

FILED

FEB 27 2013

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DIVISION III
STATE OF WASHINGTON
By _____

NO. 31116-3-III

**COURT OF APPEALS FOR DIVISION III
STATE OF WASHINGTON**

HOSPICE OF SPOKANE, a Washington-profit corporation,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH, a Washington
governmental agency, SECRETARY MARY SELECKY, Secretary of
Washington's Department of Health in her official and individual capacity,
FAMILY HOME CARE CORP., a Washington corporation,

Respondents.

BRIEF OF RESPONDENT FAMILY HOME CARE

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I. INTRODUCTION

This is an appeal from an administrative law judge's decision, which was affirmed by the superior court. A Health Law Judge ("HLJ") ruled that respondent Family Home Care ("FHC") met the regulatory criteria for issuance of a Certificate of Need ("CN") permitting FHC to open a hospice agency in Spokane County to complement its existing home health agency. The licensing agency, respondent Department of Health's CN Program ("the Department"), advocated at the hearing that FHC met the regulatory criteria for issuance of a CN and urged approval of FHC's application to provide hospice care to Spokane County residents.

The agency action subject to judicial review in this appeal is the HLJ's final order granting a CN to FHC. *See DaVita, Inc. v. Dept. of Health*, 137 Wn. App. 174, 181, 151 P.3d 1095 (2007) ("the HLJ is the secretary's designee, with the authority to make final decisions and issue a final order for CN applications. Thus, the agency action we review ... is the HLJ's written order, not the [CN] Program's written evaluation."). Appellate courts "sit in the same position as the superior court" when reviewing HLJ rulings, applying applicable law to the record before the HLJ. *Id.*, at 180.

Petitioner Hospice of Spokane ("HOS") is one of two existing hospice providers in Spokane County. HOS intervened in the

administrative proceeding, unsuccessfully arguing Spokane County residents have no need for another hospice agency to provide palliative care to dying residents.¹

Although HOS raised several arguments before the HLJ and the superior court, HOS has now narrowed its challenge to a single issue. HOS's challenge focuses on the HLJ's interpretation of WAC 246-310-290, which provides an equation for forecasting need for additional hospice services in each county. HOS argues the HLJ erred by interpreting WAC 246-310-290 as enacting a three-year "planning horizon," rather than a one-year "planning horizon."²

The HLJ held hospice CN applicants must prove they will have a minimum average daily census ("ADC") of thirty-five patients by the third year of operation in order to prove there will be sufficient future need for

¹ "Hospice services" are defined as "symptom and pain management provided to a terminally ill individual, and emotional, spiritual and bereavement support for the individual and family in a place of temporary or permanent residence and may include the provision of home health and home care services for the terminally ill individual." RCW 70.127.010(13); WAC 246-310-290(1)(e).

² As part of the Department's health care planning pursuant to RCW 70.38.015, need for additional health services is determined by forecasting what a community's need will be for additional health care services at some point in the future. *See generally, e.g.*, WAC 246-310-010(48), -261(5)(c), -263(9)(c). This future date is variously referred to as the "forecast year," "projection period," or "planning horizon." *See id.* FHC uses the descriptive phrase "planning horizon" because that is the phrase the HLJ used. *See CP 79.*

additional hospice services in the county they seek to provide services.³ In so ruling, the HLJ correctly interpreted and applied the three-year planning horizon set forth in WAC 246-310-290(6), which provides: “Hospice agencies applying for a certificate of need must demonstrate they can meet a minimum average daily census (ADC) of thirty-five patients by the third year of operation.”

HOS is incorrect that WAC 246-310-290(6) is irrelevant to an HLJ’s determination of whether a hospice CN applicant can demonstrate there is a future need for an additional hospice agency in the planning area. HOS fails to show the HLJ’s interpretation of the Department’s own regulation, which is presumed correct and entitled to substantial deference, was contrary to law. Responsible health care planning requires use of a planning horizon that forecasts a community’s future health care needs beyond just one year. Consequently, the HLJ’s ruling applying the three-year planning horizon in WAC 246-310-290(6), rather than a one-year planning horizon advocated by HOS, should be affirmed.

II. ASSIGNMENTS OF ERROR

FHC does not assign error to the HLJ’s or superior court’s rulings

³ At the administrative hearing level, CN applicants have the burden of proving by a preponderance of evidence that their application meets all applicable criteria, including that the “planning area” has a need for the project. WAC 246-10-606; WAC 246-310-210(1). “Planning area” is defined as “each individual county” for purposes of CN applications for a hospice agency. WAC 246-310-290(1)(f).

that FHC met all the regulatory criteria for issuance of a CN to provide hospice care in Spokane County. HOS assigns error only to the HLJ's ruling that WAC 246-310-290(6) enacted a three-year planning horizon, not a one-year horizon, for determining need for additional hospice services.

