

LOUISIANA
11 NOV 20 PM 12:55
BY *[Signature]* WASHINGTON
1500 Y

NO. 41910-6-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

EVERGREEN WASHINGTON HEALTHCARE FRONTIER, LLC d/b/a
Frontier Rehabilitation & Extended Care, et al.,

Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF SOCIAL AND HEALTH SERVICES,

Respondent.

DEPARTMENT'S RESPONSE BRIEF

ROBERT M. MCKENNA
Attorney General

Katy A. Hatfield
Assistant Attorney General
WSBA No. 39906
P.O. Box 40124
Olympia, WA 98504-0124
(360) 586-6561

pm 11/28/11

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	COUNTER-STATEMENT OF ISSUES	3
III.	COUNTER-STATEMENT OF THE CASE.....	4
	A. Calculating And Challenging Medicaid Rates For Nursing Facilities	4
	B. Life Care’s APA Challenge Of The 2006 And 2007 Rates	7
	C. Appellants Challenged The 2006 And 2007 Rates For The First Time After The Conclusion Of Life Care’s APA Case.....	11
IV.	ARGUMENT IN RESPONSE	15
	A. Standard Of Review.....	16
	B. Appellants Cannot Belatedly Seek Mandamus Or Declaratory Judgment Relief From The Department’s 2006 And 2007 Rate Setting Because They Had Adequate Administrative And Judicial Remedies Under The APA Available At That Time.	17
	1. Appellants failed to exhaust administrative remedies or petition for judicial review under the APA in 2006 and 2007	17
	2. Neither mandamus nor declaratory judgment is available when an agency action is reviewable under the APA	20
	C. To The Extent Appellants Had Any Right To Appeal The Department’s Discretionary Decision To Deny Their Late Request For A Rate Modification, Their Exclusive Remedy Would Have Been Under The APA.	25

1.	The Department’s denial of a late rate modification request is discretionary and unreviewable.....	26
2.	Even if judicial review were available to challenge the Department’s discretionary denial of a late request for rate modification, the remedy would be through the APA, not an action for mandamus or declaratory judgment.....	35
D.	The Department Properly Denied Appellants’ Late Request For Modification Of Their 2006 And 2007 Medicaid Rates.....	40
1.	If the courts have jurisdiction over Appellants’ mandamus or declaratory judgment claims, this case should be remanded to the superior court on the merits.....	40
2.	If this Court considers Appellants’ substantive claims, those claims should be denied.....	41
a.	Mandamus does not lie because the decision whether to belatedly adjust a nursing facility’s Medicaid rate is a discretionary agency act	42
b.	The Department is not collaterally estopped from denying Appellants’ late request for rate modification	43
c.	The Department’s denial of the late request for rate modification was not arbitrary or capricious	47
d.	The Department does not violate equal protection by providing a remedy to a party to a lawsuit that it does not provide to others that failed to join that lawsuit.....	49
V.	CONCLUSION	50

TABLE OF AUTHORITIES

Cases

<i>Ames v. Dep't of Health</i> , 166 Wn.2d 255, 208 P.3d 549 (2009).....	16
<i>ARCO Prods. Co. v. Utils. & Transp. Comm'n</i> , 125 Wn.2d 805, 888 P.2d 728 (1995).....	48
<i>Bock v. Bd. of Pilotage Comm'rs</i> , 91 Wn.2d 94, 586 P.2d 1173 (1978).....	21, 22, 39
<i>Christensen v. Grant Cnty. Hospital Dist. No. 1</i> , 152 Wn.2d 299, 96 P.3d 957 (2004).....	20
<i>Davidson Serles v. City of Kirkland</i> , 159 Wn. App. 616, 246 P.3d 822 (2011).....	24, 25
<i>Davis v. Dep't of Labor & Indus.</i> , 159 Wn. App. 437, 245 P.3d 253 (2011).....	23, 39
<i>Diehl v. W. Wash. Growth Mgmt. Hearings Bd.</i> , 153 Wn.2d 207, 103 P.3d 193 (2004).....	21, 39
<i>Freeman v. Gregoire</i> , 171 Wn.2d 316, 256 P.3d 264 (2011).....	42
<i>Hercules Carriers, Inc. v. Florida Dep't of Transp.</i> , 768 F.2d 1558 (11th Cir. 1985).....	44
<i>Indoor Billboard v. Integra Telecom of Wash., Inc.</i> , 162 Wn.2d 59, 170 P.3d 10 (2007).....	15, 16
<i>Inland Foundry Co. v. Spokane Cnty. Air Pollution Control Auth.</i> , 98 Wn. App. 121, 989 P.2d 102 (1999).....	15
<i>Johnson v. Continental West, Inc.</i> , 99 Wn.2d 555, 663 P.2d 482 (1983).....	46

<i>Jones v. Dep't of Corrections</i> , 46 Wn. App. 275, 730 P.2d 112 (1986).....	21
<i>Judd v. Am. Tel. & Tel. Co.</i> , 152 Wn.2d 195, 95 P.3d 337 (2004).....	21
<i>Kendall v. Douglas, Grant, Lincoln, & Okanogan Cntys. Pub. Hosp.</i> <i>Dist. No. 6</i> , 118 Wn.2d 1, 820 P.2d 497 (1991)	47
<i>Life Care v. Dep't Soc. & Health Servs.</i> , 162 Wn. App. 370, 254 P.3d 919 (2011).....	4, 5, 17
<i>Lundgren v. Kieren</i> , 64 Wn.2d 672, 393 P.2d 625 (1964).....	16
<i>Overlake Hosp. Ass'n v. Dep't of Health</i> , 170 Wn.2d 43, 239 P.3d 1095 (2010).....	47
<i>Public Utility Dist. No. 1 of Pend Oreille Cnty., v. Tombari Family</i> <i>Ltd. P'ship</i> , 117 Wn.2d 803, 819 P.2d 369 (1991).....	44
<i>Rutcosky v. Bd. of Trustees</i> , 14 Wn. App. 786, 545 P.2d 567 (1976).....	21
<i>Seattle Exec. Servs. Dep't v. Visio Corp.</i> , 108 Wn. App. 566, 31 P.3d 740 (2001).....	44
<i>Skagit Surveyors and Eng'rs, LLC v. Friends of Skagit Cnty.</i> , 135 Wn.2d 542, 958 P.2d 962 (1998).....	15, 40
<i>Spice v. Pierce Cnty.</i> , 149 Wn. App. 461, 204 P.3d 254 (2009).....	7, 19, 27
<i>U.S. v. Mendoza</i> , 464 U.S. 154, 104 S. Ct. 568, 78 L. Ed. 2d 379 (1984).....	44
<i>Your Home Visiting Nurse Servs., Inc. v. Shalala</i> , 525 U.S. 449, 119 S. Ct. 930, 142 L. Ed. 2d 919 (1999).....	passim

