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**SUPREME COURT OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON,  
DEPARTMENT OF EARLY LEARNING

Respondent,

v.

KATHLEEN HARDEE,

Petitioner.

**FILED**  
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STATE OF WASHINGTON  
*MR*

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**STATE'S ANSWER TO PETITION FOR REVIEW**

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## I. IDENTITY OF RESPONDENT

The State of Washington, Department of Early Learning, respondent, answers the petition for review.

## II. CITATION TO COURT OF APPEALS DECISION

The Court of Appeals, Division I, entered a decision July 27, 2009, affirming the final adjudicative order revoking Ms. Hardee's home childcare license. The petition includes the Court of Appeals decision as Appendix A and the final adjudicative decision as Appendix C.

## III. ISSUES PRESENTED FOR REVIEW

The petitioner raises two issues, which are more accurately stated as:

**Issue 1.** RCW 43.215.300(2) provides that "[i]n any adjudicative proceeding regarding the denial, modification, suspension, or revocation of any license under this chapter, the department's decision shall be upheld if it is supported by a *preponderance of the evidence*." (Emphasis added.) Where Ms. Hardee receives a full adjudicative hearing and judicial review, does the preponderance standard of proof in the statute violate the federal or state guarantee of procedural due process?

**Issue 2.** The Administrative Procedures Act (APA) authorizes the agency review judge to exercise all powers vested in the initial hearing officer, including making findings and conclusions that resolve the issues

raised in the adjudicative proceeding, and directs the review judge to give due regard to the initial hearing officer's opportunity to observe witnesses. RCW 34.05.464(4). Did the review judge exceed her authority where she examined the record and expressly explained why her findings and conclusions varied from the initial order, entered credibility findings, and based the findings and conclusions on substantial direct evidence, including eyewitness testimony and testimony of Ms. Hardee?

If review is accepted, the respondent raises the following issue under RAP 13.4(d).

**Issue 3.** Ms. Hardee asks the Court to apply *Ongom v. Department of Health*, 159 Wn.2d 132, 148 P.3d 1029 (2006), and *Nguyen v. Department of Health*, 144 Wn.2d 516, 29 P.3d 689 (2001), to conclude that the preponderance standard of proof stated in RCW 43.215.300(2) is unconstitutional. Should *Ongom* and *Nguyen* be reversed?<sup>1</sup>

#### IV. RESTATEMENT OF THE CASE

The State of Washington, Department of Early Learning (DEL or Department) summarily suspended the family home childcare license of Kathleen Hardee on July 6, 2006, after a report that her 19-year-old son, William, who lived at the childcare home, had sexually molested a three-

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<sup>1</sup> The Department expressly raised and preserved this issue at superior court and in its Court of Appeals brief. Resp. Br. at 2.

year-old child he was babysitting. Finding of Fact (FF) 2, 3 (Pet. App. C at 16); CP 834–35. The molestation did not involve a child at the licensed childcare, but an investigation revealed that William had been left unsupervised with childcare children, contrary to specific plans and licensing conditions submitted and agreed to by Ms. Hardee. FF 4 (Pet. App. C at 16); CP 824–44, 847, 860, 884.

On November 9, 2006, the Department gave notice that it would be revoking Ms. Hardee's home childcare license. In addition to the licensing history that documented the need to prevent William from having unsupervised contact with the children at the facility, the revocation letter cited Ms. Hardee's failure to adhere to her safety plan, which she herself had proposed as a condition of licensing to allow William to live at the home. It also noted her failure to notify the Department or conduct proper background checks on individuals with access to the childcare children and that these facts demonstrated that Ms. Hardee did not have the character required by statute to continue as a childcare provider. FF 5 (Pet. App. C at 17).

Ms. Hardee contested the revocation. A hearing occurred May 7–10, 2007, before an Administrative Law Judge (ALJ), who issued an initial order that proposed reversing the Department action. CP 324–33. Pursuant to both the APA and agency rules, an initial

decision is subject to a “petition for review” to the designee of the Department, known as a review judge. *See* RCW 34.05.461–.464; WAC 170-03-0570.