III. COUNTER-STATEMENT OF THE ISSUE PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

Did the HLJ (and superior court) correctly interpret WAC 246-310-290(6) as enacting a three-year planning horizon, requiring hospice CN applicants to demonstrate there is sufficient need for another hospice agency by applying the methodology for calculating need in WAC 246-310-290(7) to show the applicant will have an average daily census of 35 hospice patients by the third of operation, rather than within the year after the application is submitted?

IV. STATEMENT OF THE CASE

A. Overview of Regulatory Framework

Certain health care services, including Medicare certified hospice care, can be offered in Washington only by holders of a CN. *See* RCW 70.38.105; WAC 246-310-010(26); WAC 246-310-020. A CN is a "nonexclusive license" issued by the Department. *St. Joseph Hosp. v. Dept. of Health*, 125 Wn.2d 733, 736, 887 P.2d 891 (1995).

The overriding purpose of the CN law is the “promotion and maintenance of access to health care services for all citizens.” *Overlake Hosp. Assn. v. Dept. of Health*, 170 Wn.2d 43, 55, 239 P.3d 1095 (2010). Of secondary significance is “controlling the costs of medical care and promoting prevention.” *Id.* Thus, CN regulations are interpreted consistent with the overriding purpose of the CN statute (RCW 70.38.015(1)), which is to “provide accessible health services, health manpower, [and] health facilities” to all state citizens. *Id.*

In deciding whether to grant a CN application, the Department considers four criteria: (1) need; (2) financial feasibility; (3) structure and process of care; and (4) cost containment. WAC 246-310-210 through -240.⁴ To obtain a CN, a hospice agency’s CN application must convince the Department there will be future need for additional hospice services in the particular county where the agency wants to provide hospice care. *Odyssey v. Dept. of Health*, 145 Wn. App. 131, 138, 185 P.3d 652 (2008).

WAC 246-310-290 sets forth the methodology the Department uses to forecast need for new hospice agencies. This mathematical equation uses statistical data to forecast whether there will be a future unmet need for additional hospice services in each county. *Odyssey*, 145

⁴ HOS’s appeal is focused solely on the need criterion, conceding FHC’s CN application met the other three criteria. Brief of Appellant HOS (“BA”), pp. 1, 4 n.1. Accordingly, this brief focuses solely on the HLJ’s ruling that the need criterion was met.

Wn. App. at 138-40; CP 71-81 (HLJ's ruling applying the methodology).

Procedurally, after receiving a CN application, the Department must notify certain interested parties (including competitors) an application has been filed, take public comment on the application and, if requested, hold a public hearing. RCW 70.38.115(9); WAC 246-310-160 and -180. The Department then issues a written evaluation of the CN application, explaining why the application was approved or denied. WAC 246-310-490(1)(a).

If the CN application is denied, the applicant may seek administrative review before an HLJ and, after exhausting that remedy, judicial review of the HLJ's ruling. RCW 70.38.115(10)(a); WAC 246-310-610(1). If the application is granted, competitors may seek administrative review and pursue judicial review if dissatisfied with an HLJ's ruling. *St. Joseph Hosp.*, 125 Wn.2d at 742; RCW 70.38.115(10)(b). The adjudicative proceeding and judicial review are governed by RCW 70.38.115(10) and chapter 34.05 RCW, the Administrative Procedure Act. *Id.*; *see also* chap. 246-10 WAC (additional procedures applicable to HLJ administrative proceedings).

B. Evidence Presented to the HLJ

Evidence presented to the HLJ showed FHC met the WAC 246-310-210 need criteria. **First**, many of FHC's home health agency clients

who become eligible for hospice care have chosen to forego their Medicare hospice benefit in order to avoid transferring to new providers and severing existing relationships with FHC's health care providers at a vulnerable time near the end of their lives. AR 1416-17, 1558, 1571, 2413, 2607-08.⁵ In 2006 alone, the year FHC applied for a CN (AR 1392-1441), seventy of FHC's terminally ill patients confronted this disruption in the continuity of their care. AR 1416-17. Neither of the two existing hospices in Spokane County provides home health care in conjunction with hospice care. *Id.* Permitting FHC to operate a hospice in conjunction with its existing home health agency in Spokane County, as it has done in neighboring Whitman County, makes hospice more available and accessible to FHC's home health patients. *Id.*

Second, FHC demonstrated that terminally ill patients eligible for hospice care who reside in nursing homes are underserved in Spokane County, as well as statewide. AR 1408-14; Administrative Hearing Transcript ("Hearing Transcript"), pp. 121-23, 158-59.⁶ In the six years preceding FHC's 2006 CN application, less than ten percent of the hospice

⁵ The 3,033 page administrative agency record filed with the superior court was sent as an original with the Clerk's Papers pursuant to RAP 9.7(c). *See* CP 96-99. Like HOS, FHC cites to this Administrative Record using the acronym "AR" followed by the page numbers created by the Department.