Statutes

RCW 7.16.360	20, 25, 39
RCW 7.24.146	20, 25, 39
RCW 34.05	5, 30
RCW 34.05.010(3).....	36
RCW 34.05.030(5).....	17
RCW 34.05.410-.494	5
RCW 34.05.510	21, 39
RCW 34.05.534	6
RCW 34.05.570	22, 39
RCW 34.05.570(2).....	36
RCW 34.05.570(3).....	6, 36
RCW 34.05.570(4).....	36
RCW 34.05.570(4)(b)	36, 38
RCW 34.05.570(4)(c)	30, 36, 39
RCW 74.09.120	4
RCW 74.09.530(1)(a)	4
RCW 74.46	4, 5, 16
RCW 74.46.022(11).....	5, 27
RCW 74.46.421	passim

RCW 74.46.421(1).....	32
RCW 74.46.421(2)(b).....	32
RCW 74.46.421(3).....	32
RCW 74.46.421(4)(a).....	32
RCW 74.46.421(4)(b).....	32, 33
RCW 74.46.421(4)(c).....	32, 33, 45
RCW 74.46.431	5, 45
RCW 74.46.531	passim
RCW 74.46.531(4).....	passim
RCW 74.46.531(6).....	passim
RCW 74.46.780	27
Laws of 2009, ch. 564, § 206(1).....	46, 48
Laws of 2009, ch. 570, § 1(4).....	46, 48
Laws of 2009, ch. 570, § 1(5).....	46, 48
Laws of 2009, ch. 570, § 1(6).....	46, 48
Laws of 2009, ch. 570, § 1(7).....	46, 48
Laws of 2011, 1st Spec. Sess., ch. 15	4

Other Authorities

Philip A. Trautman, <i>Claim and Issue Preclusion in Civil Litigation in Washington</i> , 60 Wash. L. Rev. 805, (1985).....	46
--	----

Regulations

WAC 388-96.....	4
WAC 388-96-901(2)(d)	6
WAC 388-96-904.....	5, 12, 13, 30
WAC 388-96-904(1).....	5, 22
WAC 388-96-904(5).....	6, 22, 30
WAC 388-96-904 (6).....	30
WAC 388-96-904 (7).....	30
WAC 388-96-904 (8).....	30
WAC 388-96-904 (9).....	30
WAC 388-96-904 (10).....	30
WAC 388-96-904 (11).....	30
WAC 388-96-904 (12).....	30
WAC 388-96-904(13).....	6, 22, 30

I. INTRODUCTION

Each year the Department of Social and Health Services (Department) sets the daily rates that individual nursing facilities will be paid for providing care to Medicaid residents. A facility that disagrees with the rate it is assigned may appeal within 28 days. After the 28-day deadline, a facility may still ask the Department to review any alleged error. Under RCW 74.46.531 the Department is authorized to grant such late requests by retroactively adjusting a facility's rate. However, there is neither a right to a rate modification in response to a late request, nor a right to an administrative appeal if the late request is denied.

In 2006 and 2007, a group of nursing facilities not including Appellants timely requested administrative hearings to challenge the Department's calculation of their rates. On judicial review from those administrative proceedings, the superior court concluded that under the applicable statute the Department had miscalculated the rate for those facilities and ordered the Department to increase their payments. While the Department considered the case wrongly decided—an interpretation later confirmed by the Legislature—it did not seek an appeal and instead applied the superior court's rate methodology to the facilities party to the superior court order for 2006 and 2007 and to all nursing facilities for 2008.

Appellants are nursing facilities that provide care to Medicaid residents but did not timely pursue administrative or judicial remedies available under the Administrative Procedure Act (APA) to appeal their 2006 or 2007 Medicaid payment rates. Years later, well beyond the 28-day deadline for an appeal, Appellants asked the Department to modify their 2006 and 2007 payment rates. The Department considered and denied Appellants' late request in 2009 under RCW 74.46.531. Appellants failed to timely seek judicial review of that agency action, and later voluntarily dismissed their APA challenge to the Department's decision that Appellants had received adequate notice of the 2006 and 2007 rate methodology and had no right to a belated administrative hearing to challenge those rates.

In this case, Appellants seek a writ of mandamus and a declaratory judgment to require the Department to retroactively adjust their 2006 and 2007 Medicaid rates. The superior court correctly dismissed those claims for lack of subject matter jurisdiction. Because Appellants had adequate administrative remedies available to challenge the 2006 and 2007 rate settings, the courts lack jurisdiction over their mandamus and declaratory judgment claims. And to the extent that the Department's 2009 decision to deny Appellants' late request for a rate adjustment is subject to judicial

review, that review is under the APA not the Uniform Declaratory Judgment Act or the statutory writ of mandamus.

II. COUNTER-STATEMENT OF ISSUES

1. The Appellants failed to timely seek administrative or judicial review available under the APA of their 2006 and 2007 Medicaid payment rates. Does Appellants' failure to seek such relief when it was available mean that they may belatedly seek a writ of mandamus or declaratory judgment to challenge their 2006 and 2007 payment rates?

2. Under RCW 74.46.531, the Department is authorized to grant a nursing facility's request for a rate adjustment even after the deadline for an appeal has passed, but "if the request is denied, the [nursing facility] shall not be entitled to any appeals or exception review procedure that the department may adopt" What judicial review, if any, is available to a nursing facility after the Department denies a late request made under RCW 74.46.531?

3. At the same time that the Appellants filed this action for mandamus and declaratory judgment, the Appellants filed a separate petition for judicial review under the APA asking for the same relief. Did the superior court correctly dismiss the Appellants' mandamus and declaratory judgment action for lack of subject matter jurisdiction?

4. Does RCW 74.46.531 place a mandatory duty on the Department, enforceable by mandamus or declaratory judgment, to retroactively adjust a nursing facility's Medicaid rate when the facility alleges errors after the right to challenge the rate in an administrative hearing has expired?

III. COUNTER-STATEMENT OF THE CASE

A. Calculating And Challenging Medicaid Rates For Nursing Facilities

The Department administers the cooperative federal-state Medicaid program in Washington State.¹ *Life Care v. Dep't Soc. & Health Servs.*, 162 Wn. App. 370, 373, 254 P.3d 919 (2011).² As part of that program, the Department compensates nursing facilities in Washington State for care the facilities provide to residents who qualify for Medicaid. *Id.* Chapter 74.46 RCW, the nursing facility Medicaid payment system, states the methodology by which the Department determines how to allocate payments among the various facilities. *Id.* To implement chapter 74.46 RCW, the Department promulgated rules in chapter 388-96 WAC.

¹ On July 1, 2011, Health Care Authority became the single state agency authorized to administer Washington's Medicaid program. RCW 74.09.530(1)(a); *see generally* Laws of 2011, 1st Spec. Sess., ch. 15. But under statute and agreement between the agencies, the Department of Social and Health Services continues to handle the administrative functions for the nursing facility Medicaid payment system. RCW 74.09.120.

² The *Life Care* case cited here is unrelated to Life Care's 2006 and 2007 challenge to the vendor rate increase issue that is discussed in this case.

