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KAC

STATE OF WASHINGTON  
OFFICE OF THE INSURANCE COMMISSIONER

In re  
Seattle Children's Hospital's Appeal of  
OIC's Approvals of HBE Plan Filings

NO. 13-0293  
BRIDGESPAN HEALTH COMPANY'S  
MOTION IN LIMINE TO EXCLUDE  
EVIDENCE RE: SEATTLE CHILDREN'S  
HOSPITAL COST STRUCTURE

**I. RELIEF REQUESTED**

Seattle Children's Hospital ("SCH") seeks to offer evidence that its high reimbursement rates are justified because of costs allegedly associated with its status as a stand-alone pediatric specialty hospital. This evidence is not material to the Office of Insurance Commissioner's ("OIC") approval of the BridgeSpan and Premera individual Exchange health plan filings for the 2014 plan year. Argument and evidence about SCH's cost structure should be excluded as irrelevant to the legal standard for network adequacy approval. Alternatively, if the presiding officer believes it to be relevant, the issue should be remanded to the OIC Department of Rates and Forms for review.

**II. FACTUAL AND REGULATORY BACKGROUND**

The Patient Protection and Affordable Care Act ("ACA") and the Washington state statutory scheme enacted pursuant to the ACA, the Washington Health Benefit Exchange ("HBE" or "Exchange"), relies exclusively on private health carriers (also known as issuers) such as BridgeSpan to provide health insurance to Washington citizens. The same scheme

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COST STRUCTURE - 1

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1 requires the OIC to evaluate and approve health carriers to participate in the HBE by  
2 establishing compliance with both the ACA, state statutes enacted pursuant to the ACA, and  
3 state insurance requirements applicable to health plans sold both on and off the HBE. These  
4 include both state and federal provider network adequacy requirements enacted to ensure that  
5 a health plan contracts with sufficient providers to provide member benefits.

6 The ACA depends on competitive rate negotiation between providers and health plans.  
7 Regulations expressly stop short of requiring a plan to contract with a provider where neither  
8 party can reach an agreement regarding reimbursement rates. *See* WAC 284-43-200(4); 45  
9 CFR §156.235(d). The OIC regulates network adequacy to protect the interest of the  
10 consumer, rather than the provider or health carrier, and does not inquire into the  
11 reimbursement rates offered by each party or attempt to evaluate the justification for those  
12 rates when determining whether a network is adequate under state and federal law.

13  
14 8 Q. And likewise, you have not, with respect to  
15 9 Seattle Children's Hospital, considered whether Seattle  
16 10 Children's has refused to accept the generally  
17 11 applicable payment rates of BridgeSpan or Premera Blue  
18 12 Cross?  
19 13 A. No.  
20 14 Q. And do you intend to do that for the upcoming  
21 15 plan review?  
22 16 A. We don't look at compensation amounts.

23 Deposition of Molly Nollette, OIC Deputy - Rates and Forms Division, 26:8-16.

24  
25 17 Q. So I'm trying to understand how those two  
26 18 provisions might work together. In other words, the  
19 19 provision to assess relative availability based on the  
20 20 willingness of providers of facilities to contract  
21 21 under reasonable terms or conditions, and this other  
22 22 provision that says you're not going to look at the  
23 23 contract terms.  
24 24 A. We wanted to be clear, especially in the ECP  
25 25 categories, that we were not going to be looking at  
14:1 26 rates. So reasonable terms and conditions do not  
2 2 exactly equal rates, and we wanted to be clear to  
3 3 people that we were not going to be doing that; that we  
4 4 were not going to be interjecting ourself in the  
5 5 contract negotiation.

1 Deposition of Kate Reynolds, Special Assistant to the Commissioner, 13:17 – 14:05.

2 SCH now offers evidence that the high reimbursement rates it seeks are justified by,  
3 *inter alia*, its status as a stand-alone pediatric specialty hospital. Because SCH's justification  
4 for its reimbursement rates is irrelevant to the OIC's approval of the BridgeSpan Health Plan  
5 for sale on the HBE, the presiding officer should exclude reference to any such argument or  
6 evidence.

### 7 III. LEGAL ARGUMENT

#### 8 A. The Presiding Officer Has the Authority to Grant this Motion in Limine.

9 A pre-trial motion in limine may be brought to decide certain evidentiary issues before  
10 they arise at trial. *Fienmore v. Drake Construction Co.*, 87 Wn.2d 85, 549 P.2d 483(1976);  
11 *State v. Smith*, 189 Wn. 442, 65 P.2d 966 (1937). The Washington Administrative Procedure  
12 Act provides that a presiding officer may exclude evidence that is irrelevant or immaterial,  
13 and shall refer to the Washington Rules of Evidence as guidelines for evidentiary rulings.  
14 WAC 10-08-140; RCW 34.05.452 (1)-(2).

#### 15 B. Evidence that the Seattle Children's Hospital Reimbursement Rates are 16 Reasonable is Not Relevant and Should Be Excluded.