Review Judge Christine Stalnaker entered a final decision ordering license revocation. Pet. App. C. The final order found two reasons for affirming the license revocation. First, it found and concluded that the “Department has proven that [Ms. Hardee] violated her 2003 safety agreement and the terms of her 2004 waiver. The Department has proved that [Ms. Hardee] allowed William to have unsupervised access to a child under her care.” Conclusion of Law (CL) 11 (Pet. App. C at 31). Second, the “Department has proven that the Appellant lacks the personal characteristics an individual needs to provide care to children” as required by WAC 170-296-140(2). CL 11 (Pet. App. C at 31); *see also* CL 10 (Pet. App. C at 31); slip op. at 15–16. Based on the violations, the final order revoked the license. Pet. App. C at 32.

Ms. Hardee unsuccessfully sought judicial review in King County Superior Court. She sought further review in the Washington Court of Appeals, which issued a published decision finding that revocation of Ms. Hardee’s license was proper, and that Ms. Hardee was not denied due process by application of the preponderance of the evidence standard set forth in RCW 43.215.300(2).

## V. REASONS WHY REVIEW SHOULD BE DENIED

The petition for review identifies two issues. The first issue asks if the standard of proof is constitutional. The second issue asks if the review judge may enter new findings of fact based “solely on hearsay rejected by the ALJ.” Pet. at 1. Ms. Hardee cites RAP 13.4(b)(1), (2), and (4) as the basis for seeking review.

For her first issue, Ms. Hardee claims a conflict exists because the Court of Appeals held that the statutory preponderance of the evidence standard meets procedural due process for revocation of a home childcare license. The Court of Appeals, however, properly distinguishes the cases that invoke a higher burden of proof (“clear, cogent, and convincing”). Moreover, if a conflict exists, it arises from the *Nguyen* and *Ongom* opinions, on which Ms. Hardee relies. As shown in the briefing below, the statutory preponderance standard meets procedural due process. *See* Resp. Br. at 14–23. The *Nguyen* and *Ongom* decisions rely on an erroneous view of procedural due process. *See* Resp. Br. at 23–28.

Ms. Hardee’s second issue depends on a faulty view of the record and statutes. Ms. Hardee’s arguments overstate and mischaracterize the actions of the administrative review judge and the record. She ignores how the APA expressly authorizes the final review judge with all authority of the initial hearing officer, requiring only due regard for the initial

hearing officer's opportunity to observe witnesses. Because it is not based on the record, the second issue does not meet any of the criteria in RAP 13.4(b).

Finally, Ms. Hardee argues that this Court should clarify the burden of proof for licensing actions affecting home childcare providers. Providers, however, need no such clarification. Providers have the explicit language in RCW 43.215.300(2), where the legislature adopted the preponderance standard. Providers also have the Court of Appeals decision, confirming that the statute lawfully defined the burden of proof.

**A. Affirming The Preponderance Of Evidence Standard In RCW 43.215.300(2) Does Not Conflict With Precedent**

“The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to ‘instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.’” *Addington v. State of Texas*, 441 U.S. 418, 423, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979) (quoting *In re Winship*, 397 U.S. 358, 370, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) (Harlan, J., concurring)). The legislature can choose to condition home childcare licenses on a burden of proof that avoids placing an unreasonable risk on children and parents, particularly where it chooses the well-accepted

preponderance of evidence standard and provides an adjudicative proceeding under the APA.

The implications of Ms. Hardee's conflict argument are troubling. She argues that due process compels a higher standard of proof for private interests which overrides the legislative judgment about the confidence it requires for a licensing action, and overrides the legislative judgment that protection of children is paramount to a person's interest in running a childcare facility. RCW 43.215.005(3)(c). She argues, in essence, that if a fact-finder determines it was *more likely than not* that a licensee violated the law, due process prevents the legislature from authorizing an agency response. Her argument has no limits and would apply to violations involving harm to children, or risks of physical harm, or even sexual abuse.

**1. Affirming The Standard Of Proof In RCW 43.215.300(2) Does Not Present A Genuine Conflict**

RCW 43.215.300(2) is legislation and it is presumed constitutional. There is nothing remarkable about the legislature choosing a preponderance of evidence standard for home childcare licensing. The response brief, which will not be repeated here, demonstrated that procedural due process is satisfied when the interests at stake are the safety of children on one hand, and the interest in running a home childcare business on the other, and where the licensee is protected by

processes that include an adjudicative proceeding under the APA and a fact-finder applying a preponderance standard. Resp. Br. at 15–28.