Every year, the Department's Office of Rates Management sets a facility-specific, prospective per-patient payment rate for each nursing facility based on numerous factors. RCW 74.46.431; *Life Care*, 162 Wn. App. at 375. Notice of each facility's rate is mailed in late June, with the rate starting July 1 of that year. *See id.*

The APA, chapter 34.05 RCW, governs the courts' review of disputes over the methodology the Department uses to allocate Medicaid payment rates to specific facilities. *Life Care*, 162 Wn. App. at 373-74. The Department's rules provide for an adjudicative proceeding process as an administrative remedy, as authorized by the APA and chapter 74.46 RCW. RCW 34.05.410-.494; RCW 74.46.022(11) (formerly codified at RCW 74.46.780); WAC 388-96-904. In 2006 and 2007, the Department's rules stated that a facility seeking to challenge a payment rate "shall request an administrative review conference in writing within twenty-eight calendar days after receiving notice of the department's action or determination."³ WAC 388-96-904(1) (2005 & 2007). A nursing facility that disagrees with the result of that initial conference may seek further administrative review by requesting an adjudicative

³ Non-substantive, minor word changes have been made to the current version of the rule. The current version of WAC 388-96-904(1) states that a nursing facility seeking to challenge the payment rate "shall file a written request for an administrative review conference with the office of rates management within twenty-eight calendar days after receiving notice of the department's action or determination."

proceeding with the Department's Board of Appeals (Board) within 28 days of receiving a decision from the administrative review conference. WAC 388-96-904(5). If the nursing facility is dissatisfied with the Board's decision after the adjudicative proceeding, or if the Board issued an order dismissing the adjudicative proceeding, the facility may invoke the superior court's limited jurisdiction under the APA by timely filing a petition for judicial review. RCW 34.05.570(3); WAC 388-96-904(13). Furthermore, challenges that are outside the authority of the Department to decide—such as the legal validity of a statute—can be filed directly in superior court in an APA petition for judicial review. RCW 34.05.534 (person may directly file petition for judicial review under the APA without exhausting administrative remedies if remedies would be inadequate or futile); WAC 388-96-901(2)(d) (no agency-level remedy available to challenge the legal validity of a statute).

In addition to the timely hearing request to challenge the Department's rate-setting methodology, nursing facilities may also make a late request for rate modification. RCW 74.46.531. Known as the "errors or omissions" statute, RCW 74.46.531 requires the Department to review any facility's request for a rate adjustment, "even if the time period has expired in which the [nursing facility] must appeal the rate when initially issued." RCW 74.46.531(4). The Department is authorized by this law to

retroactively correct errors that the nursing home failed to timely appeal. *Id.* But if the Department denies the untimely request, the nursing facility “shall not be entitled to any appeals or exception review procedure that the department may adopt under RCW 74.46.780 [now codified at RCW 74.46.022(11)].” *Id.*

B. Life Care’s APA Challenge Of The 2006 And 2007 Rates

On or before June 30, 2006, the Department sent to each Medicaid nursing facility in the state of Washington notice of its July 1, 2006, rate. CP at 63 (*Board’s Finding of Fact 6*).⁴ The notice included a rate computation worksheet with a step-by-step explanation as to how the rate was calculated and a description of the rate. CP at 63-65 (*Board’s Findings of Fact 6-9*). It also provided notice of the facility’s right to an administrative review of the rate and stated that “To appeal this rate, you must submit a written request in writing within twenty-eight (28) calendar days after receiving this notice of the rate.” CP at 63 (*Board’s Finding of Fact 6*) (emphasis added).

⁴ The Board’s order is at Clerk’s Papers pages 59-76. Appellants had the opportunity to challenge the Board’s findings in their APA petition for judicial review challenging the Board’s order. CP at 100-11; CP at 598. Instead, Appellants voluntarily dismissed their APA petition on April 22, 2011, before the superior court considered the merits of their petition. The voluntarily withdrawal of their APA petition from superior court “finally terminated *all* further appellate review of the [Board’s] Findings of Fact, Conclusions of Law, and Decision.” *Spice v. Pierce Cnty.*, 149 Wn. App. 461, 464, 204 P.3d 254 (2009) (emphasis in original).

Within 28 days of issuance of the July 1, 2006, Medicaid rates, twenty-one nursing facilities under the ownership of Life Care Centers of America—none of which are Appellants in the present case—submitted written requests for administrative review to challenge the Department’s methodology for applying the “vendor rate increase.”⁵ CP at 65 (*Board’s Finding of Fact 10*). The Life Care nursing facilities exhausted their administrative remedies and timely petitioned the superior court under the APA to challenge the Department’s application of the vendor rate increase in their July 1, 2006, Medicaid payment rates. CP at 403-05. In contrast, the Appellants in this case did not timely request administrative review or petition for judicial review of their 2006 rates. CP at 65 (*Board’s Finding of Fact 10*); Br. Appellants at 2.

Before the superior court issued any order in response to the Life Care facilities’ APA petition for judicial review of the 2006 rates, the Department issued the July 1, 2007, rates. As in the previous year, the Department sent each nursing facility notice of its new rate, a description of the rate, and a rate computation worksheet including a step-by-step explanation as to how the rate was calculated. CP at 66-67 (*Board’s Findings of Fact 12-14*). The Department again notified Appellants that “[t]o appeal this rate, you must submit a request in writing within twenty-

⁵ Vendor rate increase is sometimes referred to as the “economic trends and conditions” factor. These two terms can be used interchangeably.

eight (28) calendar days after receiving this notice of the rate.” CP at 66 (*Board’s Finding of Fact 12*).

Within 28 days of issuance of the July 1, 2007, Medicaid rates, the twenty-one Life Care facilities that obtained administrative review in 2006, plus an additional eight nursing facilities—again, none of which are Appellants in the present case—submitted written requests for administrative review to challenge the Department’s methodology for applying the vendor rate increase in the 2007 rate. CP at 67 (*Board’s Finding of Fact 15*). Again, the Appellants in this case did not timely exhaust administrative remedies or petition for judicial review of the Department’s methodology for applying the vendor rate increase.⁶ CP at 67-69, 72-73, 75-76 (*Board’s Findings of Fact 15-18 and Conclusions of Law 8 & 12*); see Br. Appellants at 11.

The Department entered into Agreed Orders with the twenty-nine facilities that had timely requested administrative review in 2007, whereby the parties agreed to be bound by any final judgment entered in the 2006 challenge involving the vendor rate increase issue. CP at 67 (*Board’s*

⁶ In 2007 the Evergreen Healthcare Management facilities timely requested a rate conference to review a different issue: the legality of the numerical value that the Legislature set in the biennial appropriations act for that fiscal year’s vendor rate increase. The Department’s Office of Rates Management determined it did not have authority to change a number established by the Legislature in statute. Even if Evergreen had meant to challenge the Department’s application of the vendor rate increase, they never challenged to the Board the Office of Rates Management’s denial of their request. They therefore failed to exhaust available administrative remedies. CP at 67-69, 72-73, 75-76 (*Board’s Findings of Fact 15-18 and Conclusions of Law 8 & 12*).

Finding of Fact 15); see Br. Appellant at 10. Appellants were not parties to those agreements.

