
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

EVERGREEN WASHINGTON HEALTHCARE FRONTIER, L.L.C.
d/b/a Frontier Rehabilitation & Extended Care; ET AL.,

Appellants,

v.

DEPARTMENT OF SOCIAL AND HEALTH SERVICES, STATE OF
WASHINGTON
Respondent.

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

This nursing home rate case presents unique legal problems related to the standards for a writ of mandate and the defense of exhaustion of administrative remedies and a fact pattern that differs from the usual. The Superior Court said that her ruling was “making new law.” (Tr. 34) Appellant nursing homes believe that no new law is involved, just a mis-application of the existing law to a fact pattern that does not conform to the typical administrative case.

The unique legal structure stems from the availability of two separate remedies available to nursing homes in the rate-setting statute, RCW chap. 74.46, first through former RCW 74.46.780 and its implementing regulation, WAC 388-96-904, and the second through RCW 74.46.531(4). WAC 388-96-904 has a requirement of filing a request for administrative review of a decision of the Department within 28 days of the receipt of the notice of the action. Such time limits are common.

On the other hand, where an error or omission has been made by the Department, there is no time limit for seeking correction of the error or omission. RCW 74.46.531(4). However, that statute does not allow a nursing facility to use the appeal mechanism in RCW 74.46.780 WAC 388-96-904 if the Department refuses to correct its error.

In this case the Appellants did not appeal their July 2006 rates under WAC 388-96-904, to seek a correction to the change in method that the Department used to calculate the inflation factor, or “Vendor Rate Increase” (“VRI”). That factor is based upon the amount in the biennial appropriations bills. They were not told that a methodology change had occurred, to their detriment, and did not know of a basis for appeal of the calculation at that time.

Appellants did seek correction of the rates under RCW 74.46.531(4), after they learned the Thurston County Superior Court had ruled the Department erred as to its VRI calculation methodology used in 2006, also applied to 2007 and 2008.

The Superior Court in this case held that because the Appellants had an administrative remedy in 2006 and 2007 and did not appeal, they were foreclosed from relief through a writ of mandate to compel the Department to reverse its refusal to correct the legal errors in affected rates for July 1, 2006 and July 1, 2007. In essence, the Court made a novel ruling that if the Appellants had a plain, speedy and adequate remedy at one time (2006 or 2007), they are barred from challenging a later decision of the Department under a separate remedy denying (a) that it made an error and (b) that it would correct the rate errors.

The Superior Court did not address the Appellants' claims that the denial of correction resulted in violation of Constitution art. I, § 12 (equal protection) and art. IV, § 6 (correction of error of law, arbitrary and capricious action).

No reported opinion holds that where a party has two administrative remedies, failure to exhaust the first results in the party being barred from review of the second administrative action. The Superior Court's decision is unprecedented.

This Court is asked to review both the grant of the Department's motion for summary judgment and the denial of the Appellants' motion for summary judgment. Appellants are entitled to judgment as a matter of law.

II. ASSIGNMENTS OF ERROR

A. Grant of Department's Summary Judgment Motion

The Order of Dismissal erred in dismissing the Appellant's case based upon the doctrine of exhaustion of administrative remedies. The doctrine of exhaustion of administrative remedies either (a) does not apply to bar issuance of a writ of mandate against the Department or (b) is excused because:

1. The 2006 and 2007 administrative remedies that were available to the Appellants in those years are not the exclusive administrative remedy and do not preclude Appellants from rights under RCW 74.46.531(4) to have their erroneously set rates corrected at a later time.

Statement of Issue: Where a party has two separate administrative review remedies, is a timely appeal under the first available remedy a requisite to court review of agency action following denial of relief after pursuit of the second remedy?

2. In 2008-09 Appellants exhausted the only administrative remedy they had by requesting correction of the Department's errors under RCW 74.46.531(4).

Statement of Issue: Did the Appellants exhaust the remedy available to them in 2008-09 for correction of their July 1, 2006 and July 1, 2007 Medicaid rates?

3. Appellants had no administrative remedy available to them to remedy the Department's refusal on December 2, 2009 to correct their rates.

Statement of Issue: Does RCW 74.46.531(4) bar further administrative review after a denial of rate correction?

4. Appellants' legal bases for relief include rights under the state Constitution.

Statement of Issue: Are the constitutional issues raised by Appellants in their pleadings outside the scope of the doctrine of exhaustion of administrative remedies and preclude dismissal on that basis?

5. Appellants had no notice of the Department's decision to change its methodology for the July 1, 2006 and later rate settings, and some Appellants tried unsuccessfully to appeal their July 1, 2007 rate appeals, but were denied relief because the Department had no administrative review procedure for the VRI claims.

Statement of Issue: Do lack of notice in 2006 and the Department's refusal to provide a remedy in 2007 excuse pursuit of an administrative remedy in 2006 and 2007?

6. If the doctrine of exhaustion of administrative remedies potentially applies, its application results in unfairness to the Appellants and denies them of any remedy for the Department's violations of the legislative requirements for their July 1, 2006 and 2007 rate-settings.

Statement of Issue: Have the Appellants established the requisite unfairness to preclude application of the doctrine in this case?

B. Failure to Grant Appellant's Motion for Summary Judgment

The summary order of dismissal fails to determine that the Appellants have established all elements for entitlement to a writ of mandate and declaration of their right to rate corrections.

1. Element 1: The Department failed to comply with its duty to correct Appellants' July 1, 2006 and July 1, 2007 Medicaid nursing home rates. *Life Care Centers of America, Inc. v. DSHS*, Thurston County Cause No. 07-02172-5 ("Life Care"), established that the Department erred in calculating the amount of the Vendor Rate Increase for 2006 and 2007, and that judgment is binding on the Department. Refusal to correct the rates is arbitrary and capricious, and contrary to law and the state Constitution.

Statement of Issue: Did the Department act contrary to law or arbitrarily and capriciously in denying correction of the Appellants' July 1, 2006 and July 1, 2007 rates by its letter of December 2, 2009?

Statement of Issue: Is the Department estopped to deny it committed error of law in setting Appellants' July 1, 2006 and July 1, 2007 rates?

2. Element 2: The Appellants had no plain, speedy and adequate remedy at law for the Department's refusal on December 2, 2009 to correct their rates. The Appellants exhausted the remedy that was available to them in 2008-09 under RCW 74.46.531(4).

Statement of Issues: The issues as to the second element are listed under Assignment of Error A, above. This element was the basis for the Superior Court's denial of relief.

3. Element 3: The Appellants are directly and beneficially interested in the Department's decision to not correct their 2006 and 2007 Medicaid rates?

Statement of Issue: There is no issue as to this element.

It was not contested at the Superior Court level.

III. STATEMENT OF THE CASE

In this action, Appellants, a group of nursing homes that contract with the Respondent Department of Social and Health Services (“Department”) and provide Medicaid services, seek to have their Medicaid payment rates corrected for the July 1, 2006 and July 1, 2007 rate settings to conform to the requirements of RCW 74.46.421.