The due process analysis in the state’s briefing thus supports the Court of Appeals holding that RCW 43.215.300(2) is constitutional. As a result, *Nguyen* and *Ongom* do not present a genuine conflict. Instead, as the court recognized, *Nguyen* and *Ongom* “involved a professional license of a particular individual.” *Hardee v. Dep’t of Soc. & Health Servs.*, No. 62436-9, slip op. at 7 (Wash. Ct. App. July 27, 2009) (Pet. App. A at 7). *Hardee*, in contrast, had “a site license, obtainable by the licensee’s completion of 20 clock hours of basic training approved by the Washington State training and registry system.” Slip op. at 7 (Pet. App. A at 7). The personal medical license at issue in *Nguyen* is a different interest than the limited and conditional license to run a childcare business. *See* Resp. Br. at 18–19.

To argue a conflict exists, Ms. Hardee argues that she has a greater personal interest in her business than Ms. Ongom had in her registration. Petition at 7. She then cites to *Ongom*’s observation that “time and money spent on training . . . cannot, by itself, justify a higher or lower burden of persuasion.” *Ongom*, 159 Wn.2d at 138–39 (quoting *Nims v. Bd. of Prof’l Eng’rs & Land surveyors*, 113 Wn. App. 499, 505, 53 P.3d 52 (2002)). This reasoning from *Ongom*, however, supports the Court of

Appeals distinction. It confirms that *Ongom* relied on an analogy between two personal licenses related to the medical field. *Ongom* was not based on time and money invested.<sup>2</sup>

In a related argument, Ms. Hardee dwells on the mention of an erotic dancing license in the opinion. That mention, however, does not support her arguments that a conflict exists. The legislature does not equate family home childcare licenses with erotic dancing licenses. The DEL statute selected the preponderance of evidence standard to ensure protection of children. As stated in RCW 43.215.005(3)(c), the legislature intended to safeguard the health, safety, and well-being of children in care and determine that the interests of such children are paramount to the right of a person to provide care.

Next, the petition argues a conflict with *Chandler v. Office of the Insurance Commissioner*, 141 Wn. App. 639, 173 P.3d 275 (2007), saying that case compels a higher burden of proof for auctioneers, barbers, cosmetologists, and more. Pet. at 10. As the Court of Appeals recognized, *Chandler* is an opinion “without comment or analysis” that approves a final decision applying both the preponderance standard and the clear and convincing standard. See Slip op. at 8. The burden of

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<sup>2</sup> As discussed in the state’s response brief at pages 23–28, the better conclusion is that variations in time or money spent on training does not compel a higher burden of proof if the legislature adopts a preponderance standard.

proof discussion in *Chandler* does not create a conflict with upholding of RCW 43.215.300(2).

**2. If Review Is Granted, The Court Should Affirm The Constitutionality Of RCW 43.215.300(2) By Reversing *Nguyen* and *Ongom***

If review is granted, then *Nguyen* and *Ongom* should be reconsidered to eliminate the sense of conflict. These cases, not *Hardee*, stand virtually alone. *See generally* App. A. (attached) (listing national cases on procedural due process and standards of proof). Furthermore, as shown in the response brief at pages 14–28, the guarantees of procedural due process in the context of a home childcare license do not preclude the legislature from choosing a preponderance of evidence standard. A “more likely than not” standard of proof assures an accurate decision, and serves the interests of the children in care who may be placed at risk by the action or inaction of the care provider.

*Stare decisis* does not support retaining *Nguyen* or *Ongom*. *Stare decisis*, admittedly, “requires a clear showing that an established rule is incorrect and harmful before it is abandoned.” *See In re the Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). *Nguyen*, however, is far from an “established rule.” This Court followed it in *Ongom*, but the majority expressly noted that reversing *Nguyen* was not

properly raised. *Ongom*, 159 Wn.2d at 137 n.3; *see also Ongom*, 159 Wn.2d at 144, 152 (four justices urging reversal of *Nguyen*).<sup>3</sup>

The instant case illustrates how *Nguyen* and *Ongom* are harmful precedent. Ms. Hardee claims that *Nguyen* prevents the legislature, on behalf of society, from adopting a standard for factual findings allowing an agency to act for the protection of children and parents when it is more likely than not a licensee violated the law or terms of a license. *See generally Ongom*, 159 Wn.2d at 144 (J. Madsen dissenting), 152 (J. Owens dissenting).