On September 5, 2008, Thurston County Superior Court granted the Life Care facilities the relief they had requested in their 2006 challenge under the APA. CP at 403-05. Judge Chris Wickham ordered the Department to use a different methodology to calculate the 2006 vendor rate increase for the Life Care facilities. *Id.* The Court's order included only those nursing facilities that had timely challenged the 2006 Medicaid rates and were therefore parties to the APA petition before the court. *Id.*

Rather than appeal that order, the Department chose to recalculate the Life Care facilities' 2006 rates as ordered by Judge Wickham and recalculate the 2007 rates for the twenty-nine facilities as provided in the Agreed Orders. CP at 36, 48. The Department did not recalculate the 2006 or 2007 rates for any of the Appellants in this case, who were neither parties to the APA petition nor parties to the Agreed Orders. For the 2008 rate, however, the Department applied the superior court's methodology to all nursing facilities, including Appellants. CP at 531; see also Br. Appellants at 11.

C. Appellants Challenged The 2006 And 2007 Rates For The First Time After The Conclusion Of Life Care's APA Case

It was only *after* Judge Wickham ruled in favor of the Life Care facilities that the Appellants in this case first challenged the vendor rate increases applied to them in 2006 and 2007. CP at 530; Br. Appellants at 11. Contrary to what is alleged in the Appellants' opening brief, the Evergreen Healthcare Management facilities did not timely challenge the Department's application of the vendor rate increase for the 2007 rate. *See* Br. Appellants at 9. Rather, in 2007 the Evergreen facilities requested an administrative review conference to challenge a different issue: the legality of the numerical value that the Legislature set in the biennial appropriations act for that fiscal year's vendor rate increase. CP at 67-68 (*Board's Findings of Fact 16-17*). The Department's Office of Rates Management determined it did not have authority to change a number established by the Legislature in statute. CP at 68 (*Board's Finding of Fact 17*). Evergreen never sought an administrative hearing to challenge the Department's interpretation of their request and therefore failed to exhaust all available administrative remedies. CP at 68, 72-73, 75-76 (*Board's Finding of Fact 18 and Conclusions of Law 8 & 12*). Furthermore, Evergreen never brought an action in court to challenge the number set by the Legislature in the biennial appropriations act.

Because Appellants were well outside the 28-day regulatory appeal deadline in WAC 388-96-904, they asked the Department to modify their 2006 and 2007 Medicaid rates pursuant to the “errors or omissions” clause of RCW 74.46.531. CP at 34. The Department’s Office of Rates Management reviewed the late requests and declined to modify Appellants’ 2006 and 2007 rates. CP at 530-32. On December 2, 2009, the Department sent each of the Appellants a letter denying the late request for rate modification. *Id.*

Appellants did not seek judicial review under the APA of the denial letter issued December 2, 2009. Instead, even though further agency-level review of an “errors or omissions” denial is expressly disallowed by RCW 74.46.531(4), Appellants sought further administrative remedies from the Board. *See* CP at 59-76 (*Board’s order*). Appellants argued to the Board that they had a right to an administrative hearing under the errors or omissions statute to challenge the Department’s denial of their late request for rate modification. CP at 73 (*Board’s Conclusion of Law 9*). Appellants further argued that the rate notifications they received in 2006 and 2007 were deficient in apprising them of how the Department was applying the vendor rate increase. CP at 74 (*Board’s Conclusion of Law 11*). The Board dismissed Appellants’ administrative hearing because RCW 74.46.531 “specifically

denies a nursing facility the right to an administrative hearing” to contest an errors or omissions denial and because the Board had “no authority to hear late challenges brought under RCW 74.46.531.” CP at 74 (*Board’s Conclusion of Law 10*). The Board also determined that the 2006 and 2007 notices were sufficient to alert the nursing facilities of the vendor rate increase calculations and the administrative appeal deadline, and thus that the appeal was untimely under WAC 388-96-904, the rule providing 28 days for a facility to challenge the rates set by the Department. CP at 63-76 (*Board’s Findings of Fact 6-19 and Conclusions of Law 8-12*). Finally, the Board determined that Appellants had failed to timely exhaust available administrative remedies to challenge the Department’s application of vendor rate increase to the 2006 and 2007 rates. See CP at 75-76 (*Board’s Conclusion of Law 12*).

After the Board issued its order, Appellants simultaneously filed two separate actions in the superior court: (1) a complaint for declaratory judgment and writ of mandamus (Thurston County Cause No. 10-2-01832-5); and (2) a petition for judicial review of the Board’s order under the APA (Thurston County Cause No. 10-2-01833-3). CP at 29-43 (amended complaint), 100-11 (amended petition for judicial review). Both actions requested the same relief: that the Department be ordered to retroactively re-calculate Appellants’ July 1, 2006 and July 1, 2007

nursing facility Medicaid payment rates. *Compare* CP at 40 (prayer for judgment in action for mandamus and declaratory judgment), *with* CP at 104 (basis for relief in APA petition for judicial review).

In the action for mandamus and declaratory judgment, the superior court determined that there “was a plain, speedy, adequate remedy available to the Plaintiffs in this case, but it is no longer available.” CP at 597. The superior court also concluded that there was “no authority for this Court under either chapter 7.16 RCW or chapter 7.24 RCW to order a declaratory judgment or a writ of mandamus in this case.” CP at 598. The superior court dismissed the action for mandamus and declaratory judgment “for lack of subject matter jurisdiction,” but also ruled that Appellants’ petition for judicial review under the APA of the Board’s order “remains pending” before the superior court. CP at 598. Appellants later abandoned their APA case by moving for dismissal of the petition before the superior court had an opportunity to rule on its merits.⁷

It is the dismissal for lack of subject matter jurisdiction of the action for mandamus and declaratory judgment that is now before this Court on appeal.

⁷ At Appellants’ request, the superior court dismissed Appellants’ APA petition on April 22, 2011. Thurston County Superior Court Cause No. 10-2-01833-3.

IV. ARGUMENT IN RESPONSE

The superior court correctly dismissed Appellants' action for mandamus and declaratory judgment for lack of subject matter jurisdiction.⁸ Subject matter jurisdiction is a "threshold issue" that must be considered before evaluating substantive issues. *Indoor Billboard v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 70-71, 170 P.3d 10 (2007). Without subject matter jurisdiction, courts need not—and cannot—address any other arguments by the parties on substantive issues. *E.g., Skagit Surveyors and Eng'rs, LLC v. Friends of Skagit Cnty.*, 135 Wn.2d 542, 556, 958 P.2d 962 (1998) ("Lack of jurisdiction over the subject matter renders the superior court powerless to pass on the merits of the controversy brought before it."); *Inland Foundry Co. v. Spokane Cnty. Air Pollution Control Auth.*, 98 Wn. App. 121, 123-24, 989 P.2d 102 (1999) ("Without subject matter jurisdiction, a court or administrative tribunal may do nothing other than enter an order of dismissal.").