The facts material to Appellants’ case are not at issue. The July 1, 2006 and July 1, 2007 Medicaid rates had an error or omission by the Department in its calculation of the “vendor rate increase,” which is a factor applied to increase the rates to account for economic trends and conditions and is established in the biennial appropriations act. (CP 450-51)

Starting with the July 1, 2006 Medicaid rates for all Medicaid nursing home contractors the Department changed the way it interpreted RCW 74.46.421’s requirements for calculating the amount of the vendor rate increase or “VRI” applicable the July 1, 2006 rates. Instead of taking into account the legislatively set inflation factors since the year

upon which the July 1, 2006 rates were based, as it had previously done under RCW 74.46.421, it applied only the factor applicable to the current year. *Life Care Centers of America, Inc. v. DSHS*, Thurston County Cause No. 07-02172-5. (CP 500) This reduced the amount of the inflation factor from 8.2% to 1.3% for a portion of the July 1, 2006 Medicaid rates payable to all nursing homes. (Id.) (CP 500)

This change is summarized in Finding No. 10 from the *Life Care* administrative decision:

10. The Department, in calculating the facilities' July 1, 2006 Medicaid rates based upon each facility's 2003 cost reports, did not adjust the facilities' 2003 *Direct Care* and *Operations* costs forward to account for economic trends and conditions (Vendor Rate Increases or VRI) for fiscal years 2004, 2005 and 2006. During the previous "rebasings" of the *Direct Care* and *Operations* cost components in 2001, the Department did adjust the relevant costs from the 1999 cost reports forward to 2001 based upon the VRI provided in statute.

(Emphasis in original; CP 500). This resulted in a lowering of the inflation factor that was applied to the Appellants' and all other facilities' rates. In turn, this meant the facilities were paid less than the statutory standard.

One of the Medicaid nursing home contractors, Life Care Centers of America, Inc.,¹ challenged this change to the VRI calculation method, starting with the July 1, 2006 methodology change. (CP 499) Appellants did not appeal their 2006 rates under WAC 388-96-904 because they could not figure out why their rates were lowered. (CP 298-99, Patterson; CP 180, Seils) The Department did not notify them that it had changed its methodology when it issued the rates and gave notice of other changes that it made. (CP 298; CP 527, Ulrich) The Department did not change the Medicaid State Plan, which must be approved by the DHHS Centers for Medicare and Medicaid Services, to incorporate its new VRI calculation methodology.² (CP 386, Grimm) One of the present Appellants, Evergreen Healthcare, did attempt to appeal its July 1, 2007 rates as to the VRI issue, but the Department rejected the appeal because it said it had no jurisdiction to consider an issue involving the legislatively set vendor rate increase. (CP 298-99, Patterson)

Life Care's July 1, 2006 rate appeal was denied by the Department. On review in the Thurston County Superior Court, *Life Care Centers of America, Inc. v. DSHS*, Thurston County Cause No. 07-

¹ Life Care Centers of America, Inc. is not a part of the present action.

02172-5 (“*Life Care*”), the Superior Court ruled in a final judgment against the Department that the Department had failed to follow the requirements of RCW 74.46.421 and that it “had erred in its method of applying the “vendor rate increase” (VRI) to the July 1, 2006 rates of the *Life Care* facilities.” (CP 404; CP 534)³ The Court stated in its Order Reversing Administrative Decision, §2(a), (CP 404):

This requires an 8.2% vendor rate increase to the Appellants’ July 1, 2006 direct care and operations rate components, as opposed to the 1.3% previously applied by the Department.”

Pursuant to stipulations with the *Life Care* Appellants and 8 other facilities entered in their 2007 administrative proceedings, the Department also applied this decision to the July 1, 2007 rates as well, but only to the rates for the parties and facilities named in the *Life Care* case and the 8 other facilities allowed to be tied to the decision in that case. (CP 534)

The Department did not appeal the September 5, 2008 Superior Court reversal in *Life Care*, and it became a final judgment. (CP 530)

² This is a requisite to legal validity. 42 CFR § 430.20(b)(2), 42 CFR § 447.256(c); *Exeter Mem’l Hosp. Ass’n v. Belshe*, 145 F.3d 1106, 1108 (9th Circ. 1998).

³ Judge Wickham ruled in his oral decision (CP 450) that the statutory language on the calculation of the VRI had not changed, and the Department’s prior interpretation that all the inflation factors since the base year had to be taken into account “makes sense,” because the language of “the statute says that ‘rate allocations shall be adjusted annually for economic trends and conditions.’” (CP 451)

In the fall of 2008, after the Superior Court ruled in the *Life Care* case, and throughout 2009, the Appellants asked the Department to correct and reset the rates that had been calculated under the erroneous method for the VRI, under the explicit statutory authority for that in RCW 74.46.531(4). (CP 530)

On February 23, 2009 they obtained part of the relief that they sought, but only for one of the three affected years. On that day, by “Notice of Adjustment of Medicaid Nursing Facility Rates Pursuant to RCW 74.46.421” (CP 534-36) the Department corrected the same VRI calculation methodology error as to the July 1, 2008 rates for both the *Life Care* parties and for all other facilities in the Medicaid program, including the Appellants in this case. That Notice summarized the reasons for extending the *Life Care* decision to the July 2008 rate-setting:

- the *Life Care* decision was not appealed to the Court of Appeals (CP 530);
- the *Life Care* decision affected the July 1, 2008 rate-setting, even though the decision did not specifically refer to that time period (CP 535);
- the *Life Care* facilities did not appeal their July 1, 2008 rates (CP 534);

- the Department decided to extend the *Life Care* decision to the July 1, 2008 rate setting for the *Life Care* facilities (CP 535);
- the Department decided that the “most equitable course of action” was to apply the *Life Care* decision to all other facilities’ July 1, 2008 rates “to give other facilities the same treatment as that received by the Life Care facilities” and that “in the end all facilities will be treated equally” (CP 535);
- the Department recalculated all Medicaid facilities’ rates for the July 1, 2008 rate year, “using the method of compounding the VRI as ordered by the Superior Court [in the *Life Care* case] (CP 535);”
- The Department still did not apply the correction to any facilities but the *Life Care* parties for the July 1, 2006 and July 1, 2007 rates (CP 535).

Pursuant to this notice, the Department corrected rates retroactive to July 1, 2008, for ALL providers regardless of whether an appeal was filed but failed to adjust rates for July 1, 2006 or July 1, 2007 for the Appellants and other non-*Life Care* Medicaid facilities. (CP 535)

Finally, on December 2, 2009, the Department issued a letter to all of the Appellants in this case, denying the retroactive rate adjustments to correct the errors that were made on July 1, 2006 and July 1, 2007 as to these Appellants, as well as the *Life Care* parties. (CP 530-32)

Exactly opposite of the reasoning and determination on February 23, 2009, in the December 2, 2009 letter, the Department took the position that it had not “acted incorrectly.” (CP 530) It denied it made an error as to July 1, 2006 and July 1, 2007, despite the Superior Court’s *Life Care* ruling to the contrary and its own change to correct the July 2008 rates to be consistent with that ruling. (CP 531)

In summary, the Department on February 23, 2009 afforded Appellants equal protection of the law for the July 1, 2008 rates, but has refused to provide equal protection of the law to the Appellants in this case for the two earlier rate-settings. The December 2, 2009 decision arbitrarily and contrary to law refused to follow the authority of RCW 74.46.531(4), which requires the Department to correct its errors and re-set rates.

Appellants attempted to appeal this refusal through the Department’s administrative review process and had that appeal dismissed because of lack of jurisdiction in the presiding officer. (CP 141-159; *Evergreen Washington Healthcare Frontier, L.L.C. v. DSHS*

Thurston County Case No. 10-2-01833-3). There were no administrative appeal rights that were available to remedy the refusal of the Department to correct its errors as to them, as well.