This Court is responsible for constitutional rulings, such as *Nguyen* and *Ongom*, and it should correct rulings that put a cloud on the validity of legislation. Thus, if the Court grants reviews, it should decide Ms. Hardee's procedural due process issue by reversing *Nguyen* and *Ongom*, and affirming the constitutionality of the burden of proof in RCW 43.215.300(2).

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<sup>3</sup> In at least four states (Texas, Minnesota, North Dakota, and Iowa), courts have expressly disagreed with or distinguished *Nguyen*. *Granek v. Texas State Bd. of Med. Exam'rs*, 172 S.W.3d 761 (Tex. App. 2005); *Uckun v. Minnesota State Bd. of Med. Practice*, 733 N.W.2d 778 (Minn. Ct. App. 2007); *North Dakota State Bd. of Med. Exam'rs-Investigative Panel B v. Hsu*, 2007 ND 9, 726 N.W.2d 216, *as amended* (Feb. 1, 2007); *Miulli v. Iowa Bd. of Med. Exam'rs*, noted at 683 N.W.2d 126, 2004 WL 893934 (Iowa Ct. App.)

**B. The Petition Does Not Present A Significant Question About The Review Judge's Authority Because The Issue And Arguments Do Not Fairly Reflect The Decision Or The Record**

Ms. Hardee's second issue asks the Court to decide if the review judge violated RCW 34.05.464(4). That statute authorizes a review judge to exercise all the powers of the presiding officer who makes an initial ruling in an adjudicative proceeding, while giving due regard to the presiding officer's opportunity to observe witnesses.<sup>4</sup> Ms. Hardee claims her arguments present issues of substantial public interest under RAP 13.4(b)(3).

Ms. Hardee, however, argues that the Court needs to decide whether a review judge may "simply disregard wholesale" the factual and legal findings of the ALJ and substitute an "incorrect view of the law." Pet. at 10. She frames her issue on the premise that the review judge relied "solely on hearsay." Pet. at 1. The record does not support Ms. Hardee's hyperbole. As discussed below and as set forth in detail in the final decision (Pet. App. C), the ALJ was given due regard, and the

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<sup>4</sup> The subsection states in full: "The officer reviewing the initial order (including the agency head reviewing an initial order) is, for the purposes of this chapter, termed the reviewing officer. The reviewing officer shall exercise all the decision-making power that the reviewing officer would have had to decide and enter the final order had the reviewing officer presided over the hearing, except to the extent that the issues subject to review are limited by a provision of law or by the reviewing officer upon notice to all the parties. In reviewing findings of fact by presiding officers, the reviewing officers shall give due regard to the presiding officer's opportunity to observe the witnesses." RCW 34.05.464(4).

findings are not based solely on hearsay. Moreover, Ms. Hardee's petition does not identify where she believes the review judge applied an incorrect view of the law. Ms. Hardee's second issue simply disagrees broadly with the review judge's findings and legal conclusions. It does not show how the record in this case presents any issue needing resolution by this court.

Ms. Hardee first suggests that there is some issue arising from the language of WAC 170-03-0620, the DEL regulation implementing RCW 34.05.464(4). The regulation requires the DEL review judge to "consider" the ALJ's opportunity to observe witnesses. As Ms. Hardee notes, the APA says to give "due regard" to that opportunity. Pet. at 11. This is a distinction without a difference. Consideration includes giving that regard which the considering party feels is due.<sup>5</sup> WAC 170-03-0620(1) is not at odds with RCW 34.05.464(4) and, in any event, the slight language difference has no operative effect.

Next, the record contradicts Ms. Hardee's various arguments claiming that the review judge exceeded her statutory authority. Review Judge Stalnaker expressly noted how the initial order had not translated the opportunity to observe witnesses into any findings she could consider. FF 29, CL 6 (Pet. App. C at 24, 27). The final order, however, had to

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<sup>5</sup> Webster's defines consideration as: "2. Continuous and careful thought: DELIBERATION, ATTENTION < to read a book with ~ > . . . 4. Thoughtful regard . . . ." Webster's Third New International Dictionary Of The English Language 484 (2002).

make findings on the factual dispute regarding whether Ms. Hardee's son had been diapering the young girl at the childcare, because that dispute related directly to the alleged violation of the licensing conditions. *See* FF 15,17, 18, 20–26 (Pet. App. C at 20–24); CL 4–7 (Pet. App. C at 28–29). The final decision then provides detailed findings citing the record, along with conclusions and reasons to explain how and where the initial order was incomplete, and to explain where the initial order was contrary to the record. The Court of Appeals properly found that the review judge gave due regard to the ALJ's ability to hear the witnesses. Slip op. at 11–15; Resp. Br. at 32–39.