The superior court lacked subject matter jurisdiction in this action for mandamus and declaratory judgment for two reasons. First, the Appellants failed to timely obtain available judicial review under the APA of the 2006 and 2007 rate-setting action at issue in this case. When an

⁸ Contrary to the Appellants' assertions in their opening brief, the superior court did not rule on summary judgment, but rather dismissed for lack of jurisdiction. CP at 598.

agency action is reviewable by the courts under the APA, then the APA is the exclusive means to review. Second, the Department's denial of a late request made under RCW 74.46.531 is either (1) a discretionary agency action unreviewable by the courts or, alternatively, (2) an "other agency action" reviewable under the APA. Either way, the superior lacks subject matter jurisdiction in this non-APA action for mandamus and declaratory judgment.

A. Standard Of Review

A superior court's legal conclusion that it lacked subject matter jurisdiction to hear a claim is reviewed de novo. *Indoor Billboard*, 162 Wn.2d at 71. An appellate court will not reverse a dismissal order from the superior court if the dismissal can be sustained upon any theory within the pleadings and proof. *E.g., Lundgren v. Kieren*, 64 Wn.2d 672, 677, 393 P.2d 625 (1964).

While it is ultimately up to the Courts to determine the meaning of statute, Courts give substantial weight to an agency's interpretation of a law it administers. *Ames v. Dep't of Health*, 166 Wn.2d 255, 261, 208 P.3d 549 (2009). In this case, the Department's application of the Medicaid statutes, including the errors or omissions statute, warrants respectful consideration due to the complexity of chapter 74.46 RCW and the expertise of the Department.

B. Appellants Cannot Belatedly Seek Mandamus Or Declaratory Judgment Relief From The Department's 2006 And 2007 Rate Setting Because They Had Adequate Administrative And Judicial Remedies Under The APA Available At That Time.

The relief the Appellants seek in this case is a mandate “requiring the Department to retroactively correct the July 1, 2006 and July 1, 2007 component rates using the compounding method for the [vendor rate increase] specified in [Judge Wickham’s order in Life Care’s APA case].” Br. Appellants at 47. But the superior court does not have subject matter jurisdiction over Appellants’ claims for mandamus or declaratory judgment because the Appellants’ exclusive avenue for judicial review of their 2006 and 2007 Medicaid rates is the APA. Declaratory judgments and writs of mandamus are not available where the challenged agency action is reviewable under the APA. The superior court’s order dismissing the non-APA case for lack of subject matter jurisdiction should be affirmed.

1. Appellants failed to exhaust administrative remedies or petition for judicial review under the APA in 2006 and 2007

Department actions are governed by the APA. RCW 34.05.030(5). The Department’s calculations of nursing facility Medicaid payment rates are reviewable by the courts under the APA. *E.g., Life Care*, 162 Wn. App. at 373-74. In fact, the Department’s specific application of the

vendor rate increase in the 2006 and 2007 Medicaid payment rates was reviewable by the courts under the APA. The fact that the Life Care facilities were able to obtain their desired relief on the vendor rate increase issue from the superior court in an APA action shows adequate judicial remedies under the APA were available to any nursing facility that timely and properly exercised its right to petition for review. CP at 403-05.

Appellants state in their opening brief that they believe the “ultimate issue” in this appeal is whether the Department made an error in applying the vendor rate increase in 2006 and 2007. Br. Appellants at 47. The relief Appellants seek in this case is a mandate “requiring the Department to retroactively correct the July 1, 2006 and July 1, 2007 component rates using the compounding method for [vendor rate increase] specified in [Judge Wickham’s order in the Life Care case].” *Id.* In other words, Appellants concede that they are attempting to challenge in this non-APA action for mandamus and declaratory judgment the exact same legal issue that the Life Care facilities successfully challenged under the APA.

Appellants assert that they “had no notice” of “the method of calculating the vendor rate increase in July 2006, nor in July 2007.” Br. Appellant at 27. The Appellants further state that “[t]he Department did not contest these statements of lack of knowledge.” *Id.* Both of the

Appellants' assertions are patently incorrect. The Department's Board made final findings of fact and conclusions of law determining that Appellants did have adequate notice of the vendor rate increase calculations in 2006 and 2007. CP at 63-76 (*Board's Findings of Fact 6-19; Board's Conclusions of Law 8-12*). Appellants had the opportunity to challenge the Board's determinations about the adequacy of the 2006 and 2007 notice letters in their simultaneously-filed APA petition. In oral argument at the superior court in this non-APA action for mandamus and declaratory judgment action, the Department's attorney made it clear that the superior court did have jurisdiction to review the Board's findings in the then-currently-pending APA case and that, depending on the superior court's ruling in the APA case, there could be a "different outcome on whether or not [the Appellants are] entitled to a hearing . . . under [WAC 388-96-]904." RP at 27.

Rather than pursuing the argument about inadequate notice in their APA case, Appellants chose to voluntarily dismiss their APA petition before the superior court ruled on it. Appellants' voluntarily withdrawal of their APA petition from superior court "finally terminated *all* further appellate review of the [Board's] Findings of Fact, Conclusions of Law, and Decision." *Spice v. Pierce Cnty.*, 149 Wn. App. 461, 464, 204 P.3d 254 (2009) (emphasis in original). Because Appellants never pursued

their APA case in the superior court to challenge the Board's findings, Appellants are collaterally estopped from now challenging those findings in this action. *Christensen v. Grant Cnty. Hospital Dist. No. 1*, 152 Wn.2d 299, 96 P.3d 957 (2004) (collateral estoppel prevents a party from challenging in a subsequent judicial proceeding findings made by the Public Employment Relations Commission). In other words, Appellants' decision to abandon their APA petition made final all of the Board's findings, including the findings about the adequacy of the 2006 and 2007 notice letters.

Like Life Care, Appellants had a right to challenge the Department's rate methodology both administratively and in the courts. But unlike Life Care, Appellants failed to obtain judicial review under the APA to challenge the vendor rate increase issue for the 2006 or 2007 rates.

2. Neither mandamus nor declaratory judgment is available when an agency action is reviewable under the APA

Neither a mandamus nor a declaratory judgment action is available if the agency action being challenged was reviewable by the courts under the APA. RCW 7.16.360 (writ of mandamus); RCW 7.24.146 (declaratory judgment). Both the mandamus and declaratory judgment chapters of the RCW explicitly declare that the chapters do "not apply to state agency action reviewable under [the APA]." *Id.* It is well settled

that when an agency action is reviewable by the superior court under the APA, then the APA is the exclusive avenue for judicial review. *E.g.*, RCW 34.05.510; *Diehl v. W. Wash. Growth Mgmt. Hearings Bd.*, 153 Wn.2d 207, 213, 103 P.3d 193 (2004); *Judd v. Am. Tel. & Tel. Co.*, 152 Wn.2d 195, 204-05, 95 P.3d 337 (2004); *see also Jones v. Dep't of Corrections*, 46 Wn. App. 275, 279, 730 P.2d 112 (1986) (estoppel cannot be the basis for conferring subject matter jurisdiction upon a court). The time limit for requesting an administrative hearing from an agency “is mandatory and jurisdictional.” *Rutcosky v. Bd. of Trustees*, 14 Wn. App. 786, 789, 545 P.2d 567 (1976) (citing *Rust v. W. Wash. State Coll.*, 11 Wn. App. 410, 415, 523 P.2d 204 (1974)). When a hearing is not timely requested, “further administrative and judicial review of the dismissal is barred.” *Id.*

Declaratory relief and writs of mandamus are barred if previously-available judicial review under the APA was not timely pursued. The “loss of the remedy provided by the APA through failure to file a timely petition for review does not render that remedy inadequate, or give rise to a right to extraordinary writs.” *Bock v. Bd. of Pilotage Comm'rs*, 91 Wn.2d 94, 98, 586 P.2d 1173 (1978). In other words, “if APA review was available, the extraordinary writs are not.” *Id.* In *Bock*, Bock failed to seek review of an agency action within the applicable 30-day deadline.

