

**FILED**

JAN 31, 2014 <sup>29</sup> *CH*

Hearings Unit, OIC  
Patricia D. Petersen  
Chief Hearing Officer

**STATE OF WASHINGTON  
BEFORE THE WASHINGTON STATE  
OFFICE OF THE INSURANCE COMMISSIONER**

In the Matter of:

**Seattle Children's Hospital Appeal of OIC's  
Approvals of HBE Plan Filings.**

**Docket No. 13-0293**

**SEATTLE CHILDREN'S  
HOSPITAL'S OPPOSITION TO OIC  
STAFF'S MOTION TO DISMISS**

**I. INTRODUCTION AND SUMMARY OF RESPONSE**

The OIC staff raises only two brief issues in its motion to dismiss. As to both issues, the staff fails to meet the required standards to obtain summary judgment dismissal of SCH's appeal.

**II. FACTUAL BACKGROUND**

Please see the factual summaries provided in SCH's summary judgment motion, and in SCH's opposition to the Intervenor's joint motion for summary judgment, the substance of which are incorporated here by reference.

**III. ISSUES PRESENTED**

1. Has the OIC staff failed to establish that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law on the basis that the issues raised by SCH's action are nonjusticiable under the Hearings Unit's authority, as provided in RCW 48.04.010?

2. Has the OIC staff failed to establish that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law on the issue of whether the OIC complied with federal and state requirements in reviewing and approving the Intervenor's

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Exchange plans, despite the OIC's conceded failure to consider and apply the federal requirements that the plans must include essential health benefits and essential community providers?

#### IV. EVIDENCE RELIED UPON

SCH relies on:

- the accompanying Supplemental Declaration of Eileen O'Connor, together with the exhibits thereto,
- the accompanying Supplemental Declaration of Michael Madden, together with the exhibit thereto,
- the accompanying Declaration of Kelly Wallace,
- the accompanying Declaration of Suzanne Vanderwerff;
- SCH's pending Motion for Partial Summary Judgment;
- the previously filed [First] Declaration of Michael Madden (dated January 17, 2014), together with the exhibits thereto,
- the accompanying [First] Declaration of Eileen O'Connor, (dated January 16, 2014), together with the exhibits thereto,

and the other records and files herein.

#### V. AUTHORITY AND ARGUMENT IN RESPONSE

- A. The OIC staff has failed to establish that, as a matter of law, the issues that SCH raises are nonjusticiable under RCW 48.04.010.**

The OIC staff makes the unprecedented argument that the Hearings Unit cannot, under its statutory authority provided by RCW 48.04.010, consider and review the claims of SCH regarding whether the Commissioners' actions in approving the Intervenors' Exchange plans complied with controlling federal and state law, and whether SCH was aggrieved by the Commissioner's actions. The Hearings Unit's jurisdiction under RCW 48.04.010 is mandatory: the Unit "shall hold a hearing" upon receipt of a written demand for hearing by an aggrieved

party. *Id.* The OIC staff offers no authority, and SCH is aware of none, allowing the Hearings Unit to forego the requirements of RCW 48.040.010 on the basis that it may not be able to provide “final and conclusive” relief to SCH. Nothing in RCW 48.04.010 allows such a conclusion. SCH’s demand for hearing identified a number of available options for relief that the Hearings Unit can provide, and SCH’s summary judgment motion similarly identifies available options for relief. The Hearings Unit’s options for providing relief are not limited by RCW 48.04.010. Its options could include not only the possibilities offered by SCH, but others as well, even if the absence of invalidating the approvals, such as an order of contempt against the Commissioner, or a declaratory judgment.

The OIC staff erroneously cites *Washington Educ. Ass’n v. Public Disclosure Comm’n*, 150 Wn.2d 612, 80 P.3d 608 (2003), to support its assertion that SCH’s action must be dismissed because the Hearings Unit may not be able to provide “final and conclusive” relief in response to SCH’s claims. *See* OIC Staff’s Motion, at 5. Nothing in that decision, which reviewed whether to determine the validity of an agency’s non-binding “guidelines,” supports a conclusion here that alters the scope of the Hearings Unit’s statutory authority under RCW 48.04.010. The *Washington Educ. Ass’n* court concluded that the question presented to the superior court presented “nothing more than an academic or hypothetical question,” and therefore that the trial court erred in undertaking APA review, which would result in an inappropriate advisory opinion. *Id.* at 623. There is nothing academic or hypothetical about the issues presented by this action.

The second decision that the OIC staff cites, *Marley v. Dep’t of Labor & Indus.*, 125 Wn.2d 533, 886 P.2d 189 (1994), rather than supporting the OIC staff’s position, confirms that the state agency “had both personal jurisdiction and subject matter jurisdiction” over the claim that the plaintiff had presented, and affirmed that the agency made a valid and binding decision over the claim. *Id.* at 544. The final decision the OIC staff cites, *Inland Foundry Co. v. Spokane County Air Pollution Control Authority*, 98 Wn. App. 121, 989 P.2d 102 (1999), stands for the unremarkable proposition that an administrative agency “has only the jurisdiction conferred by

its authorizing statute.” *Id.* at 124. Similarly here, where the Hearings Unit derives its authority from RCW 48.04.010, it is bound by the language of that statute to hold the hearing sought by the demand presented to it. Nothing in RCW 48.04.010, nor in the APA, precludes the Hearings Unit from conducting a hearing, making rulings, and imposing appropriate relief, to be determined by the Hearings Unit at the time it makes its ruling on the merits.