⁶ The HLJ presided over a two-day hearing that was transcribed. The 443 page hearing transcript is the last portion of the administrative record, located at AR 2591-3033. FHC cites to the original page numbers of the Hearing Transcript, rather than the AR page numbers.

patients served by the two existing hospice agencies in Spokane County were residents of nursing homes. AR 1558-59. For example, in 2005, 1,179 Spokane County residents died in nursing homes, but only 89 of those residents, or 7.5 percent, received hospice care. AR 2603. In comparison, the national average was about 20 to 25 percent of all hospice patients resided in nursing homes. AR 1409.

Similarly, the number of nursing home residents who actually use their Medicare hospice benefit is small compared to the total number of nursing home residents, even though about a third of Washington deaths occur in nursing homes. *Id.* In 2004, the national average was only about 2.2 percent of all nursing home residents received hospice care, while Washington State was below average at 1.5 percent. AR 1409, 1413-14.

In 2006, there were sixteen nursing homes in Spokane County. AR 2609. FHC proposed to make hospice care more available and accessible to this underserved population of nursing home residents in Spokane County by increasing outreach and education efforts. *Id.*; AR 1409.

Third, FHC showed another underserved population in Spokane County is non-cancer patients, including end-stage dementia, Parkinson's, renal disease, cardiac and pulmonary disease patients. AR 1407, 1572, 2604-09; Hearing Transcript, pp. 71, 74-75, 160-62. Only 23 percent of Washington deaths in 2005 among people 65 and older were from cancer;

77 percent were from other causes. AR 2604-05; Hearing Transcript, p. 160. In that same period, among all deaths statewide of people 65 and older, 7 percent were cancer patients who died without receiving hospice care, while 51 percent were non-cancer patients who died without receiving hospice care. *Id.* Comparable discrepancies exist in Spokane County. AR 2605-06. FHC proposed to increase the availability and accessibility of hospice care to these non-traditional hospice patient groups through outreach and education efforts. *Id.*

Fourth, FHC showed any portion of the hospice patients served by FHC will be part of the increasing number of patients eligible for hospice in Spokane County. AR 2608. *See also* AR 433 (showing the two Spokane County hospice agencies' combined annual admissions grew from 459 patients in 2005 to 1,162 patients in 2010). The number of people annually accessing hospice care in Spokane County has almost tripled from 2005 to 2010 and more likely than not will continue to grow due to the aging of "baby boomers," the first wave of whom are just now entering their late 60's. *See* AR 433.

As HOS Administrator Gina Drummond testified during the administrative hearing, HOS vigorously opposed Horizon Hospice's entry into the Spokane hospice "market" over twelve years ago on the grounds another hospice would diminish HOS's patient volumes (just as HOS

argued in this case). Hearing Transcript, p. 436. Yet, Ms. Drummond confirmed that both Spokane hospice agencies' patient volumes have grown over the years despite HOS's concerns that Horizon Hospice would take patients away from HOS. *Id.* The same shared growth will more likely than not occur with FHC's entry into this market where no new hospice agency has been permitted in over twelve years and the number of hospice users continues to grow. Hearing Transcript, pp. 265-68.

Moreover, need is determined based on the current capacity of existing agencies, not potential future increases in the existing agencies' capacities. WAC 246-310-290(1)(c)(i) focuses on the "current capacity" of existing hospices for purposes of determining need. "Current capacity" is defined as "the average number of admissions for the last three years of operation." WAC 246-310-290(1)(c)(i). Correspondingly, need for an additional hospice agency is demonstrated not by reducing the current capacity of existing providers, but by showing a forecasted growth in hospice patient volumes over and above the current capacities of the existing providers. Hearing Transcript, pp. 245-48.

Fifth, FHC showed Spokane County has a population of over 460,000 people, but only two hospice agencies are currently available to serve that population. AR 2453-54; Hearing Transcript, pp. 187-89. In comparison, Clark County, with a similar population of about 425,000

residents has four hospice providers, and Yakima County, with a population of about 234,000 people, has five hospice providers available to its residents. *Id.* Jefferson County, with a much smaller population of about 29,000 people, has three hospice providers, and Kitsap County, with a population of about 239,000 people, also has three hospice providers. *Id.* Thus, Spokane County residents have less access to hospice providers than is the case in counties of comparable or smaller populations.

Sixth, focusing on whether a three-year or one-year planning horizon should be used, the HLJ received testimony from the Department's Executive Director in charge of the CN Program that the Department has consistently interpreted WAC 246-310-290 as requiring use of a three-year planning horizon measured from the date the CN applicant will start its hospice operations. AR 848-49; CP 229-30. Among other reasons, he testified "[o]ne year is too short-sighted of a planning horizon, and risks that a county may continue to be underserved year after year, with no opportunity for approval of a new provider." AR 849; CP 230. "Further, a one-year planning horizon, as advocated by Hospice of Spokane, would virtually eliminate any possibility of a finding of need in a county." *Id.* The Department's CN analysts similarly testified at the administrative hearing that the Department uses a three-year planning horizon because WAC 246-310-290(6) requires hospice CN applicants to have an ADC of

35 patients by the third year of operation in order for their application to be approved. *E.g.*, Hearing Transcript, pp. 116, 214, 247-48.