Id. at 100. Bock instead filed a petition for writs of mandamus, prohibition, and declaratory judgment. *Id.* at 96. But because Bock failed to timely pursue remedies under the APA, the Washington Supreme Court held that the superior court “had no jurisdiction to review the Board’s action, and should have dismissed the action on that ground.” *Id.* at 100 (emphasis added). Because the procedure to challenge the Board’s actions was prescribed by the APA, “jurisdiction can be obtained only under that Act [the APA].” *Id.*

Here, as in *Bock*, challenges to nursing facility rates are provided an administrative process and judicial review under the APA. RCW 34.05.570 (judicial review under APA); WAC 388-96-904(1), (5), (13) (administrative remedies and authority to petition for judicial review under APA once administrative remedies exhausted). The Life Care facilities took advantage of these processes and obtained judicial review under the APA within the required timelines, whereas Appellants did not. As in *Bock*, this Court’s jurisdiction can be obtained only under the APA. Loss of an APA remedy through the Appellant’s inaction does not confer some alternative jurisdiction.

In a similar recent case involving the Department of Labor and Industries, this Court held that plaintiffs “cannot avoid the exclusive remedy provisions of the [Industrial Insurance] Act by invoking the trial

court's authority to grant equitable relief." *Davis v. Dep't of Labor & Indus.*, 159 Wn. App. 437, 443, 245 P.3d 253 (2011). In *Davis*, workers had filed a class action lawsuit asserting that the Department of Labor and Industries impermissibly allocated their third party settlements in violation of the takings clause of the Constitution. *Id.* at 439-40. The superior court declined to rule on whether it had subject matter jurisdiction over the industrial insurance issues raised in the lawsuit. *Id.* at 440. On appeal, this Court reversed and remanded for dismissal, holding that even if the legal claims had merit, "they cannot survive dismissal unless the named plaintiffs have properly invoked the superior court's jurisdiction." *Id.* at 443. In other words, "the trial court should have dismissed the lawsuit for lack of subject matter jurisdiction." *Id.* at 442.

Here, the superior court did properly dismiss the Appellants' lawsuit for lack of subject matter jurisdiction. CP at 596-98. Just as in *Davis*, the nursing facility Appellants cannot obtain judicial review while avoiding the exclusive remedy provisions of the APA. And just as in *Davis*, the Appellants' action for mandamus and declaratory judgment must be dismissed because they failed to properly invoke the superior court's jurisdiction.

In another recent analogous case, landowners brought a claim in superior court against the City of Kirkland, rather than seeking review of

city ordinances from the Growth Management Hearings Board. *Davidson Serles v. City of Kirkland*, 159 Wn. App. 616, 622, 246 P.3d 822 (2011). The landowners asserted that the superior court had subject matter jurisdiction to grant a writ or declaratory judgment because of article IV, section 6 of the Washington Statute Constitution. *Id.* at 626. The superior court dismissed the landowners' claims for lack of subject matter jurisdiction. *Id.* at 624. The Court of Appeals affirmed the dismissal for lack of subject matter jurisdiction, holding that because the City's comprehensive plan could be reviewed by the Growth Management Hearings Board, and subsequently the Board's order could be reviewed by the courts under the APA, the superior court was barred from issuing a writ or declaratory judgment. *Id.* at 627 & 627 n.1. Because an adequate remedy existed, a party "can seek neither a constitutional writ pursuant to article IV, section 6 nor a declaratory judgment pursuant to chapter 7.24 RCW. Accordingly, the trial court properly dismissed Davidson's challenges to the City's amendments to the comprehensive plan." *Id.* at 628.

Here, the superior court also correctly dismissed Appellants' claim for mandamus and declaratory judgment. Similar to the landowners in *Davidson Serles*, the Appellants had an opportunity to seek administrative remedies and APA judicial review to challenge their 2006 and 2007

payment rates. The Life Care facilities were able to obtain judicial review under the APA of the same rate-setting action. Because an adequate remedy existed to challenge the rate-setting action, the Appellants “can seek neither a constitutional writ . . . nor a declaratory judgment” and the superior court “properly dismissed” the Appellants’ challenges to their 2006 and 2007 payment rates. *Davidson Serles*, 159 Wn. App. at 628.

Because the 2006 and 2007 rate-setting actions at issue in this case were reviewable under the APA, writs of mandamus and/or declaratory judgments do not apply. RCW 7.16.360; RCW 7.24.146. The opportunity for both administrative and judicial remedies under the APA were available to the Appellants in 2006 and 2007. Having failed to take advantage of those remedies, Appellants cannot now claim that their remaining remedies are inadequate. Under well-settled law, the superior court was correct in dismissing this action for mandamus and declaratory judgment for lack of subject matter jurisdiction. This Court should affirm that dismissal.

C. To The Extent Appellants Had Any Right To Appeal The Department’s Discretionary Decision To Deny Their Late Request For A Rate Modification, Their Exclusive Remedy Would Have Been Under The APA.

The Appellants’ opening brief argues that the superior court and this Court have jurisdiction in this action for mandamus and declaratory

judgment because of RCW 74.46.531, a statute known as the “errors or omissions” law. The Appellants’ argument is fundamentally flawed.

When the Department denies a late request for rate modification under RCW 74.46.531, there is either (1) no judicial review of a denial; or in the alternative, (2) judicial review of the denial under only the APA. In other words, denials of untimely requests made under RCW 74.46.531 are either not entitled to any review, judicial or administrative; or in the alternative, the denial is an agency action subject to judicial review under only the APA. Either way, the Appellants’ non-APA action for mandamus and declaratory judgment must be dismissed for lack of subject matter jurisdiction.

1. The Department’s denial of a late rate modification request is discretionary and unreviewable

RCW 74.46.531 allows nursing facilities to “request” rate modification to the Department’s Office of Rates Management even after the mandatory regulatory appeal deadline, but the statute explicitly prohibits any appeals or administrative review of late-filed requests.

RCW 74.46.531(4) states:

The department shall review a [nursing facility’s] request for a rate adjustment because of an alleged error or omission, even if the time period has expired in which the [nursing facility] must appeal the rate when initially issued, pursuant to rules adopted by the department under 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 [nursing facility] shall not be entitled to any appeals or exception review procedure that the department may adopt under RCW 74.46.780.⁹ [Emphasis added.]