Appellants then sought a Writ of Mandate and Declaratory Judgment as to their rights to have their rates corrected. The Thurston County Superior Court rejected Appellants' Motion for Summary Judgment and granted the Department's Motion to Dismiss, because the Appellants had not pursued the administrative review process under WAC 388-96-904 in 2006 and 2007. (Tr. 33-34)

The Superior Court accepted the Department's arguments concerning exhaustion of administrative remedies, ruling that the Appellants had to pursue the first of their two review rights under WAC 388-96-904 in 2006 and 2007 or they were barred from getting correction under the second procedure in RCW 74.46.531(4), Errors and Omissions. (Tr. 33-34)

Appellants seek reversal of the grant of the Department's Motion for Summary Judgment/Dismissal and also seek grant of the Appellants' Motion for Summary Judgment and declaration of their rights to have their rates corrected for July 1, 2006 and July 1, 2007 rate-settings.

IV. ARGUMENT

A. Standard of Review

This case was decided on summary judgment, so this Court must review the summary judgment order “de novo, taking the evidence in the light most favorable to the nonmoving party and engage in the same inquiry as the Superior court.” *Failor's Pharmacy v. Dep't of Soc. & Health Servs.*, 125 Wn.2d 488, 493, 886 P.2d 147 (1994); *St. John Medical Center v. State ex rel. Dept. of Social and Health Services*, 110 Wn. App. 51, 64, 38 P.3d 383 (2002). Only where there is no genuine issue of material fact and reasonable people could reach “but one conclusion” from all of the evidence is summary judgment appropriate. *Barrie v. Hosts of Am., Inc.*, 94 Wn.2d 640, 642, 618 P.2d 96 (1980); *Balise v. Underwood*, 62 Wn.2d, 195, 199, 381 P.2d 966 (1963).

Because there were cross motions for summary judgment, our analysis reviews first whether the Department carried its burden under these standards, and then applies the same logic to the Appellants’ motion. The Superior Court in granting the Department’s motion failed to take into account all of the facts and pertinent law. If it had done so, it should have granted the Appellants’ motion.

B. The Superior Court Erred by Granting the Department's Summary Judgment Motion

The Department's summary judgment motion contended that there was no subject matter jurisdiction of the Superior Court to order a writ of mandate because of the doctrine of exhaustion of administrative remedies and RCW 7.16.360. The Superior Court agreed, holding that the Appellants had a plain, speedy and adequate remedy in 2006 and 2007, so the Court was precluded from issuing a writ of mandate to compel the Department to change its 2009 decision refusing to correct Appellants' rates.

1. Assignment of Error 1(a): The 2006 and 2007 administrative remedies that were available to the Appellants in those years are not the exclusive administrative remedy and do not preclude Appellants from rights under RCW 74.46.531(4) to have their erroneously set rates corrected at a later time.

Nursing home Medicaid contractors have two means to seek correction of their rates. The first is through the set of administrative procedures found in WAC 388-96-904, which have an administrative review conference and a fair hearing if the contractor is unsatisfied with the results of the conference. WAC 388-96-904(2) and 904(5). Such appeals must be filed within 28 days of receipt of the notice of the Department's action. WAC 388-96-904(1).

The second avenue of redress is for correction of Department errors and omissions through RCW 74.46.531(4), which provides:

(4) The department shall review a contractor's request for a rate adjustment because of an alleged error or omission, even if the time period has expired in which the contractor must appeal the rate when initially issued, pursuant to rules adopted by the department under [former] RCW 74.46.780. If the request is received after this time period, the department has the authority to correct the rate if it agrees an error or omission was committed. However, if the request is denied, the contractor shall not be entitled to any appeals or exception review procedure that the department may adopt under [former] RCW 74.46.780.⁴

[Emphasis added] This remedy is plainly not time limited, nor is it dependent upon the contractor having previously filed a timely appeal under WAC 388-96-904. Appellants in this case have sought review of errors and omissions by the Department under RCW 74.46.531(4).

Therefore, the first remedy under WAC 388-96-904 is not the exclusive remedy. The two remedies are independent. However, the Superior Court's ruling erroneously links the two and analyzes the factor of availability of a plain speedy and adequate remedy at law upon a requirement that the contractor had to have availed itself of the earlier WAC 388-96-904 remedy in order get court relief from a later refusal by the Department to correct errors and omissions.

⁴ RCW 74.46.780 was repealed in the 2010 legislature.

Of course, RCW 74.46.531(4) has no such prior appeal requirement. The reason is obvious – RCW 74.46.531(4) is meant to keep the system fair and allow a provider contractor to discover and bring to the Department errors in the rates for it to correct at a later date than the short time frame of WAC 388-96-904. A provider would not have to seek review of errors or omissions under RCW 74.46.531(4) if it had appealed the same issue under WAC 388-96-904 within 28 days of receipt of notice. The Superior Court’s ruling has no precedent and effectively writes RCW 74.46.531(4) out of the statute because its logic makes it impossible for a Medicaid contractor to get relief if the Department arbitrarily refuses to correct its legal errors.

The Superior Court had no authority to add language and requirements to RCW 74.46.531(4) and 7.16.160 beyond what is established by the legislature. *Lake v. Woodcreek Homeowner’s Association*, 168 Wn.2d 694, 704, 229 P.3d 791 (2010).

The Superior Court’s interpretation also leads to absurd results: Unless a provider appealed at an early time an issue related to an error it did not know existed, it could not get relief through a statute that provides for later relief when discovered, and the courts have no oversight of decisions under that statute, RCW 74.46.531(4), refusing to correct errors of law and actions that are arbitrary and capricious.

Statutes must be interpreted to avoid such absurd results. *Odyssey Healthcare Operating BLP v. Washington State Dept. of Health*, 145 Wn. App. 131, 143-44, 185 P.3d 652 (2008); *Alderwood Water Dist. v. Pope & Talbot, Inc.*, 62 Wn.2d 319, 321, 382 P.2d 639 (1963).

Appellants' rights and remedies stem from the language of RCW 74.46.531(4). Therefore, the proper analysis is whether that statute provides for an administrative remedy that the Appellants failed to exhaust. The answer is plainly no, as the Appellants demonstrated when they tried to get an administrative remedy and were denied for lack of jurisdiction for administrative review.

The language could not be any more plain. The legislature has prohibited use of the Department's administrative review procedure, found in WAC 388-96-904, to rectify the refusal of the Department to agree that an error has been made.

Moreover, the language of RCW 74.46.531(4) recognizes that the remedy for correction of errors and omissions is not dependent upon a prior appeal under WAC 388-96-904 and former RCW 74.46.780, because it provides the remedy "even if the time period has expired in which the contractor must appeal the rate when initially issued."

This Court must apply the provisions of RCW 7.16.170 to the decision that is at issue, the denial of relief on December 2, 2009, (CP

530-32) not the rights and remedies that existed at the time the rates were initially issued.

2. Assignment of Error 1(b): Appellants exhausted the only administrative remedy they had by requesting correction of the Department's errors under RCW 74.46.531(4).

RCW 74.46.531(4) allows a Medicaid contractor to seek review at any time and however it chooses. In this case there is no issue that the Appellants sought review in 2008, after the decision in the *Life Care* case became known. (CP 530) Through its letter of February 23, 2009 the Department granted the partial correction relief, as to the rates VRI calculation for all nursing homes' July 1, 2008, even though not one provider had appealed the issue of the VRI calculation within 28 days of receipt of the initially issued rates. This demonstrates the independence of the two remedies under WAC 388-96-904 and RCW 74.46.531(4).