C. The HLJ's Ruling that FHC's CN Application Showed Need for another Hospice Agency in Spokane County

After due consideration of all parties' arguments, and applying his specialized knowledge and expertise regarding CN regulations, the HLJ largely adopted the Department's method for calculating need and concluded FHC met its burden of showing there was need for a third hospice agency in Spokane County.⁷ CP 71-81. The HLJ concluded the preponderance of evidence showed hospice patient volumes have grown and will continue to grow in Spokane County beyond the 2005 capacities of the two existing providers. *Id.* Another hospice agency "will provide additional access and choices for patients in the community" and the need methodology in WAC 246-310-290 "shows that the population could support another facility." CP 81.

The HLJ found HOS and the other existing hospice provider in the county (Horizon Hospice) have not fully served several patient groups FHC intends to serve, specifically: non-cancer patients, nursing home

⁷ As previously noted, the only agency action subject to judicial review in this case is the HLJ's final order granting a CN to FHC. *See DaVita, Inc.*, 137 Wn. App. at 181. Accordingly, HOS's references to the CN Program's initial decision denying FHC's CN application, the Program's denial of reconsideration, the Program's two remand decisions, and the Program's response to FHC's summary judgment motion are largely irrelevant to this appeal of the HLJ's independent decision concluding FHC met all the regulatory criteria for issuance of a CN. *See, e.g.*, BA, pp. 7-10.

residents, and rural residents. *Id.* Rather than taking patients away from HOS, the HLJ concluded FHC will improve access to hospice care for the increasing population of county residents and provide services to patient groups the two existing providers have not been fully serving. *Id.* The HLJ also recognized FHC's project will ensure continuity of care for patients of its well-established home health agency in Spokane County by allowing a smooth transition to FHC's hospice agency when appropriate, rather than forcing those patients to transfer to a different agency's unfamiliar hospice care providers at a vulnerable time near the end of their lives.⁸ *See id.*

With respect to the issue of using a three-year versus a one-year planning horizon, the HLJ concluded the WAC 246-310-290 need methodology requires use of a three-year planning horizon. CP 79-81. He reasoned that WAC 246-310-290 should be harmonized and read as a whole, and HOS's interpretation that a one-year planning horizon should be used would render the three-year planning horizon set forth in subsection (6) of WAC 246-310-290 meaningless. CP 80.

Applying the three-year planning horizon in WAC 246-310-290(6), the HLJ found FHC's application indicated its hospice operations

⁸ These unchallenged findings of fact are treated as verities on appeal, and the HLJ's unchallenged conclusions of law are the law of the case. *Energy Northwest v. Hartje*, 148 Wn. App. 454, 459, 463, 465, 199 P.3d 1043 (2009).

would begin in 2008 (*see* AR 1405), so 2011 would be the third full year of operation. CP 81. According to the HLJ's unchallenged calculation, the need methodology showed the requisite ADC of 35 was reached in Spokane County in 2009, the first full year of FHC's proposed operation, and increased to an ADC of 40 in 2011. CP 79-81. Thus, the HLJ's calculation of the need methodology showed FHC's application should be approved because there was sufficient need in Spokane County for an additional hospice agency with an ADC of at least 35 patients by the third full year of operation. *Id.* Indeed, the requisite showing of an ADC of at least 35 patients existed during the first full year of FHC's proposed operation (*i.e.*, 2009). *Id.*

D. The Superior Court's Decision Affirming the HLJ's Ruling

The superior court affirmed the HLJ's ruling in all respects and dismissed HOS's petition for judicial review. CP 292-311. With regard to whether the HLJ erred by using a three-year planning horizon rather than a one-year horizon, the court's "answer to that question is a definitive no." CP 299-300. The court determined WAC 246-310-290 is ambiguous, citing the *Odyssey* case, and agreed with the HLJ that the regulation should be read in its entirety, harmonizing WAC 246-310-290(6) with WAC 246-310-290(7), with an eye to avoiding strained or absurd results.

CP 301-02. Further, the court reasoned that interpreting the regulation as imposing a one-year planning horizon would be contrary to responsible health care planning, which requires planning ahead more than just one year. CP 300-03.

