701's Geographic Accessibility Standards for Strafford County.**

36. FACT: Anthem submitted proposed QHPs, including documents pertaining to the geographic accessibility of its Pathway Network, to the NHID's Compliance Division for review.

37. FACT/LAW: Although health insurers offering QHPs on the federally-facilitated exchange may choose their service areas, no service area in New Hampshire may be smaller than a county. (NHID Exh. F at p. 229.)

38. FACT: NHID Exhibits A, A2, B and B2 are documents pertaining to the geographic accessibility of Anthem's Pathway Network in Strafford County. (Wilkey testimony, transcript at p. 200, l. 5-23; p. 201, l. 1-10; p. 203, l. 18-23; p. 204, l. 1-23; p. 205, l. 1-5.)

39. FACT/LAW: Anthem's Pathway Network met or exceeded every geographic accessibility standard for Stafford County for plan year 2014. (Wilkey testimony, transcript at p. 216, l. 14-23; p. 217, l. 1-15; *see also* NHID Exh. A, A2, B and B2.)

40. FACT: Because Anthem's Pathway Network met or exceeded every geographic accessibility standard for plan year 2014, the NHID recommended that the federal regulator, the United States Department of Health and Human Services' Center for Consumer Information and Insurance Oversight ("CCIIO"), ratify the NHID's recommendation that CCIIO certify the Pathway Network for offering on the federally-facilitated exchange. CCIIO subsequently ratified the NHID's recommendation and certified the Pathway Network for offering on the federally-facilitated exchange. (Wilkey testimony, transcript at p. 218, l. 17-23; p. 219, l. 1-5.)

41. FACT/LAW: The NHID has no authority to certify QHPs, including provider networks, for use on the federally-facilitated exchanges. Only the federal government, by and through CCIIO, may certify QHPs and provider networks for use on the federally-facilitated exchange. (Feldvebel testimony, transcript at p. 144, l. 21-23; p. 145, l. 1-23; *see also* Wilkey testimony, transcript at p. 217, l. 16-23; p. 218, l. 1-23.)

**IV. The Petitioner Failed to Establish that the Pathway Network in Strafford County is Inadequate.**

42. FACT: At all relevant times, the Petitioner, Margaret McCarthy (“Petitioner”), has resided at 30 Cocheco Ave., East Rochester, New Hampshire 03868. (NHID Exh. C.)

43. FACT/LAW: Accordingly, for purposes of the federally-facilitated exchange, the Petitioner’s service area is Strafford County.

44. FACT: All of the Petitioner’s current medical providers are located in Rochester, New Hampshire. (Petitioner testimony, transcript at p. 80, l. 1-3.)

45. FACT: The Anthem Pathway Network included a hospital, Wentworth-Douglas, and approximately fifty *open* primary care physicians who were located either in or near Rochester. (See Strafford County map marked as NHID Exhibit H; *see also* NHID Exhibits A2 and B2.)

46. FACT/LAW: The Petitioner failed to meet her burden of proving that the Anthem Pathway Network was inadequate in Strafford County.

47. LAW: Accordingly, the Petition should be dismissed.

**V. The Petitioner Failed to Demonstrate She Sustained an Injury-in-Fact.**

48. LAW: Assuming, *arguendo*, the Hearing Officer determines, somehow, that the Petitioner proved the Pathway Network in Strafford County is inadequate, which the NHID denies, the Hearing Officer should nevertheless dismiss the Petition because the Petitioner failed to establish she sustained an injury-in-fact.

49. FACT: On March 28, 2014, the Insurance Commissioner issued an Order and Notice of Hearing in the matter of *In Re Petition of Margaret McCarthy*, Docket No. Ins. 13-038-AR.

50. FACT: The March 28<sup>th</sup> Order and Notice of Hearing determined that the Petitioner had alleged “a sufficiently direct injury to confer standing under RSA 400-A:17, II(b).” The Order further stated that “Petitioner McCarthy has standing . . . as a consumer who claims to have been harmed by the circumstance that there is only one Marketplace provider and that this provider has an inadequate network which can only be made adequate by the inclusion of Frisbie.” (March 28, 2014 Order and Notice of Hearing at p. 5.)

51. FACT/LAW: The Petitioner’s entitlement to an adjudicative hearing is predicated on the “direct injury” she allegedly sustained as an individual consumer. (March 28, 2014 Order and Notice of Hearing.)

52. FACT: The “direct injury” that the Petitioner alleges she sustained is based on her assertion that in order to retain her Frisbie-connected providers, who were not included in Anthem’s Pathway Network, she had to forego a tax subsidy for which she would have qualified if she had obtained insurance through the federally-facilitated exchange. In other words, the Petitioner’s “direct injury” is the difference between the premium she would have paid for health

insurance on the federally-facilitated exchange and the premium she had to pay in order to retain her Frisbie-connected providers.