Following the February 23, 2009 letter notice, the issue of correction of the Appellants' July 1, 2006 and July 1, 2007 rates for the VRI calculation remained undetermined. Finally, on December 2, 2009 the Department issued its letter (CP 530-32) as a blanket denial to all Appellant nursing homes.

Most of the Appellants appealed through WAC 388-96-904, as a precautionary measure. The Department's review judge ruled that RCW 74.46.531(4) prohibited use of the Department's administrative review

procedures to challenge decisions of the Department under RCW 74.46.531(4). (CP 74)

Appellants were left with only their rights under RCW 7.16.170 et seq. and under the Declaratory Judgment Act, RCW CH. 7.24, to redress the several kinds of errors that Department made in failing to correct the Appellants' 2006 and 2007 rates to be consistent with the legal standard established in the *Life Care* case and mandates of the State Constitution, discussed below. They have pursued that remedy, this case under RCW 7.16.170 and the Declaratory Judgment Act.

3. Assignment of Error 1(c): Appellants had no administrative remedy available to them to remedy the Department's refusal on December 2, 2009 to correct their rates.

The previous discussion leaves no doubt that RCW 74.46.531(4) prohibits use of administrative remedies under WAC 388-96-904 as a means to challenge the Department's refusal to correct its errors and omissions. Appellants had no plain, speedy and adequate remedy at law to remedy the Department's refusal to correct their rates.

4. Assignment of Error 1(d): Appellants' legal bases for relief preclude application of the doctrine of exhaustion of administrative remedies.

The Superior Court was incorrect to apply the doctrine of exhaustion of administrative remedies (the "doctrine") in making her decision. There is no requirement that a party exhaust administrative

remedies, unless that requirement is plainly in a statute. *Morrison Knudsen Co., Inc. v. CHG International, Inc.* 811 F.2d 1209, 1223 (9th Cir. 1987). The doctrine is not a limit on jurisdiction. It is a method to exercise comity to administrative agencies and to promote efficient use of judicial resources and is based in the sound discretion of the court. *Id.*; *South Hollywood Hills Citizens Ass'n for Preservation of Neighborhood Safety and the Environment v. King County*, 101 Wn.2d 68, 73-74, 677 P.2d 114 (1984) (“*South Hollywood*”).

In *South Hollywood*, the Court established the rules for application of (and exceptions from) the doctrine of exhaustion of administrative remedies:

The doctrine of exhaustion of administrative remedies is well established in Washington. The rule provides that “[i]n general an agency action cannot be challenged on review until all rights of administrative appeal have been exhausted.” *Spokane Cy. Fire Protection Dist. 9 v. Spokane Cy. Boundary Rev. Bd.*, 97 Wn.2d 922, 928, 652 P.2d 1356 (1982). The test for imposition of the doctrine was spelled out recently in *State v. Tacoma-Pierce Cy. Multiple Listing Serv.*, 95 Wn.2d 280, 622 P.2d 1190 (1980). There, the court said:

[A]dministrative remedies must be exhausted before the courts will intervene: (1) “when a claim is cognizable in the first instance by an agency alone”; (2) when the agency’s authority “ ‘establishes clearly defined machinery for the submission, evaluation and resolution of complaints by aggrieved parties’ ”; and (3) when the “relief sought ... can be obtained by resort to an exclusive or adequate administrative remedy”. 95 Wn.2d at 284,

622 P.2d 1190 (quoting from *Retail Store Employees Local 1001 v. Washington Surveying & Rating Bureau*, 87 Wn.2d 887, 906-07, 909, 558 P.2d 215 (1976).)

(Emphasis added). All three elements must be met, or the doctrine does not apply.

The first principle precludes dismissal against Appellants, because some of their claims are not cognizable by the Department at all, specifically the equal protection and due process claims under Const. art. I, § 12 and art. IV, § 6. See Amended Complaint, CP 29-43.

The Department's own regulations prohibit administrative review of constitutional issues and Appellants' attempts to seek administrative review have been futile. WAC 388-96-901.

The second principle of the doctrine also is not met, because RCW 74.46.531(4) aborts the administrative review process with the first decision of the Department after it fulfills its initial statutory duty to review requests for rate revision due to errors or omissions. The statute does not allow a party seeking correction of an error to use the administrative review process, as the Appellants found out when they tried and had their appeal dismissed for lack of jurisdiction of the Department's Review Judge. There is no "clearly defined machinery ... for the resolution of complaints."

The third principle is also absent. For the doctrine to apply, the Appellants must have an administrative remedy from the December 2, 2009 decision denying correction of rates that is “exclusive or adequate.” Instead, they have no administrative remedy at all under RCW 74.46.531(4) and WAC 388-96-904, if the Department denies the request for correction as it did in this case.

Appellants attempted to appeal the denial of the rate correction in the December 2, 2009 letter, but were denied administrative jurisdiction because of RCW 74.46.531(4).⁵ Simply put, there is no administrative remedy for the Appellants’ constitutional claims.

Smoke v. City of Seattle, 132 Wn.2d 214, 937 P.2d 186 (1997), adds a further barrier to dismissal of Appellant’s case, even if there was a relationship between the available initial appeals in 2006 and 2007 and remedies following denial under RCW 74.46.531(4). The Court held that the doctrine of exhaustion does not arise unless the agency (Department) has issued a final, appealable order:

No exhaustion requirement arises, however, without the issuance of a final, appealable order. See *Valley View Indus. Park v. City of Redmond*, 107 Wn.2d 621, 634, 733 P.2d 182 (1987).

As this court has previously explained, an informal agency letter may suffice as a final decision for the purposes of exhaustion:

⁵ CP 154, Review Decision and Final Order.

A letter from an agency will constitute a final order if the letter clearly “fixes a legal relationship as a consummation of the administrative process.” Such a letter must be so written as to be clearly understandable as a final determination of rights.... [D]oubts as to the finality of such communications must be resolved in favor of the citizen.

Valley View, 107 Wn.2d at 634, 733 P.2d 182; see also *Bock v. State Bd. of Pilotage Comm'rs*, 91 Wn.2d 94, 99, 586 P.2d 1173 (1978); *Ventures Northwest Ltd. Partnership v. State*, 81 Wn. App. 353, 367, 914 P.2d 1180 (1996).

[Emphasis added]

The rates issued in 2006 and 2007 were not “final,” nor the “consummation of the administrative process” because of the possibility of correction under RCW 74.46.531(4) at some later time. Therefore, even if the Appellants had been given notice of the change in calculation methodology, the availability of the first remedy in 2006 and 2007 does prevent the re-opening of the rates to correct errors at a later time and cannot be a bar to remedies related to errors or omissions.

Even if the doctrine did potentially apply, three of the bases for excuse from the doctrine stated in *South Hollywood* are present: (1) presence of constitutional claims in the Appellant’s case, (2) lack of notice to Appellants of the change in calculation methodology, and (3) unfairness.