V. ARGUMENT

A. Standard of Review

“The standard of review in CN cases is that the agency decision is presumed correct and that the challengers have the burden of overcoming that presumption.” *Overlake Hosp. Assn. v. Dept. of Health*, 170 Wn.2d 43, 49-50, 239 P.3d 1095 (2010). Courts are to “accord substantial deference to the agency’s interpretation of law in matters involving the agency’s special knowledge and expertise.” *Id.* To overcome the presumption of correctness, challengers must show the agency decision was arbitrary and capricious, or contrary to law. *Id.* “The error of law standard permits this court to substitute its interpretation of the law for that of the agency, but we accord substantial deference to the agency’s interpretation, particularly in regard to the law involving the agency’s special knowledge and expertise.” *Univ. of Wash. Med. Ctr. v. Dept. of Health*, 164 Wn.2d 95, 102, 187 P.3d 243 (2008). An agency’s interpretation of its own regulations is also accorded “great weight” or substantial deference. *Port of Seattle v. Pollution Control Hearings Bd.*,

151 Wn.2d 568, 593, 90 P.3d 659 (2004).

B. The HLJ Correctly Interpreted WAC 246-310-290(6) as Enacting a Three-Year Planning Horizon to Determine Need, Rather Than a One-Year Planning Horizon

The sole issue on appeal is whether the HLJ correctly interpreted WAC 246-310-290(6) in harmony with WAC 246-310-290(7) to conclude a three-year planning horizon is used to determine need for a new hospice agency, rather than a one-year planning horizon. WAC 246-310-290(6) provides that “[h]ospice agencies applying for a certificate of need must demonstrate that they can meet a minimum average daily census (ADC) of thirty-five patients by the third year of operation.” WAC 246-310-290(6) (emphasis added).

HOS argues the HLJ’s interpretation applying the three year planning horizon in WAC 246-310-290(6) was contrary to law because FHC instead should have been required to prove it would have had an ADC of at least thirty-five patients the year it applied for a CN (*i.e.*, 2006) before beginning operations. HOS contends WAC 246-310-290(6) is irrelevant to determining the planning horizon used in the need methodology. *E.g.*, Brief of Appellant HOS (“BA”), p. 23. Instead, according to HOS, the reference to a “one-year estimated population growth” in Step 5 of the methodology (*i.e.*, WAC 246-310-290(7)(e)) must be interpreted in isolation to mean a one-year planning horizon is intended for determining

need, rather than the three-year planning horizon expressly referenced in WAC 246-310-290(6). HOS is incorrect.

Courts should give “great weight” to the HLJ’s interpretation of the Department’s hospice need methodology in WAC 246-310-290. *Odyssey*, 145 Wn. App. at 142. Substantial deference to the HLJ’s interpretation of the planning horizon to be applied in WAC 246-310-290 is appropriate because the issue involves interpretation of the Department’s own rule as well as the agency’s special knowledge and expertise concerning effective health care planning. *See Overlake Hosp. Assn.*, 170 Wn.2d at 49-50; *Port of Seattle*, 151 Wn.2d at 593.⁹

Moreover, the *Odyssey* court found WAC 246-310-290 contains ambiguities, which independently justifies according deference to the HLJ’s interpretation of the regulation. The *Odyssey* court reasoned as follows:

Despite the simple language used to describe the mathematic methodology in WAC 246-310-290(7), there is ample room for disagreement about various interpretations of the formula used to calculate the unmet hospice care “need” for each county. The WAC 246-310-290(7) methodology in its entirety is a complex formula, not a simple numerical computation. Therefore, we defer to the Department’s expertise and interpretation.

⁹ Contrary to HOS’s suggestion, substantial deference to the HLJ’s interpretation of WAC 246-310-290 is appropriate under these authorities regardless of whether the regulation is deemed ambiguous.

Odyssey, 145 Wn. App. at 143 (emphasis added).¹⁰

Even if this Court were to give no deference to the HLJ's interpretation and instead performs a *de novo* interpretation of WAC 246-310-290 as HOS urges, the Court should reach the same result as the HLJ. WAC 246-310-290 should be interpreted in a manner that harmonizes and gives effect to all provisions within the regulation; "a term in a regulation should not be read in isolation but rather within the context of the regulatory and statutory scheme as a whole." *Odyssey*, 145 Wn. App. 142. HOS's interpretation of the WAC 246-310-290(7)(e) reference to a one-year population growth rate as enacting a one-year planning horizon fails to give any effect to the three-year planning horizon referenced earlier in the same regulation, at WAC 246-310-290(6).

To harmonize these subsections of the regulation, the reference in WAC 246-310-290(7)(e) to inflating hospice volumes by "one-year estimated population growth" means inflating the potential volume of hospice service on an annual basis. Hearing Transcript, pp. 34-36, 42-45,

¹⁰ HOS argues the *Odyssey* court was focused on the ambiguity in Step 2 of the methodology (WAC 246-310-290(7)(b)), and contends the rest of the methodology is unambiguous. *See* BA, pp. 16-18. Although the *Odyssey* court's focus indeed was on Step 2, the court found the methodology "in its entirety" is ambiguous. *Odyssey*, 145 Wn. App. at 141, 145 n. 6 (noting the entire "WAC methodology is complex and ambiguous when read as a whole," and "because the methodology is ambiguous, we must defer to the interpretation of Department as the agency responsible for the methodology's administration and enforcement."). Given HOS's interpretation of the rule differs from the HLJ's, the superior court's, the Department's and FHC's interpretation, the portions of the regulation at issue should be deemed ambiguous. *See id.* at 143 (ambiguity exists if two interpretations are both reasonable).