The OIC staff apparently also asserts that the fact that the Washington HBE and the HHS Secretary have certified these three plans in some way deprives the Hearings Unit of its statutory authority to review SCH’s demand challenging the validity of the Commissioners’ actions. The OIC staff cites no authority for such a proposition. Nothing in the Exchange’s or the Secretary’s authority to act deprives the Hearings Unit of its own statutory authority to rule on the validity of the Commissioner’s actions. The fact that the Commissioner had authority to deny approval in the first place, and the further fact that the plans could not operate on the Exchange without his approval, belies the notion that the Commissioner’s action is not subject to normal appeal procedures.

The OIC staff then appears to assert that the Hearings Unit is unable to impose relief requiring the Intervenors to contract with SCH or any other provider. The OIC staff cites no authority to support this assertion. Even in the absence of relief of this nature, however, the Hearings Unit can and does exercise authority with respect to the plan approvals, and can and should require in this action that the Commissioner reevaluate its approval of the Intervenors’ Exchange plans under the controlling federal and state law. The OIC staff seems to argue that once the Commissioner has approved an Exchange plan, neither the Commissioner nor the Hearings Unit has any authority to alter that approval. If this were the case, then the Commissioner would also be precluded from, for example, engaging in its current efforts to amend the network adequacy regulations. The planned revisions of these regulations will impose additional requirements on the Intervenors and their Exchange plans. Under the OIC staff’s

theory, however, such revisions would be precluded by the Exchange's and HHS Secretary's approvals of the plans.

The OIC staff further asserts that the Hearings Unit has no "jurisdiction" to review whether SCH is or is not an in-network provider in the Premera Exchange plans. To the contrary, such review is an essential part of the Hearings Unit's consideration of whether the Commissioner engaged in necessary and appropriate analysis of the adequacy of Premera's network, including review of the validity of the Commissioner's determination as to whether Premera's proposed Exchange plans complied with federal and state requirements for in-network providers. The OIC staff offers no authority that precludes the Hearings Unit from reviewing the Commissioner's actions in approving Premera's Exchange plans.

Finally, while it fails to challenge the injuries that SCH asserts or its standing to assert these injuries, the OIC staff asserts that review of the Commissioner's approval of these Exchange plans would serve "no practical or legal purpose." In effect, the OIC staff would allow a wrong to have no remedy, a result wholly inconsistent with the rule of law. *See, e.g., Blanchard v. Golden Age Brewing Co.*, 188 Wash. 396, 427, 63 P.2d 397 (1936) ("the Legislature may not abolish a common-law right and its remedy without setting up some reasonable substitute. To attempt to do so is to deny due process of law within the meaning of both the State and Federal Constitutions."). The OIC staff has completely failed to establish that the Hearings Unit should ignore its statutory authority by rejecting SCH's demand for review of the validity of the Commissioner's actions.

**B. The OIC staff has failed to establish, beyond dispute and as a matter of law, that the Commissioner followed applicable federal and state network adequacy requirements when he approved the challenged plans.**

The OIC raises arguments that were also raised by the Intervenors in their summary judgment motion. The substance of SCH's response to those arguments, provided in SCH's summary judgment motion and in SCH's opposition to the Intervenors' joint motion for summary judgment, is incorporated here by reference. SCH additionally notes that the position

the OIC staff takes in its motion directly conflicts with the position that the OIC staff took in the CCC proceeding, in which it asserted that, as a matter of law, CCC's Exchange plans' network was inadequate for failure to include SCH as an in-network provider. [First] Madden Decl. Exs. C, D.

#### VI. PROPOSED ORDER

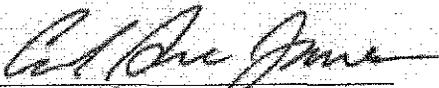
A proposed order is attached to the Hearing Unit's copy of this pleading.

#### VII. CONCLUSION

For the foregoing reasons, SCH asks the Hearings Unit to deny the OIC staff's motion to dismiss this action.

RESPECTFULLY SUBMITTED this 29<sup>th</sup> day of January, 2014.

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**CERTIFICATE OF SERVICE**

I certify that I served a true and correct copy of this document on all parties or their counsel of record on the date below by e-mail and mail on today's date addressed to the following:

**Hearings Unit**

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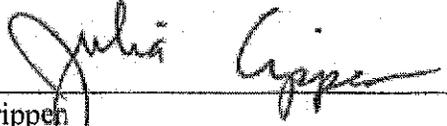
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Seattle, Washington, this 29th day of January, 2014.

  
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Julia Crippen  
Legal Assistant

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