17 At issue in this matter is whether the OIC correctly determined that BridgeSpan and  
18 Premera individual market Exchange filings for the 2014 plan year met the state insurance  
19 network adequacy requirements at WAC 284-43-200<sup>1</sup> and the federal qualified health plan  
20 requirements at 42 U.S.C. §18031(c)(1)(C) and 45 CFR §156.235(d). Although both state and  
21 federal regulations require issuers to maintain networks with a certain amount and type of  
22 providers, they also make clear that they are not intended to impede an issuer's ability to  
23 negotiate a competitive contract. *See* 45 CFR §156.235(d) ("Nothing in paragraph (a) of this  
24 section shall be construed to require a QHP issuer to contract with an essential community

25 <sup>1</sup> WAC 284-43-200 was amended effective May 26, 2014. All references refer to the previous version in  
26 effect throughout the 2013 QHP approval process. *See*

1 provider if such provider refuses to accept the generally applicable payment rates of such  
2 issuer.”); WAC 284-43-200(4) (“Relative availability includes the willingness of providers or  
3 facilities in the service area to contract with the carrier under reasonable terms and  
4 conditions.”). *See also* 42 U.S.C. §18031(c)(2).

5 Representatives from the OIC have testified that although *attempts* at good-faith  
6 contracting may be evaluated when determining if an issuer’s network is adequate, the OIC  
7 will not evaluate the actual reimbursement rates offered by a provider or an issuer or the  
8 justification each party may have for those rates. *See* Deposition of Molly Nollette, 26:16  
9 (“We don’t look at compensation amounts”); Deposition of Kate Reynolds, 13:24-14:05  
10 (“[R]easonable terms and conditions do not exactly equal rates, and we wanted to be clear to  
11 people that we were not going to be doing that; that we were not going to be interjecting  
12 ourself [sic] in the contract negotiation”).

13 Under the Washington Rules of Evidence, irrelevant evidence is inadmissible. ER 402.  
14 Evidence is not considered relevant “unless (1) it has a tendency to prove or disprove a fact,  
15 and (2) the fact is of some consequence in the context of the other facts and the applicable  
16 substantive law.” *State v. Sargent*, 40 Wn. App. 340, 349 n. 3, 698 P.2d 598 (1985); ER 401.  
17 This second element evaluates the “materiality” of the evidence, and stands for the  
18 proposition that “evidence that makes no difference to the outcome of the case—evidence that  
19 cannot affect the validity of [an action], even if true—is immaterial and does not met the test  
20 of relevance under Rule 401.” 5 Karl B. Tegland, WASHINGTON PRACTICE, § 401.5 (5th ed.  
21 2007); *see also, e.g., Channel v. Mills*, 77 Wn.App. 268, 280-81, 890 P.2d 535 (1995) (trial  
22 court property excluded testimony offered by personal injury plaintiff to prove the speed of  
23 defendant’s automobile where defendant’s speed was immaterial under applicable tort law).

24 Here, any evidence regarding SCH’s justification for their requested reimbursement  
25 rates may or may not tend to prove that SCH’s high reimbursement rates are justified.  
26

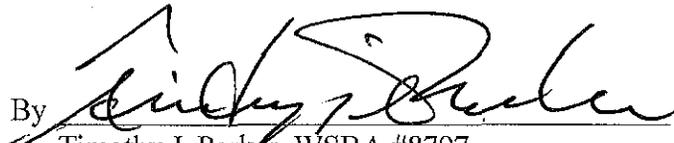
1 However, this fact simply does not have any consequence in the context of other facts and the  
2 applicable substantive law. Although the law may require the evaluation of whether an issuer  
3 has attempted to negotiate with a provider, it does not require an evaluation of the actual  
4 financial justification for each party's bargaining position. The OIC regulates network  
5 adequacy from the consumer perspective, and does not consider provider reimbursement rates  
6 at all when determining compliance with the network adequacy regulations, even when the  
7 issue of good-faith contracting negotiations arises. Therefore, any justification for SCH's  
8 high reimbursement rates are immaterial to the legal issue of whether the OIC ensured  
9 BridgeSpan met federal and state requirements for a Qualified Health Plan before approving it  
10 for sale on the Exchange.

11 **IV. CONCLUSION**

12 For the foregoing reasons, any evidence or argument regarding SCH's justification for  
13 its high reimbursement rates should be excluded as irrelevant.

14 DATED this 11 day of August, 2014.

15 CARNEY BADLEY SPELLMAN, P.S.

16  
17 By 

18 Timothy J. Parker, WSBA #8797

19 Melissa J. Cunningham, WSBA #46537

20 Attorneys for BridgeSpan Health Company

CERTIFICATE OF SERVICE

I, Christine Williams, under oath hereby declare as follows: I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, and not a party to nor interested in this action. On August 11, 2014, I caused to be delivered via e-mail and U.S. mail a copy of the foregoing document on the following parties at the last known address as stated:

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I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this 11th day of August, 2014, at Seattle, Washington.

Christine Williams, Legal Assistant