212-14, 244-45. This calculation is then used to “[d]etermine the number of hospice agencies in the proposed planning area which could support the unmet need with an ADC of thirty-five.” WAC 246-310-290(g). The forecast year in which the requisite ADC of thirty-five must be met is the applicant’s third year of operation. WAC 246-310-290(6). Thus, reading WAC 246-310-290(6), (7)(e), and 7(g) as a whole, means hospice volumes must be inflated on annual basis to determine whether there is an unmet need with an ADC of thirty-five by the applicant’s third year of operation.

To conclude otherwise requires improperly reading Step 5 in isolation from the rest of the need calculation, not giving any effect to WAC 246-310-290(6), and not harmonizing the rule. As the HLJ ruled, HOS’s interpretation improperly renders WAC 246-310-290(6) meaningless or superfluous. CP 80.

HOS’s interpretation also is contrary to the primary purpose of the CN laws. A court’s “paramount concern is to ensure that the regulation is interpreted consistently with the underlying legislative policy of the statute.” *Overlake Hosp. Assn.*, 170 Wn.2d at 55. The primary legislative policy of the CN statute is the “promotion and maintenance of access to health care services for all citizens.” *Id.* As the CN Program’s Executive Director explained, “a one-year planning horizon, as advocated by Hospice

of Spokane, would virtually eliminate any possibility of a finding of need in a county. One year is too short-sighted of a planning horizon, and risks that a county may continue to be underserved year after year, with no opportunity for approval of a new provider.” CP 230. HOS’s interpretation of WAC 246-310-290 thus conflicts with the legislative goal of improving citizens’ access to hospice services.

HOS’s argument for a short-sighted one-year planning horizon is further dispelled by considering that planning horizons of at least three years are used in all other CN contexts in chapter 246-310 WAC. For example, a three-year planning horizon is used for hospice care centers. WAC 246-310-295(8)(a). No health care service governed by chapter 246-310 WAC uses a one-year planning horizon. *Cf.* WAC 246-310-745(3) (five year planning horizon for percutaneous coronary intervention); WAC 246-310-261(5)(c) (four year planning horizon for open heart surgery); WAC 246-310-263(9)(c) (four years for pediatric open heart surgery); WAC 246-310-270(9)(b)(i) (three years for ambulatory surgery centers); WAC 246-310-010(48) and WAC 246-310-380(3) (three years for nursing homes); WAC 246-310-284(6) (three years for kidney dialysis facilities).

For any or all of these reasons, there is no legal or practical merit to HOS’s interpretation that WAC 246-310-290 requires use of a one-year planning horizon, rather than a three-year horizon to determine future need.

Therefore, the HLJ's interpretation of the Department's regulation should be affirmed, whether based on the substantial deference properly accorded the HLJ's interpretation, or based on a *de novo* review.

1. HOS is incorrect that WAC 246-310-290(6) should be interpreted as a “performance standard” having nothing to do with the need methodology

HOS contends WAC 246-310-290(6) should be construed as a “performance standard,” meaning that it is part of the Financial Feasibility criteria in WAC 246-310-220 or the Quality of Care criteria in WAC 246-310-230, not part of the Need criteria in WAC 246-310-290 where the provision actually is codified. BA, p. 24. This is an unreasonable construction given that WAC 246-310-290(6) plainly is a subsection of the Need criteria in WAC 246-310-290, immediately preceding the need methodology in WAC 246-310-290(7), and is not a subsection of the Financial Feasibility criteria in WAC 246-310-220 or the Quality of Care criteria in WAC 246-310-230.

HOS argues the sole purpose of WAC 246-310-290(6) is to establish an internal “performance standard” requiring hospice CN applicants to show they will have an average daily census of 35 patients within three years after commencing operations, but this requirement is irrelevant to the WAC 246-310-290(7) methodology for determining need. BA, p. 24. Under this interpretation, the applicant's regulatory requirement

to show that need will arise for an additional agency with an ADC of 35 patients within three years is a meaningless exercise because, according to HOS, the Department is required to use a one-year projection to evaluate the application, not the three-year projection that is required to be included in the CN application pursuant to WAC 246-310-290(6). That is an illogical interpretation leading to a strained result. *See Odyssey*, 145 Wn. App. at 143 (“We must avoid interpretations that are unlikely or absurd.”). No purpose would be served by requiring applicants to show need within three years of beginning operations if HOS is correct that the methodology actually requires showing need (*i.e.*, an ADC of at least 35 patients) within one year of application.