53. FACT: The Petitioner admits she never actually applied for health insurance through the federally-facilitated exchange. (Petitioner testimony, transcript at p. 60, l. 19-23; p. 61, l. 1-6; p. 86, l. 14-19.)

54. FACT: The Petitioner admits nothing prevented her from applying for health insurance through the federally-facilitated exchange. (Petitioner testimony, transcript at p. 64, l. 23; p. 65, l. 1-3.)

55. FACT: Further, the Petitioner admits she *chose* not to apply for health insurance through the federally-facilitated exchange. (Petitioner testimony, transcript at p. 65, l. 4-6.)

56. FACT: By choosing not to apply for health insurance through the federally-facilitated exchange, the Petitioner was unable at the adjudicative hearing to adduce evidence establishing that she was, in fact, entitled to any tax subsidy at all, or, if she was entitled to a subsidy, what the actual amount of the subsidy was.

57. FACT: Instead of introducing definitive evidence of the actual amount of tax subsidy which she alleges she was entitled to—evidence she could easily have gathered by simply applying for insurance through the federally-subsidized exchange—the Petitioner testified she relied on so-called “subsidy calculators” that are operated by neither governmental agencies or Anthem. (Petitioner testimony, transcript at p. 59, l. 21-23; p. 60, l. 1-2 and l. 11-18.)

58. FACT: The Petitioner was unable to recall with certainty the names of the operators of the “subsidy calculators” she used, although she thought one was operated by Intuit. (Petitioner testimony, transcript at p. 60, l. 3-15.)

59. FACT: During direct examination, the most the Petitioner could offer regarding her eligibility for a tax subsidy through the federally-facilitated exchange was that she “*might* be able to get a subsidy for the plan that [she] purchase[s] on the Exchange.” (Italics added.) (Petitioner testimony, transcript at p. 56, l. 3-6.)

60. FACT: The Petitioner is presently insured under an Anthem individual health insurance policy that allows her to utilize her Frisbie providers. Accordingly, at no time has the Petitioner had to forgo either health insurance or the medical providers of her choice. (Petitioner testimony, transcript at p. 65, l. 17-20; p. 80, l. 18-22; and p. 81, l. 8-12.)

61. FACT: Anthem offered the Petitioner the opportunity to early renew her current Anthem policy, which expires on August 1, 2014. If the Petitioner had accepted Anthem’s offer of early renewal, the policy would have expired on December 1, 2014. However, the Petitioner chose to decline Anthem’s offer of early renewal. (Petitioner testimony, transcript at p. 84, l. 7-23; p. 85, l. 1-6.)

62. FACT: When the Petitioner’s Anthem policy expires on August 1, 2014, she can obtain an individual health insurance policy through Assurant Health, and the Assurant Health policy would allow her to continue to utilize her Frisbie providers. (Petitioner testimony, transcript at p. 82, l. 19-23; p. 83, l. 1-8; *see also* NHID Exhibits J and J-1; and Wilkey testimony, *generally*, transcript at pp. 189-193; pp. 219-221.)

63. FACT: Moreover, when enrollment for the federally-facilitated exchange opens for plan year 2015, four additional health insurers—Harvard Pilgrim, Minuteman, Assurant Health and Maine Community Health Options—will join Anthem on the exchange. All of the four new exchange carriers have indicated they intend to offer QHPs in Stafford County, and at least one of the new carriers, Harvard Pilgrim, has already entered a contract with Frisbie under which consumers, including the Petitioner, will be able to obtain health insurance coverage through the federally-facilitated exchange and utilize Frisbie providers. (*See* Petitioner testimony, transcript at p. 67, l. 23; 68, l. 1-23; p. 70, l. 1-13.)

64. LAW: Pursuant to Ins 204.05(e), the Petitioner carries the burden of establishing, by a preponderance of the evidence, that she sustained an injury-in-fact as a result of the NHID's recommendation that CCIIO certify Anthem's Pathway Network for offering on the federally-facilitated exchange for plan year 2014.

65. LAW: To prove an injury-in-fact in the context of an administrative appeal, a person must show that the action being challenged has or will have a direct effect on the person's legally protected interest. (March 28, 2014 Order and Notice of Hearing at p. 3.)

66. FACT/LAW: Because the Petitioner failed to adduce evidence establishing she was, in fact, entitled to any tax subsidy at all, or, if she was entitled to a subsidy, what the actual amount of the subsidy was, and, further, because the Petitioner has never had to forgo either health insurance or her choice of medical providers, the Petitioner has failed to prove she sustained an injury-in-fact as a result of the NHID's recommendation that CCIIO certify Anthem's Pathway Network for offering on the federally-facilitated exchange for plan year 2014.