Next, Ms. Hardee argues as if there is a legal barrier to a review judge making credibility findings. Case law and statutes confirm that review judges can make credibility findings even when overturning an express credibility finding made by the ALJ. *See* RCW 34.05.464(5), (6), (8). *Regan v. Department of Licensing*, 130 Wn. App. 39, 49, 121 P.3d 731 (2005), cites rulings by this Court to explain the authority of an ALJ:

As the reviewing officer, the Director has the ability and the right to modify or to replace an ALJ's findings, including findings of witness credibility. *See Tapper [v. Employment Security Dept.]*, 122 Wn.2d [at] 405–06 (holding that RCW 34.05.464(4) vests final authority in the agency head, including the decision making power of the hearing officer, and the agency head may modify or replace an ALJ's findings). We note that RCW 34.05.464(4) required reviewing officers to give "due

regard” to the presiding officer’s opportunity to observe the witnesses.

This rule did not mean, however, that the statute required the Director to defer the ALJ’s credibility determinations. Rather, the statute authorized the Director to make his own independent determinations based on the record. . . .

*Regan*, 130 Wn. App. at 59.

Moreover, this case does not involve rejection of express ALJ credibility findings as implied by the petition. The final order simply explains how it dealt with places where the initial order failed to confront contradictory evidence, and failed to resolve disputed direct testimony. *See, e.g.*, Pet. App. C at 28–29 (CL 4–6). *See* Resp. Br. at 39–43 (describing requirements that Ms. Hardee not allow unsupervised contact between her troubled son and the children at the childcare).

Ms. Hardee similarly mischaracterizes the record by suggesting the review judge based findings solely on hearsay or on rejected hearsay. Pet. at 14. Ms. Hardee’s claim about hearsay lacks any detail and thus the Department cannot provide a point-by-point reply. The final order (Pet. App. C) shows how Review Judge Stalnaker relied primarily on direct eyewitness testimony from parent JS and consideration of testimony from Ms. Hardee. Then, each finding of fact and conclusion of law within the review decision and final order gives a clear view of what was

considered, often providing the source of information in footnotes. Of 51 footnotes related to the factual findings, approximately 9 refer to hearsay information, and only half of those citations contain information contested by appellant.<sup>6</sup> In contrast, Review Judge Stalnaker cited 31 times to the testimony of witnesses with direct knowledge relevant to the case. The testimony cited most often by the review judge—17 times—was that of Ms. Hardee. This is not a case where findings relied solely on hearsay.

Ms. Hardee then argues that the ALJ is being made superfluous. Pet. at 14 (quoting *Costanich v. Dep't of Soc. & Health Servs.*, 138 Wn. App. 547, 156 P.3d 232 (2007), *reversed in part*, 164 Wn.2d 925, 194 P.3d 988 (2008)). She recognizes, however, that the issue in *Costanich* did not involve application of RCW 34.05.464. Ms. Hardee's argument fails because it asks this Court to disregard the statute and case law, both

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<sup>6</sup> Instances of hearsay cited: page 16—for charges against William (not contested); page 17—for William's date of birth (not contested); page 18—for admission to Fairfax (not contested); page 18—for conviction (fact of conviction not contested); page 18—William's MH treatment (not contested); page 19—William's behavior with stuffed animals, etc. (partially admitted by appellant); page 21—reports of parents to Investigator Junior (contested info about leaving William alone); page 22—more parent reports (contested info re people on premises); page 23—report of Ms. Hardee to Investigator that William helps with lunches (may be contested); page 25—police report that Ms. Hardee said people were constantly around house (contested).

In addition, some footnotes cited to documents or testimony of the investigator and are not included in these figures.

of which authorizes the administrative review processes in RCW 34.05.464. Slip op. at 9–11.

