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BEFORE THE STATE OF WASHINGTON
OFFICE OF INSURANCE COMMISSIONER

In the Matter of **Seattle Children's Hospital,** A Washington Not-For-Profit Corporation, and **Coordinated Care Corporation**, a Health Maintenance Organization; **Bridgespan Health Company**, a Health Services Contractor; and **Premera Blue Cross**, a Health Services Contractor, Intervenors.	**Docket No. 13-0293** ORDER ON INTERVENORS' JOINT MOTION FOR SUMMARY JUDGMENT

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NATURE OF PROCEEDING

This matter includes the review, consideration and determination of the Intervenors' Joint Motion for Summary Judgment, wherein Intervenors move to dismiss Seattle Children's Hospital's Demand for Hearing to contest the Insurance Commissioner's approvals of Intervenors' individual market Exchange plans. Intervenors include Coordinated Care Corporation, Premera Blue Cross and Bridgespan Health Company (a subsidiary of Regence BlueShield), having petitioned for and been granted the right to intervene, with the agreement of the Insurance Commissioner, on December 19, 2013. Pursuant to a briefing schedule agreed to by the parties on November 18, 2013 and so ordered by the undersigned, on January 17, 2014 the Intervenors filed Intervenors' Joint Motion for Summary Judgment, Declaration of Jay Fathi, MD in Support of Intervenors' Joint Motion for Summary Judgment, Declaration of Melissa J. Cunningham in Support of Intervenors' Joint Motion for Summary Judgment, Declaration of Beth Johnson in Support of Intervenors' Joint Motion for Summary Judgment, Declaration of Kristin Meadows, and Declaration of Rich Maturi. On January 29, 2014 Seattle Children's Hospital filed Seattle Children's Hospital's Opposition to Intervenors' Joint Motion for Summary Judgment, Supplemental Declaration of Michael Madden in Opposition to Intervenors' Joint Motion for Summary Judgment, Supplemental Declaration of Eileen O'Connor in Opposition to Intervenors' Joint Motion for Summary Judgment, Declaration of Suzanne Vanderwerff in Opposition to Intervenors' Joint Motion for Summary Judgment, and Declaration of Kelly Wallace in Opposition to Intervenors' Joint Motion for Summary Judgment. As

properly scheduled, the parties presented their oral arguments on the Intervenors' Joint Motion for Summary Judgment before the undersigned on February 3, 2014.

INTERVENORS' ARGUMENTS IN SUPPORT OF SUMMARY JUDGMENT

Intervenors argue that Seattle Children's Hospital's ("SCH") Demand for Hearing should be dismissed in its entirety on two independent bases. First, Intervenors argue, SCH lacks standing and therefore Intervenors' Motion for Summary Judgment herein should be granted on that basis alone. Second, Intervenors argue that SCH's Demand for Hearing rests entirely on the incorrect premise that a carrier's network is *ipso facto* deficient if it does not include SCH. These arguments are addressed below.

I. Intervenors argue that this case should be dismissed on summary judgment because SCH lacks standing.

RCW 48.04.010 provides:

> *The commissioner shall hold a hearing ... upon written demand for a hearing made by any person aggrieved by any act, threatened act, or failure of the commissioner to act, if such failure is deemed an act under any provision of this code*[.]

Intervenors argue that SCH has no right to hearing under RCW 48.04.010 because SCH is not "aggrieved" by the OIC's approval of the subject Exchange plans. This is because, Intervenors argue, SCH has not and cannot demonstrate that it has suffered any harm from the acts of the OIC in approving Intervenors' Exchange plans, and any purported harm SCH alleges it will suffer is only speculative.

Intervenors cite RCW 34.05.530, and acknowledge that this statute sets forth the criteria for judicial review of an agency's decision by the Superior Court, i.e., this statute sets forth the criteria which must be met in order to appeal a final order of this agency's (or any agency's) quasi-judicial executive tribunal to the Superior Court. It does not set forth the criteria which must be met for a party aggrieved by an act of the Commissioner to contest that act before this agency's (or any agency's) quasi-judicial executive tribunal such as this one. While, as Intervenors suggest, RCW 34.05.530 might be somewhat informative because it uses the same word "aggrieved" as RCW 48.04.010, it would be in error to grant summary judgment in this case based on a statute which applies to an entirely different type of review, and based on case law interpreting that inapplicable statute.

In addition, whether the criteria set forth in case law pertaining to RCW 34.05.530 is applied or whether the criteria set forth in RCW 48.04.010 is applied, SCH has raised, at the very

least, genuine issues of material fact as to whether or not it is aggrieved which cannot be decided here on summary judgment.[1]

II. Intervenors argue that this case should be dismissed on summary judgment because SCH's Demand rests entirely on its argument that a carrier's network is *ipso facto* deficient if it does not include SCH, and that there is no law which supports this position.

Intervenors state that in SCH's Demand for Hearing *SCH argues that Intervenors' plans violate state and federal law because they do not include SCH in their networks as a pediatric specialty provider. SCH's argument fails because no law requires the Intervenors to include SCH in their networks. To the contrary, the [federal] law requires health carriers to include certain categories of providers, maintain a base-level network, and provide certain categories of benefits to ensure minimum coverage. As long as a health plan meets these criteria, there is no requirement that a plan include any specific provider in the plan's network. As evidenced by the Intervenors' insurance filings and the Commissioner's subsequent certification, the Intervenors' networks comply with all of these requirements without including SCH in their network[s]. ... In fact, the network adequacy requirements ensure that plans contract with a sufficient number of providers in certain mandated categories so as to provide 'adequate' care options for covered services to the population as a whole. ...WAC 294-43-200(3)* [actually WAC 284-43-200] *expressly allows carriers to utilize out-of-network providers for any purpose as long as the consumer is not put in a worse position. In other words, for unique services rendered by SCH to Intervenors'* [Exchange] *members, the law allows for single case agreements by Intervenors ... to treat those services as in network claims. Here, the OIC has already correctly found that the Intervenors'* [Exchange] *plans provide adequate care options for pediatric services, and the evidence amply supports this finding.*