South Hollywood, 101 Wn.2d at 73-74, sets a bright line excluding Appellants constitutional claims under Art. 1, § 12 and Art. IV, §6 from the scope of the doctrine of exhaustion of administrative remedies:

Washington courts have recognized exceptions to the exhaustion requirement in circumstances in which these policies are outweighed by consideration of fairness or practicality. For example, if resort to the administrative procedures would be futile, exhaustion is not required. *Zylstra v. Piva*, 85 Wn.2d 743, 539 P.2d 823 (1975). Similarly, if the party is challenging the constitutionality of the agency's action or of the agency itself, the exhaustion requirement will be waived. *Ackerley Communications, Inc. v. Seattle*, 92 Wn.2d 905, 602 P.2d 1177 (1979) cert. denied, 449 U.S. 804, 101 S.Ct. 49, 66 L.Ed.2d 7 (1980); *Higgins v. Salewsky*, 17 Wn. App. 207, 562 P.2d 655 (1977). Also, if the aggrieved party has no notice of the initial administrative decision or no opportunity to exercise the administrative review procedures, the failure to exhaust those procedures will be excused. *Gardner v. Pierce Cy. Bd. of Comm'rs*, 27 Wn.App. 241, 243-44, 617 P.2d 743 (1980).

[Emphasis added.]

Constitutional Issues. If there are administrative remedies available, exhaustion is waived when a claimant has made a colorable constitutional claim, as constitutional claims are not suited for resolution in administrative proceedings. *James v. Shalala*, 156 F.R.D. 660, 662 (E.D. Wash. 1994). WAC 388-96-901(2) precludes an administrative law judge hearing a constitutional claim.

Appellants are challenging the constitutionality of the Department's refusal to correct their rates in accord with the methodology for the VRI required in the *Life Care Case*. In the Appellants' motion for summary judgment, the Complaint (CP 4-16) and Amended Complaint (CP 29-43) Appellants have stated claims and arguments that the refusal to correct the rates violated Const. art. 1, 12 (equal protection/special privileges) and art. IV, § 6 (unlawful act; arbitrary and capricious act). The Superior Court did not rule on these points. If the exhaustion requirement applies at all, they require that it be waived and that the writ be issued. *Id.*

The last two of the Appellants' assignments of error also relate to the bases for excuse from the potential application of the doctrine of exhaustion.

5. Assignment of Error 1(e): Appellants had no notice of the Department's decision to change its methodology for the July 1, 2006 and later rate settings, and some Appellants were told that in connection with their July 1, 2007 rate appeals, the Department had no administrative review procedure for the VRI claims.

Appellants in their declarations⁶ have stated that they had no notice of the change in the method of calculating the vendor rate increase in July 2006, nor in July 2007. The Department did not contest these statements of lack of knowledge. Consequently, the Appellants had no

reason to appeal the VRI issue in this case back in 2006 and 2007. Again, this fact requires waiver of the doctrine of exhaustion of remedies, if it applies at all.

6. Assignment of Error 1(f): Application of the doctrine results in unfairness to the Appellants and denies them of any remedy for the Department's violations of the legislative requirements for their July 1, 2006 and 2007 rate-settings

Finally, Appellants' efforts to find and pursue an administrative remedy to correct Mr. Southon's refusal to correct the Department's errors as to the July 1, 2006 and July 1, 2007 rates are uncontested. They appealed under WAC 388-96-904 and had their appeals dismissed. (CP 59-76) They have been thwarted at every turn. Attempting to obtain administrative relief has proven futile, leaving the Appellants with a path strewn with denials of relief. Denial of court relief where there is no administrative remedy is simply unfair.

Therefore, the doctrine of administrative remedies does not apply to this unique situation, where, unlike almost every other agency situation, the Appellants had two different means of obtaining rate relief.

The practical and deleterious effect of the Superior Court's ruling is that it relinquishes judicial oversight of the Department's actions, even arbitrary and capricious decisions and those contrary to law, because the

⁶ See, e.g., Declarations of Patterson (CP 298-99); Seils (CP 180).

ruling gives the Appellant facilities no ability to challenge the 531(4) decision through writ of mandate. This is contrary to the role of the courts, as discussed below.

C. The Appellants Are Entitled To Writ Of Mandate to Order Correction of Their July 1, 2006 and July 1, 2007 Rates.

1. Standards of Review: Declaratory Judgment and Writ of Mandate.

a. Writ of Mandate

Appellants seek a writ of mandate, which is authorized by RCW 7.16.160, et seq. and is applicable to public official and entities “to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station.” *Community Care Coalition v. Reed*, 165 Wn.2d 606, 614, 200 P.3d 701 (2009). *Eugster v. City of Spokane*, 118 Wn. App. 383, 402, 76 P.3d 741 (2003), summarizes the three elements that must be established:

(1) the party subject to the duty is under a clear duty to act, RCW 7.16.160; (2) the applicant has no “plain, speedy and adequate remedy in the ordinary course of law,” RCW 7.16.170; and (3) the applicant is “beneficially interested,” RCW 7.16.170.

That court also summarized the review standards :

The determination of whether a statute specifies a duty that the person must perform is a question of law. Whether there is a plain, speedy, and adequate remedy in the ordinary course of the law is a question left to the court in which the proceeding is instituted.

Eugster, at 403, citing *River Park Square, L.L.C. v. Miggins*, 143 Wn.2d 68, 76, 17 P.3d 1178 (2001). “Mandamus is appropriate to compel a government official or entity ‘to comply with law when the claim is clear and there is a duty to act.’” *Eugster*, at 404.

b. Declaratory Judgment.

Appellants also rely on the Uniform Declaratory Judgments Act, RCW chapter 7.24. RCW 7.24.010 authorizes the court to declare rights, and RCW 7.24.020 extends that authority to declarations of rights under statutes. The four elements of the case are: (1) an actual, present and existing dispute; (2) parties with genuine and opposing interests; (3) interests that are direct and substantial; and (4) a judicial determination will be final and conclusive. *Branson v. Port of Seattle*, 152 Wn.2d 862, 877, 101 P.3d 67 (2004).

Appellants will demonstrate that all elements of both a writ of mandate case and a declaratory judgment case are presented on these uncontested facts, and that they are entitled to relief.

2. Application of RCW 7.24.020 and 7.16.160: Appellants are Entitled to a Declaration of Right to Relief and Writ of Mandate to Compel Revision of their Rates to Be in Accord with Law.

a. Summary

The Department violated the law in establishing the Appellants’ July 1, 2006 and July 1, 2007 Medicaid payment rates. It made a system-

wide error in calculating the amount of the vendor rate increase (VRI). That error has been adjudicated against the Department in the *Life Care* case decided in Thurston County Superior Court on September 5, 2008, which Order became a final judgment on October 5, 2008. The Department is estopped to deny that there was an error.

The error resulted in all of the Appellants' rates being set at less than what was required by law and, consequently, underpayment for services rendered to Medicaid residents in the period July 1, 2006 through June 30, 2008. The rate-setting errors are violations of a clear duty on the Department to set and correct rates to be in accord with its enabling statute, chapter 74.46, RCW, and specifically RCW 74.46.421 and 74.46.531(4).

The Medicaid payment system provides two mechanisms for correcting errors, one at the time the rates are issued and another, RCW 74.46.531(4), to later correct errors or omissions of either the Department or the Appellant facilities that are discovered. Appellants have sought correction of the errors through the latter statutory remedy. The Department refused to grant the relief, and the Department's review judge has held that the Appellants have no administrative remedy. RCW 74.46.531(4) creates a clear second duty on the Department to correct the

errors or omissions in rate-setting, and the Department has refused to comply with this obligation.