In other words, RCW 74.46.531 allows a facility to make a late request to the Department for rate modification, and the statute allows the Department to grant the request if the Department agrees that a mistake was made. But if the untimely request is denied, the facility is not entitled to “any appeals” or further agency-level review. When a statute bars further review of a decision, any further attempts to seek judicial review are “frivolous.” *Spice*, 149 Wn. App. at 467. Allowing Appellants to seek declaratory judgment and a writ of mandamus to appeal their 2006 and/or 2007 rates would circumvent the explicit statutory requirement that a nursing facility is not entitled to any appeal or exception review procedure if it failed to timely request an administrative hearing within the 28-day regulatory deadline.

In an analogous United States Supreme Court case—*Your Home Visiting Nurse Servs., Inc. v. Shalala*, 525 U.S. 449, 119 S. Ct. 930, 142 L. Ed. 2d 919 (1999)—the Court analyzed the similar federal regulatory scheme for Medicare, which also provides (1) a regulatory deadline for challenging a payment rate, and (2) an option to make untimely requests

⁹ RCW 74.46.780 has been re-codified at RCW 74.46.022(11).

for rate modification after the regulatory deadline has expired. The Court held unanimously that if a facility utilized the second option of making an untimely request for a rate modification, then the decision to deny the late request was unreviewable by the courts under either the federal mandamus statute or under the federal APA. *Your Home*, 525 U.S. at 452-58.

In *Your Home*, the Court considered a section of the Medicare Act in which an intermediary issues payment rates to providers. *Id.* at 450-51. A dissatisfied Medicare provider has two ways to challenge a reimbursement rate. First, the provider could appeal the rate within 180 days to the federal Provider Reimbursement Review Board (PRRB), an administrative tribunal that can conduct evidentiary hearings and affirm, modify, or reverse the rate. *Id.* at 451. The PRRB's final decision is subject to judicial review in federal district court. *Id.* Second, for a period of up to three years, the provider can request the intermediary to "reopen" the reimbursement determination. *Id.* In *Your Home*, the facility did not seek administrative review of the reimbursement amount within the 180-day time limit; instead, it later asked the intermediary to "reopen" the reimbursement determination on the ground that "new and material" evidence demonstrated entitlement to additional compensation." *Id.* The intermediary denied the request to reopen. *Id.* The facility sought further administrative remedies from the PRRB, but the PRRB dismissed the case

on the ground that the facility failed to seek review within 180 days and the regulation divested it of jurisdiction to review denials of late requests. *Id.* The facility then brought an action in federal court challenging both the PRRB's dismissal and the intermediary's refusal to reopen. *Id.* at 452. The federal district court "dismissed the complaint," finding that the PRRB lacked jurisdiction to review the refusal to reopen and "reject[ing] petitioner's alternative contention that the . . . mandamus statute, [28 U.S.C.] §1361, gave the District Court jurisdiction to review the intermediary's refusal directly." *Id.*

The Supreme Court unanimously affirmed the dismissal. The Court first ruled that the PRRB lacked jurisdiction to review the intermediary's refusal to reopen. *Id.* at 452-56. Second, the Court determined that the facility was not entitled to any judicial review of the intermediary's refusal to reopen. *Id.* at 456. The Court held: "We also reject petitioner's fallback argument that it is entitled to judicial review of the intermediary's refusal to reopen." *Id.* The Court specifically determined that the facility was not entitled to judicial review under either the federal APA¹⁰ or under the federal mandamus statute.¹¹ *Id.* at 456-58.

¹⁰ The Department acknowledges that the federal APA and Washington's APA are not identical. *Compare Your Home Visiting Nurse Servs., Inc. v. Shalala*, 525 U.S. 449, 457, 119 S. Ct. 930, 142 L. Ed. 2d 919 (1999) (actions committed to agency discretion by law within the meaning of the federal APA are "unreviewable"), *with*

The Supreme Court explained that the purpose of imposing a 180-day limit on the right to seek review of the reimbursement rate would be frustrated by permitting requests to reopen to be reviewed indefinitely. *Id.* at 454.

Similar to the federal regulatory scheme, Washington’s nursing facility Medicaid payment system gives dissatisfied nursing facilities two methods to challenge a reimbursement rate. First, the provider can appeal the rate by requesting an administrative review conference within 28 days, and then an administrative hearing to the Department’s Board within 28 days after receiving the determination. WAC 388-96-904. Under this method, the Board can conduct evidentiary hearings and affirm, modify, or reverse the rate, and the Board’s final decision is subject to judicial review in superior court under the APA. WAC 388-96-904 (5)-(13); *see generally* chapter 34.05 RCW. Second, after the 28 days have expired, the provider can request a rate adjustment to the Department’s Office of Rates Management under the “errors or omissions” statute. RCW 74.46.531. This is akin to asking that a prior year’s rate be “reopened.” But under

RCW 34.05.570(4)(c) (Washington’s APA authorizes judicial review for persons aggrieved by an agency action, “including the exercise of discretion”).

¹¹ The Court declined to rule on whether mandamus is altogether unavailable to review any claim arising under the Medicare Act. *Your Home*, 525 U.S. at 457 n.3. Instead the Court ruled that “[e]ven if mandamus were available for claims arising under the Social Security and Medicare Acts, petitioner would still not be entitled to mandamus relief because it has not shown the existence of a clear nondiscretionary duty to reopen the reimbursement determination at issue.” *Id.* at 456-57 (internal quotation and citation omitted).

this second method, the Department’s Board, the superior court, and this Court lack jurisdiction to review the Office of Rates Management’s decision to refuse to modify. The relevant statutory provision—RCW 74.46.531—explicitly states that a nursing facility “shall not be entitled to any appeals” if a late request for rate modification is denied. RCW 74.46.531(4). In *Your Home*, the United States Supreme Court affirmed the dismissal of the facility’s case, rejecting the facility’s argument that it is entitled to judicial review of the intermediary’s refusal to reopen. Similarly here, this Court should affirm the dismissal of Appellants’ case by rejecting Appellants’ argument that they are entitled to judicial review of the Department’s denial of a late request for rate modification.

One reason to prohibit judicial review of an untimely “errors or omissions” request under Washington law is because of the system the Legislature adopted for distributing Medicaid payments. The Legislature caps the total amount of money that can be distributed to all nursing facilities for each fiscal year. In a law sometimes referred to as the “budget dial” statute, RCW 74.46.421 requires the Department to downward adjust any calculated rate “to assure that the statewide average payment rate to nursing facilities is less than or equal to the statewide average payment rate specified in the biennial appropriations act.”

RCW 74.46.421(2)(b). Once the total amount of money established by the Legislature for a particular year is allocated to the nursing facilities, no more money can be distributed for any reason. RCW 74.46.421(4)(a)-(c).