First, contrary to Intervenors' assertion herein, the issue raised by SCH in its Demand is not whether "a carrier's network is *ipso facto* deficient if it does not include SCH." The issue raised by SCH in its Demand is whether the OIC complied with federal and state requirements in reviewing and approving the Intervenors' Exchange plans. Second, in their Motion for Summary Judgment herein, Intervenors assert material facts concerning this issue which are disputed by SCH: as some examples, 1) SCH disputes Intervenors' assertion that SCH had "high[]" rates that caused Intervenors to decline to contract with SCH.[2] SCH asserts that there is, in fact, no evidence that SCH's rates were disproportionate to other providers or other agreements in which Intervenors participated, arguing that SCH has entered into agreements with carriers for other Exchange plans which demonstrates that other Exchange plan carriers have found SCH's rates acceptable, along with other factual arguments to support its position.[3] In addition, it is material

[1] E.g., see Declaration of Suzanne Vanderwerff in Opposition to Intervenors' Joint Motion for Summary Judgment; Supplemental Declaration of Eileen O'Connor Re: Intervenors' Joint Motion for Summary Judgment.
[2] Intervenors' Motion, at 7.
[3] Supp. O'Connor Decl. Para. 7; Supp. O'Connor Decl. Ex. A at SCH0000092-93; Supp. O'Connor Decl. Ex. D at SCH000110-111.

fact whether or not SCH "refused to accept the generally applicable payment rates of such plans."[4] 2) Intervenors assert that "single case agreements" are common and lawful[5] while SCH presents facts to support its assertion that single case agreements are very rare with only 67 (or fewer) completed during fiscal year 2012 in the context of 351,147 patient encounters during the same time period.[6] 3) Intervenors assert that their networks are adequate because they have included, as to Coordinated Care's Exchange plan, Providence and Swedish in King County, and Providence Sacred Heart and Shriners Hospital for Children in Spokane, and SCH disputes that this makes Coordinated Care's Exchange plan network adequate for reasons specified in its Opposition, and makes similar factual arguments as to Premera and Bridgespan.[7] These are genuine issues of material fact which cannot be decided here on summary judgment.

In addition, it should be noted that Intervenors provide a circular argument in support of their Motion, asserting that because the OIC approved their Exchange filings they must be in compliance with applicable laws when the question whether the OIC correctly applied applicable laws is precisely the issue in this case. Further in support of their argument, Intervenors cite the decision in *In re Coordinated Care Corporation*, Docket No. 13-0232. First, *Coordinated Care* did not rule that "*WAC 284-43-200(3) expressly allows carriers to utilize out-of-network providers for any purpose as long as the consumer is not put in a worse position.*" In addition, the parties in *Coordinated Care* only presented state law and virtually no federal law or regulations in *Coordinated Care* including the application of federal law as it relates to the issue of spot contracts.[8] Further, as required, the decision in *Coordinated Care* was based only on the arguments and evidence, or lack of argument and evidence, presented at that time. These arguments would not lend credence to Intervenors' argument that there is no genuine issue of material fact and they are entitled to judgment as a matter of law regarding whether or not their Exchange plans are in compliance with applicable federal and state law.

STANDARD OF REVIEW AND CONCLUSION

Intervenors correctly note that WAC 10-08-135 governs Motions for Summary Judgment in administrative proceedings. WAC 10-08-135 provides:

> *A motion for summary judgment may be granted and an order issued if the written record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.*

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[4] Decl. of Madden, Ex. A at 4; SCH's Opposition.
[5] Intervenors' Joint Motion, at 7.
[6] See, e.g., Supp. O'Connor Decl. Para. 10.
[7] SCH's Opposition with Declarations.
[8] Indeed, SCH points out that a search of the filings in Coordinated Care reveals not even a single inclusion of the words "essential community provider" or other key terminology included in the applicable federal law and regulations.

After careful consideration of the arguments of Intervenors presented in their Intervenors' Joint Motion for Summary Judgment filed January 17, 2014; Seattle Children's Hospital's Opposition to Intervenors' Joint Motion for Summary Judgment filed January 29, 2014; and the arguments of the parties presented during oral argument before the undersigned on February 3, 2014, for the reasons stated above Intervenors have not shown that there are no genuine issues as to any material facts and have not shown that they are entitled to judgment as a matter of law. Therefore, it is hereby concluded that, pursuant to WAC 10-08-135, Intervenors' Motion for Summary Judgment must be denied.

ORDER

On the basis of the foregoing activity,

IT IS HEREBY ORDERED that Intervenors' Joint Motion for Summary Judgment is denied.

THIS ORDER IS ENTERED AT TUMWATER, WASHINGTON, this 20th day of February, 2014, pursuant to Title 48 RCW and specifically RCW 48.04, Title 34 RCW, and regulations applicable thereto.

PATRICIA D. PETERSEN, J.D.
Chief Presiding Officer

Declaration of Mailing

I declare under penalty of perjury under the laws of the State of Washington that on the date listed below, I mailed or caused delivery through normal office mailing custom, a true copy of this document to the following people at their addresses listed above: Michael Madden, Esq., Gwendolyn C. Payton, Esq., Timothy J. Parker, Esq., Maren R. Norton, Esq., Mike Kreidler, James T. Odiorne, J.D., CPA, Molly Nollette, AnnaLisa Gellerman, Esq., and Charles Brown, Esq.

DATED this 21st day of February, 2014.

KELLY A. CAIRNS