The failure of the Department to correct the errors in Appellants' rates also results in denial of equal protection of the laws, in violation of art. I, § 12 of the State Constitution. The refusal to grant the same relief to these Appellants as in the *Life Care* case results in the Department acting contrary to law and is arbitrary and capricious. State Const. art. IV, § 6 grants this Court authority to correct the errors of law and arbitrary and capricious denial of equal treatment. The Department has a clear duty to comply with constitutional requirements and this Court has the clear authority to enforce the Department's compliance.

The second and third elements for issuance of the writ of mandate are also met. The Appellants have no plain, speedy and adequate remedy in the ordinary course of law to rectify the December 2, 2009 correction refusal. In fact, the Department has taken the position that they have no administrative remedy at all, and the Department's review judge has agreed with the Department. The Appellants are beneficially interested because they are participants in the Medicaid payment program, and their payment rates are at issue.

Appellants see no basis for the Department to contest that the four elements of a Declaratory Judgment case are present. The issues

presented in this motion stem from constitutional, contractual and statutory rights of the Appellants that are being violated.

b. Clear Duty Based upon the “Errors or Omissions” Statute, RCW 74.46.531(4)

RCW chapter 74.46, the Medicaid reimbursement law for nursing homes, provides two mechanisms for review of the rate determinations of the Department. The first is former RCW 74.46.780,⁷ which provided:

74.46.780 Appeals or exception procedure. The department shall establish in rule, consistent with federal requirements for nursing facilities participating in the Medicaid program, an appeals or exception procedure that allows individual nursing care providers an opportunity to submit additional evidence and receive prompt administrative review of payment rates with respect to such issues as the department deems appropriate.

The Department adopted WAC 388-96-904 to implement this statute. In this case the Department has insisted that this appeals procedure and its requirement that a request for review, or appeal, must be filed within 28 days after receipt is the exclusive mechanism for obtaining review. It is not.

RCW 74.46.531(4) provides an alternative where an error or omission has been made by the Department:

⁷ The legislature repealed this statute in the 2010 session, after the periods applicable to this case. The implementing regulation, WAC 388-96-904, remains and has not been repealed.

(4) The department shall review a contractor's request for a rate adjustment because of an alleged error or omission, even if the time period has expired in which the contractor must appeal the rate when initially issued, pursuant to rules adopted by the department under RCW 74.46.780.⁸ If the request is received after this time period, the department omission was committed. However, if the request is denied, the contractor shall not be entitled to any appeals or exception review procedure that the department may adopt under RCW 74.46.780.

(Emphasis added) The statute explicitly precludes the argument advanced by the Department on December 2, 2009 in denying the Appellants' requests for correction of their July 1, 2006 and July 1, 2007 rates, that the requests had to be filed within the 28-day time frame from receipt of the initial rate notification specified in WAC 388-96-904.

RCW 74.46.531(4) gives the Department the authority to correct its errors in rate-setting. The December 2, 2009 Notice denies that it made an error. However, it can error only if it is arbitrary and capricious and ignores that (a) the *Life Care* case as adjudicated its error, (b) it has admitted its error in the February 23, 2009 Notice and it did not amend the State Plan to incorporate the new VRI methodology, making it unlawful under federal law.

⁸ The Department has no rules relating to review of errors or omissions review requests.

c. Collateral Estoppel Precludes the Department from Claiming It Did Not Make an Error as to Appellants' Rates

In *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 305-308, 96 P.3d 957 (2004), the Court summarized the standards applicable to a motion for summary judgment, in the context of collateral estoppel and res judicata:

Summary judgment is appropriate where there are no disputed material facts, and the moving party is entitled to judgment as a matter of law. CR 56(c); *McGowan v. State*, 148 Wn.2d 278, 289, 60 P.3d 67 (2002). The appellate court engages in the same inquiry as the Superior court, with questions of law reviewed de novo and the facts and all reasonable inferences from the facts viewed in the light most favorable to the nonmoving party. *Williamson, Inc. v. Calibre Homes, Inc.*, 147 Wn.2d 394, 398, 54 P.3d 1186 (2002). Whether collateral estoppel applies to bar relitigation of an issue is reviewed de novo. *State v. Vasquez*, 109 Wn. App. 310, 314, 34 P.3d 1255 (2001), aff'd, 148 Wn.2d 303, 59 P.3d 648 (2002); *State v. Bryant*, 100 Wn. App. 232, 236-37, 237 n. 9, 996 P.2d 646 (2000), rev'd on other grounds, 146 Wn.2d 90, 42 P.3d 1278 (2002); see *Purdy v. Zeldes*, 337 F.3d 253, 258 (2d Cir.2003) (district court's grant of summary judgment on the basis of collateral estoppel is reviewed de novo); *Fireman's Fund Ins. Co. v. Stites*, 258 F.3d 1016, 1020 (9th Cir. 2001) (under summary judgment standard of review availability of collateral estoppel is an issue of law reviewed de novo).

Collateral estoppel, or issue preclusion, bars relitigation of an issue in a subsequent proceeding involving the same parties. 14A Karl B. Tegland, *Washington Practice, Civil Procedure* § 35.32, at 475 (1st ed.2003) (hereafter Tegland, *Civil Procedure*). It is distinguished from claim preclusion “ ‘in that, instead of preventing a second assertion of the same claim or cause

of action, it prevents a second litigation of issues between the parties, even though a different claim or cause of action is asserted.’ ”

.....

Collateral estoppel may be applied to preclude only those issues that have actually been litigated and necessarily and finally determined in the earlier proceeding. *Shoemaker*, 109 Wn.2d at 507, 745 P.2d 858. Further, the party against whom the doctrine is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding. *Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 264-65, 956 P.2d 312 (1998).

For collateral estoppel to apply, the party seeking application of the doctrine must establish that (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding, (2) the earlier proceeding ended in a judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding, and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied. *Reninger*, 134 Wn.2d at 449, 951 P.2d 782; *State v. Williams*, 132 Wn.2d 248, 254, 937 P.2d 1052 (1997); *Claim and Issue Preclusion*, 60 Wash. L. Rev., at 831.

d. The Elements of Collateral Estoppel Are Met to Establish the Department’s Errors.⁹

(1) Identity of Issues

In the present case Appellants have the very same issue as decided in the *Life Care* case and quoted above: that they are entitled to have their direct care and operations component rates for the period

⁹ The Superior Court did not reach this issue.

July 1, 2006 through June 30, 2007, and all rate components for the period July 1, 2007, through June 30, 2008, retroactively set for the same time periods, using the VRI factor principles required by the Court's final order in the *Life Care* case.

As noted above, the court in the *Life Care* case ruled on August 1, 2008 in its oral opinion that the Department had incorrectly interpreted the statute as to the method for compounding the annual VRI. The Court ruled that the Department had made an error of law. The same error of law is being applied to the present Appellants.

The first element of estoppel is met.

(2) Judgment on the Merits

This issue cannot be contested. The *Life Care* case was fully litigated at the administrative level and the Superior Court level. See CP 407 et seq., Appendix A to Order Reversing Administrative Decision ("Order" CP 403-05) and the Superior Court trial brief of the *Life Care* parties (CP 389-401). The Order became final on October 5, 2008, when no appeal was filed, as admitted by the Department in its December 2, 2009 denial notice at issue in this case.

(3) DSHS Was a Party to the *Life Care* Case.

Again, this cannot be contested. See caption on the Order Reversing Administrative Decision. (CP 403; CP 455)

(4) No Injustice to the Department.