HOS’s argument that WAC 246-310-290(6) is a “performance standard” separate from the need methodology is derived from the title of WAC 246-310-290: “Hospice services – Standards and need forecasting method.” However, the title of a regulation does not control interpretation of the regulation; instead, the nature and purpose of the regulation is used to discern intent. *See Wash. Fed’n. of State Employees v. State*, 98 Wn.2d 677, 684, 658 P.2d 634 (1983). Despite the reference to “standards” in the title of WAC 246-310-290, the only time the word “standard” actually appears in WAC 246-310-290 is in subsection (10), where it states “[f]ailure to operate the hospice agency in accordance with the certificate

of need standards may be grounds for revocation or suspension of an agency's certificate of need ..." (emphasis added). Failure of a CN applicant to show in its application a projected ADC of 35 by the third year of operation as required by WAC 246-310-290(6) would not be grounds for revocation or suspension of a CN, partly because at the application stage a CN applicant does not yet have a CN license that could be revoked or suspended. A CN applicant's failure to show in the CN application that it will have an ADC of 35 by the third year of operation as required by WAC 246-310-290(6) is grounds for refusing to issue a CN license in the first place, but is not grounds for suspending or revoking an operating hospice agency's previously issued CN license. Thus, WAC 246-310-290(6) can not be reasonably construed as a "standard" as that word is actually used in WAC 246-310-290.

HOS's interpretation also ignores the remainder of the language in WAC 246-310-290(6), which includes an alternative ground for approving a hospice CN application even if the applicant is unable to show the county's need will grow to at least an ADC of 35 patients by the third year of the new hospice agency's operation. The alternative ground for approving a CN application contained in WAC 246-310-290(6) is that a hospice CN application "may be approved" upon a showing there is no other Medicare certified hospice provider in a county the applicant

proposes to serve. This alternative ground for approval certainly cannot be rationally construed as a “performance standard.”

HOS’s interpretation requires fracturing WAC 246-310-290(6) into two parts: one being a “performance standard” and the other being an alternative method for meeting the need criteria. A more harmonious, sensible interpretation is that WAC 246-310-290(6) sets forth two alternative ways need may be shown to justify approval of a hospice CN application: one by demonstrating under the methodology the applicant will have an ADC of 35 by the third year of operation and the other by demonstrating there are no other Medicare certified hospice providers in the county to be served. HOS’s strained interpretation of WAC 246-310-290(6) as a “performance standard” irrelevant to the need calculation in WAC 246-310-290(7) should be rejected because HOS fails to read the entirety of subsection (6) of WAC 246-310-290 within the context of the regulatory and statutory scheme as a whole.

Similarly meritless is HOS’s argument that the 35 ADC requirement in WAC 246-310-290(6) is akin to quality assurance criteria in CN regulations for heart surgeons requiring them to perform a certain minimum number of heart surgeries per year in order to maintain proficiency. *See* BA, p. 24. Heart surgery outcomes have been shown to be directly related to surgeons’ proficiency. *See Children’s Hosp. & Med. Ctr. v. Dept. of*

Health, 95 Wn. App. 858, 872, 975 P.2d 567 (1999), *review denied*, 139 Wn.2d 1021 (2000). In contrast, HOS submitted no evidence, nor could it, that hospice outcomes (*i.e.*, always death) are directly related to the number of patients treated by individual hospice providers, let alone the projected average daily census of a hospice agency. Thus, construing WAC 246-310-290(6) as merely establishing an internal “performance standard” conflicts with established rules for statutory interpretation.

2. Draft recommendations from an advisory committee do not prove the Department intended to use a one-year planning horizon in WAC 246-310-290

HOS’s relies on drafts of an advisory committee’s comments before the regulation was enacted to support its interpretation of the regulation. BA, pp. 27-30. This reliance is misplaced.

The comments HOS relies on expressly state they are just “drafts;” there are no final comments in the record that are not “drafts.” *See, e.g.*, AR 2367 (noting the September 13, 2001 comments are a “very rough” first draft), and AR 2274 (noting the November 11, 2001 comments are a “working draft”). One draft suggested a three-year planning horizon and another suggested a one-year horizon. *See* BA, pp. 28-29. One person’s “draft” of others’ comments can hardly be regarded as a definitive source for discerning the Department’s intent. One draft is no more valuable than another; neither a “very rough” first draft, nor a later “working draft” are

entitled to much, if any, weight for purposes of discerning the Department's (as distinguished from the advisory committee's) intent when enacting WAC 246-310-290.¹¹

The Department's decision to enact a three-year planning horizon, despite the advisory committee's varying positions on the issue, is plainly set forth in WAC 246-310-290(6). There is no dispute the Department has consistently interpreted WAC 246-310-290 as imposing a three-year planning horizon since enactment of WAC 246-310-290. *See, e.g.*, CP 229; BA, pp. 34-35. Consequently, there is no merit to HOS's argument that drafts of the advisory committee's comments prove the Department intended to enact a one-year planning horizon despite the undisputed fact that the Department has consistently interpreted the regulation as enacting a three-year planning horizon.

