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Hearings Unit, DIC
Patricia D. Petersen
Chief Hearing Officer

August 30, 2013

Ms. Kelly Cairns
Administrative Assistant to
The Honorable Patricia D. Petersen
Office of Insurance Commissioner
Post Office Box 40255
Olympia, Washington 98504-0255

Re: *In the Matter of Dental Health Services, Inc.; Docket No. 13-0243*

Dear Ms. Cairns:

Enclosed for filing in the above-referenced matter is the OIC Staff's Motion on Burden of Proof and Production.

By copy of this letter, I am mailing a copy of the above-identified document to Respondents' attorney, Jeffrey Gingold, and sending him a PDF copy as an email attachment.

Very truly yours,

A handwritten signature in cursive script that reads "Charles D. Brown".

Charles D. Brown
Staff Attorney
Legal Affairs Division

cc: Jeff Gingold

noteworthy that RCW 34.05.570(1)(a) provides for purposes of judicial review that unless that chapter or another statute provides otherwise, "(t)he burden of demonstrating the invalidity of agency action is on the party asserting invalidity."

Because no statute allocates the burden of proof in this case, the question of which party carries the burden is subject to the default rule that the burden of demonstrating the invalidity of an agency action is on the party asserting invalidity and seeking relief. Directly on point is *Schaffer v. Weast*, 546 U.S. 49, 57 (2005), affirming the decision of an administrative law judge allocating the burden of proof to the parents of a disabled child who had requested an administrative hearing to contest a school's Individualized Education Plan under the federal Individuals with Disabilities Education Act:

When we are determining the burden of proof under a statutory cause of action, the touchstone of our inquiry is, of course, the statute. The plain text of IDEA is silent on the allocation of the burden of persuasion. We therefore begin with the ordinary default rule that plaintiffs bear the risk of failing to prove their claims. McCormick § 337, at 412 ("The burdens of pleading and proof with regard to most facts have been and should be assigned to the plaintiff who generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion"); C. Mueller & L. Kirkpatrick, *Evidence* § 3.1, p 104 (3d ed. 2003) ("Perhaps the broadest and most accepted idea is that the person who seeks court action should justify the request, which means that the plaintiffs bear the burdens on the elements in their claims").

Thus, we have usually assumed without comment that plaintiffs bear the burden of persuasion regarding the essential aspects of their claims. For example, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, does not directly state that plaintiffs bear the "ultimate" burden of persuasion, but we have so concluded. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993); *id.*, at 531, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (Souter, J., dissenting). In numerous other areas, we have presumed or held that the default rule applies. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (standing); *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 806, 119 S. Ct. 1597, 143 L. Ed. 2d 966 (1999) (Americans with Disabilities Act); *Hunt v. Cromartie*, 526 U.S. 541, 553, 119 S. Ct. 1545, 143 L. Ed. 2d 731 (1999) (equal protection); *Wharf (Holdings)*

Ltd. v. United Int'l Holdings, Inc., 532 U.S. 588, 593, 121 S. Ct. 1776, 149 L. Ed. 2d 845 (2001) (securities fraud); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931, 95 S. Ct. 2561, 45 L. Ed. 2d 648 (1975) (preliminary injunctions); *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 287, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977) (First Amendment). Congress also expressed its approval of the general rule when it chose to apply it to administrative proceedings under the Administrative Procedure Act, 5 U.S.C. § 556(d); see also *Greenwich Collieries, supra*, at 271, 114 S. Ct. 2251, 129 L. Ed. 2d 221.

As the Supreme Court's decision in *Schaffer* makes clear, where no statute allocates the burden of proof in an administrative adjudicatory proceeding, the default rule applies and the burden of proof falls on the party who challenges an administrative action and seeks relief. Under the default rule, Dental Health bears the burden of proof here just as it would if it were challenging the Commissioner's action in court.

The OIC also notes that since Dental Health bears the burden of proof in this case, it also bears the burden of production. As stated in 75 Am. Jur. 2d Trial § 276:

Although a court may alter the order of proof, the plaintiff, as the party with the burden of proof, is usually entitled to open the evidence and introduce all his or her evidence.

In determining whether Dental Health's burden of proof is met, the Chief Presiding Officer should bear in mind that the Insurance Commissioner has broad powers over the control, supervision and direction of the insurance business. *Federated American Insurance Company v. Marquardt*, 108 Wn.2d 651, 654, 741 P.2d 18 (1987), citing 2A G. Couch, *Insurance* § 21:5, at 240 (2d ed. 1984). As stated in *Marquardt, supra*, at 108 Wn.2d 656, "the Commissioner's interpretation of his own regulation is entitled to great weight." In accord, see *Credit General Ins. Co. v. Zewdu*, 82 Wn. App. 620, 627, 919 P.2d 93 (1996), refusing to enforce an automobile policy exclusion that had been disapproved by the Commissioner, in which the court observed as follows:

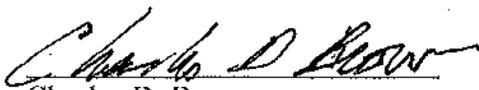
In addition, although a commissioner cannot bind the courts, the court appropriately defers to a commissioner's interpretation of insurance statutes and rules. *Bailey v. Allstate Ins. Co.*, 73 Wn. App. 442, 447, 869 P.2d 1110 (1994); *Retail Store Employees Union*, 87 Wn.2d at 898 ("We may place greater reliance than usual upon an administrative statutory interpretation in this case because the Commissioner has been entrusted with very broad discretion and responsibility in the administration of RCW 48.19.170(2)(b)).

See also *Progressive Casualty Insurance Co. v. Jester*, 102 Wn.2d 78, 82, note 2, 603 P.2d 180 (1984), making clear the broad extent of the Commissioner's regulatory discretion:

By exercising his discretion to withdraw motorcycle liability insurance forms which exclude passenger coverage, the Commissioner, in his wisdom, has ensured that future motorcycle passengers will be protected. Thus, the Insurance Commissioner has acted where we may not.

It is important to keep in mind that this is not a disciplinary case. The OIC does not seek to impose a penalty or revoke a license and no constitutional provision demands heightened scrutiny of the agency's action. The OIC staff therefore respectfully submits that Dental Health as the party seeking relief bears the burden of proof in this case and must demonstrate an abuse of discretion or an error of law in order to prevail.

Respectfully submitted this ²30 day of August, 2013.


Charles D. Brown
OIC Staff Attorney