The Department is a statutory agency charged with administering the Medicaid program for nursing homes. As such, it has no authority in rate-setting to go beyond the authority granted to it by the legislature. *State ex. Rel. Living Services, Inc. v. Thompson*, 95 Wn.2d 753, 759, 630 P.2d 925 (1981) (“Administrative agencies may not modify or amend a statute by regulation.”)

There can be no unfairness to an agency to require it to comply with its statutory mandate as to the application of the vendor rate increase. The Department has already adjusted the July 1, 2006 and July 1, 2007 component rates for the *Life Care* parties and has corrected the same error for the July 1, 2008 rate-setting for all facilities, stating as to the 2008 correction that it was the equitable thing to do.

The Department has by these actions admitted that it is not unfair to retroactively adjust the rates to be in compliance with law. It was not unfair to adjust the rates for July 1, 2008, and it is also not unfair to adjust them for July 1, 2006 and July 1, 2007. In fact, the February 23, 2009 Notice finds that extension of the Superior Court’s Order to all facilities for the July 1, 2008 rate-setting and retroactively setting the rates to be in accord with the Order was “the most equitable course of

action.” (CP 535). Just the opposite is true: it is manifestly not fair to treat the *Life Care* parties more favorably than these Appellants.

Accordingly, the doctrine of equitable estoppel requires that the Department be bound by the determination that it erred in calculation of the VRI applicable the for July 1, 2006 and July 1, 2007 rate-settings as to the Appellants, as well as the *Life Care* parties. It cannot deny the error, even if it “feels” that it did not make one.

Its failure to find in the December 2, 2009 determination of Mr. Southon that there was an error is arbitrary and capricious, that is, “willful and unreasoning action, without consideration of and in disregard of facts or circumstances.” The Department must apply RCW 74.46.421 in a consistent manner to comply with rules of statutory construction. *Seattle Area Plumbers v. Washington State Apprenticeship and Training Council*, 131 Wn. App. 862, 880-81,129 P.3d 838 (2006)(“Agencies may not treat similar situations in different ways”); *Vergeyle v. Employment Sec. Dep't*, 28 Wn. App. 399, 404, 623 P.2d 736 (1981), *overruled on other grounds in Davis v. Employment Sec. Dep't*, 108 Wn.2d 272, 276, 737 P.2d 1262 (1987) (citations omitted). An inconsistent interpretation would be arbitrary and capricious. An agency order is arbitrary or capricious “if it is willful, unreasoning, and issued without regard to or consideration of the surrounding facts and

circumstances.” *Kreidler v. Eikenberry*, 111 Wn.2d 828, 837, 766 P. 2d 438 (1989); *Western Washington Operating Engineers Apprenticeship Comm. v. Washington State Apprenticeship and Training Council*, 130 Wn. App. 510, 123 P.3d 533 (2005); *Manke Lumber Co. v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 113 Wn. App. 615, 623, 53 P.3d 1011 (2002). It disregards the *Life Care* final judgment, which is binding upon it.

e. Clear Legal Duty to Correct the Error under Art. 1, §12 of the State Constitution

The Washington Constitution’s privileges and immunities clause, or equal protection clause, in art. I, §12, provides:

SECTION 12. SPECIAL PRIVILEGES AND IMMUNITIES PROHIBITED. No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

The purpose was explained in *Grant County Fire Protection District No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 809, 83 P.3d 419 (2004; sometimes called “*Grant County II*”) and quoted again with approval in *Andersen v. King County*, 158 Wn.2d 1, 14, 138 P.3d 963 (2006):

Enacted after the Fourteenth Amendment, state privileges and immunities clauses were intended to prevent people from seeking certain privileges or benefits to the disadvantage of others. The concern was prevention of favoritism and special treatment *for a few*, rather than

prevention of discrimination against disfavored individuals or groups. (Emphasis by the Court).

Art. I, §12 applies to rate-setting actions by government agencies, including the Department. *Inman v. Sandvig*, 170 Wash. 112, 15 P.2d 696 (1932). In *Washington Ass'n of Child Care Agencies v. Thompson*, 34 Wn. App. 225, 230-31, 660 P.2d 1124 (1983), the Court held:

Most often, equal protection cases concern whether state legislation comports with the constitutional mandate. However, the equal protection clause reaches the exercise of state power however manifested, whether exercised directly or through the subdivision of the state and by any of its agents. *Avery v. Midland Cy.*, 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45 (1968).

The validity of a number of governmental activities is measured against the backdrop of the equal protection clause. These activities include apportionment of a county's districts to insure equal representation of its legislative body, *Avery v. Midland Cy.*, supra; a state welfare department's regulation which establishes a maximum grant of welfare benefits to families irrespective of the number of family members, *Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1969); a court rule establishing eligibility of applicants to the state bar, *Nielsen v. State Bar Ass'n*, 90 Wn.2d 818, 585 P.2d 1191 (1978). We are satisfied that DSHS's rates for child care agencies must stand the scrutiny of the equal protection clause.

The degree of scrutiny is whether the Department's actions have a rational basis, and the Department's rates must meet the following three tests: (1) the rate methodology must apply alike to all persons within a designated class; (2) there must be reasonable grounds for

distinguishing between those who fall within the class and those who do not; and (3) the disparity in treatment must be germane to the object of the laws under which the agency has acted. *Salstrom's Vehicles, Inc. v. Dep't of Motor Vehicles*, 87 Wn.2d 686, 694, 555 P.2d 1361 (1976); *KMS Financial Services, Inc. v. City of Seattle*, 135 Wn. App. 489, 498, 146 P.3d 1195 (2006); *Washington Ass'n of Child Care Agencies v. Thompson, supra*, at 231.

Equal protection requires that similarly situated persons receive like treatment under the law. *In re Woods*, 154 Wn.2d 400, 412, 114 P.3d 607 (2005); *Gossett v. Farmers Ins. Co.*, 133 Wn.2d 954, 979, 948 P. 2d 1264 (1997); *State v. Linssen*, 131 Wn. App. 292, 297, 126 P.3d 1287 (2006).

A valid law, administered in a manner that unjustly discriminates between similarly situated persons, violates equal protection. *State v. Gaines*, 121 Wn. App. 687, 705, 90 P.3d 1095 (2004).

The Superior Court did not address these principles. This Court has a duty to do so under its de novo review. The analysis is straightforward.

All nursing homes that participate in Medicaid are similarly situated because they are paid according to the same form of contract, same statutes and same regulations. Accordingly, they are entitled to be

treated all in like manner. But the Department has treated the present Appellants' reimbursement calculation method differently from the *Life Care* facilities, because it revised upward the *Life Care* rates but has refused to do so for the Appellants, to correct the July 1, 2006 and July 1, 2007 VRI calculation errors.

There are no reasonable grounds for the disparate treatment. The Department's February 23, 2009 action to re-set the July 1, 2008 rates exactly as Appellants now seek for the July 1, 2006 and July 1, 2007 rate-settings demonstrates that fair and equitable and appropriate treatment under the statutory scheme is to correct the errors and not discriminate in favor of the very few. The Department conceded in the notice that this was "the most equitable course of action." CP (535) The Court must conclude that the Department has already conceded by its actions re-setting the July 1, 2008 rates the validity of Appellants' points and that the denial as to the July 1, 2006 and July 1, 2007 rate corrections is arbitrary and capricious.