Moreover, HOS's reliance on the advisory committee's concern that a three-year planning horizon would give hospice CN applicants a "leg up" in showing need for a new agency is demonstrably false. There is no dispute that, since the hospice methodology was adopted in 2003, only one new hospice agency has been issued a CN based on need (rather than based

¹¹ HOS treats these committee comments as evidence of legislative history. Yet, at the same time, HOS repeatedly claims WAC 246-310-290 is unambiguous, with the exception of WAC 246-310-290(7)(b). *Contra Odyssey, supra*. Legislative history is irrelevant if the regulation is unambiguous as HOS contends. *See Davis v. Dept. of Licensing*, 137 Wn.2d 957, 963-64, 977 P.2d 554 (1999).

on a rural area, or religious exception to the need requirements). *See, e.g.*, AR 424. Establishing need for a new hospice agency under the Department’s methodology has rarely occurred even with the Department’s consistent use of a three-year planning horizon. *Id.* Experience undisputedly has shown no “leg up” exists when a three-year planning horizon is used. *Id.* Creating a one-year planning horizon would foreclose the ability of any new hospice agency to obtain a CN, giving an even greater “leg up” to existing providers. *See* CP 230. The advisory committee’s concern about a three-year planning horizon giving a “leg up” to hospice CN applicants has proven to be unjustified and, in any event, is not a concern shared by the Department. *See id.*

3. Applying a three-year planning horizon would not lead to absurd results as argued by HOS

HOS’s final argument is that using a three-year planning horizon would lead to absurd results (albeit not in this case). BA, pp. 35-37. First, HOS contends that by measuring the three-year planning horizon from the commencement of operations as required by WAC 246-310-290(6) allows CN applicants to manipulate the need calculation by setting a commencement date far into the future when need may be more easily shown. *See* BA, pp. 35-37. The CN regulations expressly preclude such manipulation. WAC 246-310-580 requires that projects requiring a CN

must commence within two years following issuance of the CN. *See also* RCW 70.38.125(1) and (2) (same). Thus, hospice CN applicants must show their proposed project will commence operations within two years of the anticipated issuance of the CN and they will have an ADC of at least 35 residents by the third year of operation as required by WAC 246-310-290(6). As the HLJ concluded, FHC's October 2006 application met these requirements. CP 79-81 (noting there was ample need in 2009, less than a year after FHC proposed to commence operations in 2008); Hearing Transcript, pp. 44-45, 95-96, 137-38, 268.¹²

Second, HOS argues that using a three-year planning horizon leads to an absurd result if two CN applicants simultaneously apply to open new hospice agencies in the same county, but one says it will commence operations a year before the other. *See* BA 36-37. According to HOS, this unlikely situation (which assumes both applicants meet all CN criteria, both apply at the same time in the same county, and there is only need for one new agency three years after commencement of the fastest established operation) inevitably would result in unfairly using different three-year

¹² HOS argues "there is no language in the regulation" stating the three-year planning horizon starts on the applicant's first year of operation, rather than on the date the CN application was filed. BA, p. 35. Yet, WAC 246-310-290(6) plainly states the three-year horizon ends on the third year of operation. Since the three-year period ends on the third year of operation, the three-year period logically starts on the first year of operation. If the Department had intended the period to start at the time of application as HOS argues, WAC 246-310-290(6) would have so provided by stating, for example, applicants must show they will have an ADC of at least 35 patients "by the third year after the application is submitted," rather than "by the third year of operation."

planning horizons that commence a year apart. *Id.* However, if this hypothetical situation were to arise, an HLJ could find the Department has discretion to evaluate both applicants using the same three-year planning horizon, or apply the different planning horizons HOS posits would occur in order to grant a CN to the agency able to most quickly meet the community's need for another agency.

More likely, if HOS's hypothetical were to occur, the HLJ would apply WAC 246-310-290(9), which expressly provides several factors to consider when deciding which of two or more competing hospice CN applicants is best able to meet forecasted need. Application of the six factors listed in WAC 246-310-290(9) (*e.g.*, which of the competing applications is “[m]ost cost efficient and financially feasible”) would decide the outcome of HOS's hypothetical, not the planning horizon used. Thus, the hypothetical situations offered by HOS fail to prove the HLJ's interpretation of WAC 246-310-290(6) potentially could lead to an absurd result.

VI. CONCLUSION

Based on the foregoing reasons and the reasons set forth in the Department's appellate response brief, this Court should affirm the HLJ's interpretation that subsection (6) of WAC 246-310-290 establishes a three-year planning horizon for evaluating hospice CN applications under the

need methodology in subsection (7) of WAC 246-310-290.

RESPECTFULLY SUBMITTED this 25th day of February, 2013.

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I certify under penalty of perjury under the laws of the state of
Washington that the foregoing is true and correct.

Dated this 25th day of February, 2013.



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