Finally, Ms. Hardee's arguments about the reviewing judge ignore how the two-tiered administrative process provides additional protection for private parties. Appellants with financial or other limits can use the process to obtain relief from an incorrect initial decision. A review judge process has no filing fees and, unlike formal judicial review in superior court, it can be more easily pursued without an attorney. If the review judge decision is in the appellant's favor, the private party has finality without facing any judicial review. *See* WAC 170-03-0660(2) (Department cannot appeal from its own final decision). Moreover, a review judge process enhances consistent application of the law in final agency decisions because there is centralized review on behalf of an agency director. Ms. Hardee has no response to the objective advantages of these additional administrative review procedures.

Thus, the APA leaves no room for Ms. Hardee's arguments that would convert the initial order into a final order. Instead, the APA expressly allows a final review in RCW 34.05.464. Judicial review then

examines whether there is error in the *final* order by examining whether the final findings are based on substantial evidence.<sup>7</sup> In the end, Ms. Hardee's arguments do not show that any findings in the final order are erroneous. She has twice failed to address and meet that burden.

The second issue, as framed and argued Ms. Hardee, is not presented by this case. This case does not present an issue about "wholesale" disregard of the initial order or about a review judge relying "solely" on hearsay. The review judge relied on direct evidence and made limited use of hearsay.

Accordingly, if the Court grants review, it should limit its review to her first issue concerning the constitutionality of RCW 43.215.300(4) and to the Department's issue addressing whether *Nguyen* and *Ongom* should be overruled. It should decline to hear Ms. Hardee's second issue regarding application of RCW 34.05.464.

**C. Review Is Not Needed To Guide Childcare Providers Regarding The Standard Of Proof**

Ms. Hardee argues that the Court should grant review because appellant or other providers need clarity. The public and childcare providers have clear guidance. First, RCW 43.215.300(2) included an

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<sup>7</sup> RCW 34.05.570(3)(e) (findings not erroneous if based on substantial evidence); RCW 34.05.542(2) (judicial review of "final" agency order); RCW 34.05.464(2) (the review judge enters the "final" agency order).

express statement about the confidence needed to take a licensing action. Second, the Court of Appeals decision confirms that the statute is constitutional. There is no uncertainty regarding the standard of proof for DEL licenses.

Moreover, fact-finding for home childcare licenses does not involve any peculiar risk of erroneous deprivation if facts are shown to be “more likely than not.” This is the standard applied in multi-million dollar civil lawsuits and in proceedings as important as paternity determinations and loss of U.S. citizenship. See *Rivera v. Minnich*, 483 U.S. 574, 107 S. Ct. 3001, 97 L. Ed. 2d 473 (1987); *Vance v. Terrazas*, 444 U.S. 252, 100 S. Ct. 540, 62 L. Ed. 2d 461 (1980). It can be applied in an adjudication regarding a family home childcare license.

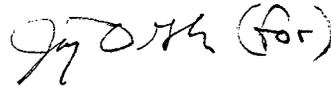
Finally, Ms. Hardee argues that the Court of Appeals decision means that other types of licensees will face uncertainty as to the burden of proof in their licensing matters. This uncertainty does not stem from upholding RCW 43.215.300(2). If there is uncertainty, it stems from *Nguyen*, where procedural due process was cited to reject the preponderance of evidence standard.

## VI. CONCLUSION

The Court should deny review. If review is accepted, the Court should limit the review to Ms. Hardee's first issue challenging the constitutionality of RCW 43.215.300(2) and to the Department's responsive issue asking whether *Nguyen* and *Ongom* should be limited or overruled.

Respectfully submitted this 19th day of November 2009.

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## Appendix A

### National Cases Evaluating Procedural Due Process And Standard of Proof For Medical And Other Licensing Cases

1. Thirteen states (Colorado, Florida, Iowa, Michigan, New Hampshire, New Jersey, New York, North Dakota, Oregon, South Carolina, Texas, Vermont, and Wisconsin) and the District of Columbia hold that the preponderance of the evidence standard does not violate the Due Process Clause in professional medical disciplinary proceedings. Florida recognized this principle when it upheld a discipline based on another state's use of the preponderance standard.