The excuses for denial proffered in the Department's December 2, 2009 denial letter do not relate to any legitimate purpose in RCW chapter 74.46. Under that law, every facility must have the same VRI applied to its rates. See RCW 74.46.431. That is the stated legislative

mandate, and it leaves no room for treating some facilities more favorably than others as to the VRI.

This case is the perfect example of a valid law (RCW 74.46.431) being applied to similarly situated parties in a disparate manner, contrary to the purposes of the statute, which requires that the same VRI be applied to all facilities, and RCW 74.46.531(4) requiring that errors be corrected. The Department's refusal to reset Appellants' rates violates the equal protection mandate and affords special privileges to a few facilities, contrary to the purpose for art. I, § 12. *State v. Gaines, supra; Grant County II, supra*. This Court must order that the Department treat Appellants the same as it has the *Life Care* facilities.

f. Clear Duty to not Act Unlawfully, Arbitrarily or Capriciously; Const. Art. IV, § 6.

In *Gehr v. South Puget Sound Community College*, 155 Wn. App. 527, 228 P.3d 823 (2010), the Court discussed the rules relating to review of agency action under Const. art. IV, § 6:

The Washington State Constitution vests superior courts with inherent authority to review administrative decisions for illegal or manifestly arbitrary and capricious acts. Const. art. IV, § 6; *Pierce County Sheriff v. Civil Serv. Comm'n of Pierce County*, 98 Wn.2d 690, 693-94, 658 P.2d 648 (1983). The superior court's scope of review under its inherent constitutional authority is limited to determining whether the administrative action was arbitrary, capricious, or illegal. *Foster v. King County*, 83 Wn. App. 339, 346, 921 P.2d 552 (1996).

Appellants have demonstrated that the denial of corrective rate-setting as to their July 1, 2006 and July 1, 2007 rates is contrary to the law, as determined in the *Life Care* case, and the Department's own actions in correcting the July 1, 2008 rates for all facilities to be in conformity with the law as determined in *Life Care*. It is also arbitrary and capricious because the Department has ignored the Superior Court ruling in *Life Care* against it and has refused to correct its errors as to these Appellants, as well as the *Life Care* beneficiaries.

- g. The State Plan was not amended, and failure to follow the established methodology violates federal law.

We noted above that the change in methodology for the VRI calculation results in the Department not conforming to the approved Medicaid State Plan, which is the federally approved document that governs the methods of reimbursement for each state Medicaid program. 42 CFR § 430.20(b)(2), 42 CFR § 447.256(c); *Exeter Mem'l Hosp. Ass'n v. Belshe*, 145 F.3d 1106, 1108 (9th Cir. 1998; “[A]pproval is required before implementation of amendments to the Plan”). The Department failed to seek federal approval before implementing the change in 2006 or continuing it in 2007. (CP 386, Grimm) This is one more reason that the denial of correction to the 2006 and 2007 rates for Appellants is

arbitrary, capricious and contrary to the duty of the agency to pay rates in conformity with law.

- h. This Court Has Jurisdiction to Declare that the Department has an Obligation to Apply the Law Relating to the VRI as Determined in the *Life Care* Case and Issue a Writ of Mandate to Order Rate Recalculation for July 1, 2006 and July 1, 2007.

The Department's whole defense to liability is its claim that the Court is without jurisdiction in this case because the Appellants did not seek administrative review under WAC 388-96-904 in the first 28 days after they received their July 1, 2006 and July 1, 2007 rates.

As discussed above, there was no administrative remedy to exhaust from the Department's December 2, 2009 denial of rate correction. Appellants are entitled to a declaration that their contractual rights, which incorporate statutory rate-setting principles, require correction of their 2006 and 2007 rates to be consistent with the legal mandate of the Department.

V. CONCLUSION

Chapter 74.46, RCW is different from most remedy provisions in that it provides two, not one, avenues of getting corrected the Department's actions in setting and paying rates, one early on in the reimbursement process and one that can be much later in time and is not limited by short appeal periods. The statute is not static in time but

provides mechanisms for making sure correct payments are done for services rendered. Reporting errors by providers can be corrected and rates changed based upon the correct numbers. Similarly, the Department's errors also can be corrected under RCW 74.46.531(4). These are tools to ensure that the system established by the legislature is being followed.

The Department has done its best to bury its 2006 and 2007 VRI calculations errors under a confusing set of legal arguments. Yet the bottom line is that this Court must exercise its oversight responsibilities under RCW 7.16.160 et seq. and the State Constitution. The ultimate issue is whether the Department made an error when it changed the VRI calculation methodology for July 2006 and July 2007. That issue has been adjudicated to final judgment in *Life Care* and is not available for debate at this time.

Appellants are entitled to Declaratory Judgment and Writ of Mandate requiring the Department to retroactively correct the July 1, 2006 and July 1, 2007 component rates using the compounding method for the VRI specified in *Life Care*.

Respectfully submitted this 30th day of June, 2011.

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DECLARATION OF SERVICE

I declare that on the 30th day of June, 2011, I caused to be filed with the Court, via ABC Legal Messengers, Inc., the original of the following documents:

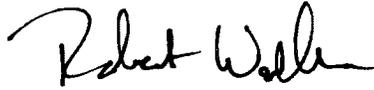
APPELLANTS' OPENING BRIEF

and served copies of the above-named documents upon the following addresses via Messenger:

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Dated: June 30, 2011

Place: Seattle, WA

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**APPENDIX A – Summary Description of the Medicaid
Rate Setting Method in RCW Chapter 74.46, as of 2006 and 2007**

A description of the Medicaid nursing home payment system codified in RCW chapter 74.46 and in regulations at WAC chapter 388-96 is included with the rate notifications issued for each July 1. See, e.g. CP 184-190, 326-330. The Department purchases nursing home services for Medicaid recipients by contracts which incorporate the statutory and regulatory system. RCW 74.09.120; RCW chapter 74.46. In most general terms, the system may be described as a prospective payment methodology based upon individual facility costs and divided into seven rate components: direct care, therapy care, support services, operations, property, financing allowance and variable return. RCW 74.46.431(1). Rates are re-established each July 1, and additionally for direct care once each calendar quarter.

By March 31 of each year nursing homes participating in the Medicaid program report their costs in each component cost center to the Department in a cost report that speaks to the prior calendar year. Only certain cost reporting years have been selected by the legislature to act as a “base year,” that is, the year whose costs are used to calculate the July 1 rates.

The rates in the seven components are established based upon historical costs in the base year, or in the case of property, depreciation expense and historical net book value of fixed assets as of the end of the previous reporting year. The legislature has codified the base years in statute, RCW 74.46.431, and the base years vary by cost center. In the 2006 legislative session, the legislature amended RCW 74.46.431 to require that for the direct care component rate and the operations rate component, the 2003 calendar year cost report data from each facility was to be used to establish the July 1, 2006 direct care and operations component rates for each facility. Laws 2006 c 258 s 2. On the other hand, the July 1, 2006 therapy care and support services rate components continued to be based upon 1999 cost report data. The updating of direct care and operations from the 1999 to 2003 cost report years is called “rebasings.”

In calculating the rates, the Department is required to annually apply an inflation factor as established in the biennial appropriations act, commonly known as the vendor rate increase, or “VRI,” to the historical cost data. RCW 74.46.431(4)(e) (direct care), RCW 74.46.431(5)(b) (therapy care), RCW 74.46.431(6)(b) (support services), RCW 74.46.431(7)(b) (operations).