67. LAW: Accordingly, the Hearing Officer should dismiss the Petition.

**VI. The NHID's Objections to Certain Exhibits the Petitioner Introduced into Evidence during the Hearing.**

68. FACT: During the May 14, 2014 adjudicative hearing, the Petitioner attempted to introduce into evidence twelve exhibits. (The Petitioner's exhibits were numbered 1-13, but there was no exhibit 10.) None of the Petitioner's exhibits were accepted as full exhibits; all were marked for identification only. As outlined below, the NHID objects to the introduction of certain of the Petitioner's exhibits and maintains they should be excluded, in whole or in part, from evidence.

69. LAW: Ins 203.01 permits a hearing officer to "receive relevant evidence" and requires a hearing officer to "exclude irrelevant, immaterial or unduly repetitious evidence." (Ins. 203.01(d)(4).)

70. FACT/LAW: Petitioner's Exhibits 2-7 for Identification should be redacted to exclude any information pertaining to any county other than Stafford County as any information beyond Stafford County would violate the Insurance Department's May 13, 2014 Order. The redacted information is only relevant in terms of whether the Stafford County network is adequate as applied to Petitioner and not as applied to any other consumers. Any such non-Stafford County information must be excluded as irrelevant to the extent that it is intended to be used by Petitioner as to any other consumer's interests. (Ins. 203.01(d)(4).)

71. FACT/LAW: Petitioner's Exhibit 8 for Identification (New Hampshire Office of Energy and Planning 2012 Population Estimates for NH Cities and Towns) is irrelevant to the legal issues presented at the May 14, 2014 adjudicative hearing. The service area at issue is Stafford

County and in particular Petitioner's residence in Strafford County in relation to network providers. Petitioner is not representing any other consumer's interests. The exhibit must be excluded as a matter of law under Ins. 203.01(d)(4). Even if relevant for some unknown reason, such information would need expert testimony to explain how it applies to network adequacy as applied to Petitioner. Without such testimony, it must, again, be excluded as irrelevant under Ins. 203.01(d)(4).

72. FACT/LAW: Petitioner's Exhibit 9 for Identification (New Hampshire Office of Employment Security, Community Profiles Packet for Strafford Towns and Cities) is irrelevant to the legal issues presented at the May 14, 2014 adjudicative hearing. The service area at issue is Strafford County and in particular Petitioner's residence in Strafford County in relation to network providers. Petitioner is not representing any other consumer's interests. The exhibit must be excluded as a matter of law under Ins. 203.01(d)(4). Even if relevant for some unknown reason, such information would need expert testimony to explain how it applies to network adequacy as applied to Petitioner. Without such testimony, it must, again, be excluded as irrelevant under Ins. 203.01(d)(4).

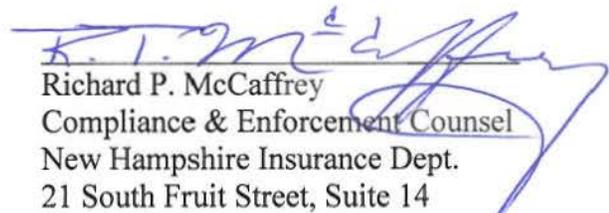
73. FACT/LAW: Petitioner's Exhibit 12 for Identification (NH Dept. of Health and Human Services 2011 State Health Profile) is irrelevant to the legal issues presented at the May 14, 2014 adjudicative hearing. The service area at issue is Strafford County and in particular Petitioner's residence in Strafford County in relation to network providers. Petitioner is not representing any other consumer's interests. The exhibit must be excluded as a matter of law under Ins. 203.01(d)(4). Even if relevant for some unknown reason, such information would need expert

testimony to explain how it applies to network adequacy as applied to Petitioner. Without such testimony, it must, again, be excluded as irrelevant under Ins. 203.01(d)(4).

74. FACT/LAW: Petitioner's Exhibit 11 for Identification for Identification ("Anthem Says Narrow Network Allows Significant Consumer Savings. . . .", Foster's Daily Democrat Article, February 11, 2014) is irrelevant to the issue of network adequacy as applied to Petitioner. It is further irrelevant as it lacks sufficient indicia of reliability to be admitted. The exhibit must be excluded as a matter of law pursuant to Ins. 203.01(d)(4).

Respectfully submitted,

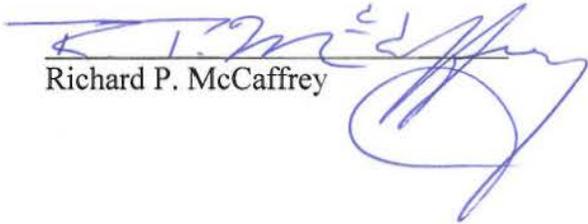
Date: June 4, 2014

  
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## CERTIFICATE OF SERVICE

The undersigned certifies that a true and accurate copy of the foregoing Request for Findings of Fact and Rulings of Law was sent this date electronically and by first-class mail, postage prepaid, to Jeremy Eggleton, counsel for the Petitioner, and Michael Durham, counsel for the Intervenor.

Date: June 4, 2014

  
Richard P. McCaffrey