- *Snyder v. Colorado Podiatry Bd.*, 100 P.3d 496, 502 (Colo. Ct. App. 2004) (“There is no constitutional requirement of a standard of proof beyond preponderance of the evidence in civil proceedings, see *Addington v. Texas*, 441 U.S. 418 (1979), and the General Assembly has determined that the standard of proof for all violations of the Podiatry Practice Act is the standard applicable in civil proceedings.”);
- *Rife v. Department of Professional Regulation*, 638 So.2d 542, 543; (Fla. App. 2 Dist., 1994) (“it is apparent that [a clear and convincing] standard is not essential to satisfy due process under the United States Constitution.”);
- *Eaves v. Bd. of Med. Exam'rs*, 467 N.W.2d 234, 237 (Iowa 1991) (“A preponderance of the evidence is all that is required. This standard is sufficient to satisfy due process.” (Citation omitted.));
- *Rucker v. Michigan Bd. of Med.*, 138 Mich. App. 209, 211, 360 N.W.2d 154, 155 (1984) (Petitioner is wrong in claiming “that due process required that a more stringent standard of proof, the ‘clear and convincing’ standard, be applied in license revocation hearings.”);

- *Petition of Grimm*, 138 N.H. 42, 50, 635 A.2d 456, 461 (1993) (“After weighing the [*Mathews*] factors set out above, we conclude that the application of the preponderance of the evidence burden of proof to psychologist disciplinary proceedings satisfies due process.”);
- *In re the Revocation of the License of Polk*, 90 N.J. 550, 569, 449 A.2d 7, 16–17 (1982) (“we conclude that the application of the burden of proof by a fair preponderance of the evidence standard in this case did not result in a deprivation of any rights guaranteed to Polk under . . . the Due Process clause of the Fourteenth Amendment”);
- *In re Gould*, 103 A.D.2d 897, 897, 478 N.Y.S.2d 129, 129 (1984) (“we reject petitioner’s claim that the standard of proof in a professional license revocation proceeding must be ‘clear and convincing’ proof to comport with due process requirements”);
- *North Dakota Bd. of Med. Exam’rs-Investigative Panel B v. Hsu*, 726 N.W.2d 216, 230 (N.D. 2007) (“Under the *Mathews* framework for analyzing due process claims, we conclude the preponderance of evidence standard satisfies due process.”);
- *Gallant v. Bd. of Med. Exam’rs*, 159 Or. App. 175, 185, 974 P.2d 814, 819 (1999) (“Balancing the three [*Mathews*] factors, we conclude that the Due Process Clause requires no more than the preponderance of the evidence standard of proof in this case.”);
- *Anonymous (M-156-90) v. Bd. of Med. Exam’rs*, 329 S.C. 371, 378, 496 S.E.2d 17, 20 (1998) (“We find a preponderance of the evidence standard adequately protects a physician’s property interest in his license.”);
- *Granek v. Texas Bd. of Med. Exam’rs*, 172 S.W.3d 761, 777 (Tex. App. 2005) (the court rejects the contention “that due process requires clear and convincing evidence in medical disciplinary actions”);
- *In re Smith*, 169 Vt. 162, 172, 730 A.2d 605, 612 (1999) (“We conclude that these statutory procedures, together with the preponderance of evidence burden of proof placed on the State, afforded the constitutional process due to appellee.”);

- *Gandhi v. Med. Examining Bd.*, 168 Wis. 2d 299, 303, 483 N.W.2d 295, 298 (1992) (the court rejected Gandhi's argument that "due process mandates proof of the allegations against a physician by at least clear and convincing evidence").
- *Sherman v. Comm'n on Licensure to Practice the Healing Art*, 407 A.2d 595, 601 (D.C. 1979) ("we hold that the preponderance of the evidence test adequately protected Dr. Sherman's Fifth Amendment property interest in his license");

2. Nine states have established a preponderance of evidence standard in medical disciplinary hearings by statute or administrative rule. See Del. Code Adm. tit. 24, 500-7.2.5; Haw. Rev. Stat. § 91-10(5); Ky. Rev. Stat. Ann. § 13B.090(7); 02-415-04 Me. Code R. § 1(A); Mass. Gen. Laws, ch. 112, § 5 (board may impose discipline "upon proof satisfactory to a majority of the board"); Md. Code Ann., Health Occ. § 14-405(b), *amended by* 2004 Md. Sess. Laws, 1st Spec. Sess., ch. 5, § 1; Mont. Code Ann. § 37-1-311; Nev. Rev. Stat. 630.352(1); Tenn. Comp. R. & Regs. 1360-4-1.02(7).

3. The following twelve states require a preponderance of evidence by judicial decision; these cases do not involve a due process claim or analysis.

- *Ferguson v. Hamrick*, 388 So.2d 981, 984 (Ala. 1980);
- *Ethridge v. Arizona Bd. of Nursing*, 796 P.2d 899, 904 (Ariz. 1989);
- *Johnson v. Arkansas Bd. of Exam's in Psychology*, 808 S.W.2d 766, 769 (Ark. 1991);

- *Swiller v. Comm’r of Pub. Health & Addiction Servs.*, No. HHD CV 95-0705601, 1995 WL 611754 (Conn. Super. Ct. Oct. 5, 1995) (chiropractor);
- *Georgia Bd. of Dentistry v. Pence*, 478 S.E.2d 437, 444 (Ga. Ct. App. 1996) (upheld preponderance standard against claim that “reasonable doubt” should be used);
- *In re Med. License of Friedenson*, 574 N.W.2d 463, 466 (Minn. Ct. App. 1998);
- *Bever v. Bd. of Reg. for the Healing Arts*, No. WD 57880, 2001 WL 68307, at \*4 (Mo. Ct. App. Jan. 30, 2001), *cause ordered transferred to Mo. S. Ct.* (Mar. 27, 2001), *reh’g denied* (Mar. 27, 2001);
- *Foster v. Bd. of Dentistry*, 714 P.2d 580, 582 (N.M. 1986) (clear and convincing standard only used in cases where fraud is alleged);
- *In re Kincheloe*, 157 S.E.2d 833, 841 (N.C. 1967);
- *Shearer v. State Med. Bd.*, 97 N.E.2d 688, 691 (Ohio Ct. App. 1950), *but see* Ohio Rev. Code Ann. § 3719.121(A), (B) (West 2001) (clear and convincing standard for disciplinary action based on illegal drug use);
- *Starr v. State Bd. of Med.*, 720 A.2d 183, 191 (Pa. Cmwlth. Ct. 1998); *Miele v. Bd. of Med. Licensure & Discipline*, No. 90-1930, 1991 WL 789899, at \*3 (R.I. Super. Oct. 9, 1991);
- *Goad v. Virginia Bd. of Med.*, 40 Va. App. 621, 634 n.10, 580 S.E.2d 494, 501 n.10 (2003).

4. Two states required the preponderance standard by statute or regulation until they were struck down on *state* constitutional grounds.

- *Johnson v. Bd. of Governors of Registered Dentists*, 913 P.2d 1339, 1347 (Okla. 1996);
- *Painter v. Abels*, 998 P.2d 931, 941 (Wyo. 2000).

5. Other states apply a clear and convincing evidence standard of proof, but none apply it based on the federal constitution procedural due

process guarantees. The following eleven states use “clear and convincing evidence” or its equivalent for common law reasons.

- *Storrs v. State Med. Bd.*, 664 P.2d 547, 555 (Alaska 1983), *but see In re Robson*, 575 P.2d 771 (Alaska 1978) (standard of proof for attorney discipline is preponderance of evidence);
- *Silva v. Superior Ct.*, 14 Cal. App. 4th 562, 17 Cal. Rptr. 2d 577, 582 (1993) (struck down preponderance of evidence standard of proof based on statutory analysis);
- *Rife v. Department of Professional Regulation*, 638 So.2d 542, 543, (Fla. App. 2 Dist.,1994) (“it is apparent that [a clear and convincing] standard is not essential to satisfy due process under the United States Constitution.”);
- *Cooper v. Bd. of Prof'l Discipline*, 4 P.3d 561, 568 (Idaho 2000);
- *Schireson v. Walsh*, 187 N.E. 921, 923 (Ill. 1933) (“clearly and conclusively”);
- *Allen v. Louisiana Bd. of Dentistry*, 531 So. 2d 787, 798 (La. Ct. App. 1988), *rev'd on other grounds*, 543 So. 2d 908 (La. 1989);
- *McFadden v. Mississippi Bd. of Licensure*, 735 So. 2d 145, 152 (Miss. 1999);
- *Davis v. Wright*, 503 N.W.2d 814, 818 (Neb. 1993) (preponderance of evidence standard not used “for the sake of uniformity,” citing equal protection concerns);
- *In re Zar*, 434 N.W.2d 598, 602 (S.D. 1989) (making exception to preponderance standard in administrative hearings for license revocations because of important interest involved);
- *Clark v. West Virginia Bd. of Med.*, 508 S.E.2d 111, 121 (W. Va. 1998) (where licensee charged with fraudulently obtaining license).