The “errors or omissions” law is explicitly tied to the budget dial statute. RCW 74.46.531(6); RCW 74.46.421. In other words, the “errors or omissions” law prohibits the Department from making a correction to a facility’s payment rate if there is insufficient money remaining in that prior year’s biennial appropriations act. *Id.* The purpose of the budget dial statute is to ensure that all nursing facility Medicaid payments, “in the aggregate for all participating nursing facilities, are in accordance with the biennial appropriations act.” RCW 74.46.421(1). The budget dial statute also is explicit that nothing in chapter 74.46 RCW “shall be construed as creating a legal right or entitlement to any payment that . . . would cause the statewide average payment rate to exceed the statewide average payment rate specified in the biennial appropriations act.” RCW 74.46.421(3). Furthermore, the Legislature mandated that even in the event of “any final order or final judgment,” the Department can increase the nursing facility’s payment rate “only to the extent that it does not result in an increase to the statewide weighted average payment rate for all facilities.” RCW 74.46.421(4)(c). In other words, the Department is strictly prohibited by law from increasing any facility’s Medicaid

payment rate by an amount that would cause the statewide aggregate payment rate to exceed the allocated funds for that given year.

The prohibitions in the budget dial statute, RCW 74.46.421, make sense when they are considered in light of annual state budgets and real dollars being allocated and spent by nursing facilities to cover costs. When a facility prevails in a timely-filed appeal, the Department still has time to prospectively adjust every other facility's payment rates for the remainder of that current fiscal year. RCW 74.46.421(4)(b) (for the current fiscal year, adjustments "shall only be made prospectively, not retrospectively"). But when a facility files a late request under RCW 74.46.531—potentially years after the rate year in question—the Department cannot grant the request if no money remains for the budget year in question. RCW 74.46.421(4)(c) (for a prior fiscal year, the Department cannot increase any facility's rate if it would exceed the total amount allocated for the fiscal year in question).

In the Department's December 2, 2009, letter denying the Appellants' late request for rate modification, the Department noted that "there were—and are—no funds in the relevant appropriation period to pay for an extension of the [Life Care] ruling to all facilities." CP at 531. In other words, the appropriated funds for the 2006 and 2007 rate years were already fully distributed to the participating nursing facilities. By

explicitly tying the “errors or omissions” determination to the budget dial statute, the Legislature prohibited the Department from modifying any nursing facility’s payment rate if doing so would exceed appropriations designated for that fiscal year. RCW 74.46.531(6); RCW 74.46.421. And by prohibiting the Department from paying more than the allocated budget amount, even in the event of a final order or final judgment, the Legislature made clear that rate modifications absolutely cannot be granted when no money remains in that year’s budget. The decision to grant an untimely request for rate modification is within the Department’s discretion, unless there is no money remaining for the rate year in question, in which case the Department is prohibited from adjusting the payment rate for any reason. This statutory scheme, when taken as a whole, explains why the Legislature prohibited any appeals of an errors or omissions denial.

The plain language of RCW 74.46.531 prohibits further judicial or administrative review of a denial of an untimely request. This statutory prohibition makes sense in light of the Department’s role to allocate no more than the amount of dollars specified by the Legislature for each fiscal year.

2. Even if judicial review were available to challenge the Department's discretionary denial of a late request for rate modification, the remedy would be through the APA, not an action for mandamus or declaratory judgment

The Appellants' claim in this case hinges on the argument that the law requires judicial review of denials of late requests made under RCW 74.46.531. *See, e.g.*, Br. Appellants at 28 (“Denial of court relief where there is no administrative remedy is simply unfair.”). The Department has shown why that argument lacks merit. But even if this Court were to agree with the Appellants that RCW 74.46.531 allows for judicial review of denials of late requests, the Appellants' attempt to obtain declaratory judgment or a writ of mandamus still must be dismissed for lack of jurisdiction. If judicial review were available of the Department's denial of an untimely request under RCW 74.46.531, that judicial review would be available under only the APA. There is no authority for the superior court to grant declaratory relief or mandamus in this case.

Assuming *arguendo* that the Department's action in denying an untimely request for rate modification under RCW 74.46.531 was subject to judicial review—notwithstanding the plain language of RCW 74.46.531 that no appeals are available—the Department's determination in implementing the Medicaid statutes and denying the rate modification

would have been an “agency action” within the definition of the APA. RCW 34.05.010(3). The APA allows for judicial review of “all agency action,” including actions in addition to rulemaking and adjudicative orders. RCW 34.05.570(2)-(4). The APA states that any party “whose rights are violated by an agency’s failure to perform a duty that is required by law to be performed may file a petition for review pursuant to RCW 34.05.514, seeking an order pursuant to this subsection requiring performance.” RCW 34.05.570(4)(b). The APA is also specific that relief for persons aggrieved by the performance of an agency action, “including the exercise of discretion,” can be granted only if the court determines that the action is (i) unconstitutional; (ii) outside the statutory authority of the agency; (iii) arbitrary or capricious; or (iv) taken by persons who were not properly constituted as agency officials lawfully entitled to take such action. RCW 34.05.570(4)(c).

The crux of the Appellants’ claim for mandamus and declaratory judgment is their allegation that they had “no plain, speedy and adequate remedy in the ordinary course of law to rectify the December 2, 2009 [denial by the Department].” Br. Appellants at 32. But Appellants did not petition the superior court for APA judicial review within 30 days of the Department’s December 2, 2009, denial letter. They never attempted to

obtain the most obvious form of judicial review of an adverse agency action: judicial review under the APA.

Instead of seeking APA judicial review of the December 2 letter, the Appellants “attempted to appeal this refusal through the Department’s administrative review process.” Br. Appellants at 13. Appellants sought further administrative remedies even though they knew or should have known that the December 2 letter was a final agency action not subject to further agency-level review; the Appellants concede that “[t]he language could not be more plain” that the “legislature has prohibited use of the Department’s administrative review procedure . . . to rectify the refusal of the Department to agree that an error has been made.” Br. Appellants at 19. As expected, the Department’s Board ruled that it had “no authority to hear late challenges brought under RCW 74.46.531.” CP at 74 (*Board’s Conclusion of Law 10*).

In response to the Board’s dismissal order, Appellants simultaneously filed two separate actions in the superior court: (1) a complaint for declaratory judgment and writ of mandamus; and (2) a timely petition for judicial review under the APA. CP at 29-43, 100-11. When the superior court dismissed the action for mandamus and declaratory judgment for lack of subject matter jurisdiction, the court explicitly ruled that Appellants’ APA case “remains pending before this

Court.” CP at 598. But the Appellants never gave the superior court an opportunity to address the merits of their timely-filed APA appeal of the Board’s order.¹² Appellants chose to voluntarily dismiss their APA petition before the superior court had an opportunity to rule on its merits. Instead, Appellants chose to argue to this Court that an APA remedy was not available.

If not barred by RCW 74.46.531(4), the plain language of the APA would allow judicial review under the APA for the exact type of allegations the Appellants are raising in this case. For instance, Appellants assert they are aggrieved because the Department had a “Clear Duty Based upon the ‘Errors or Omissions’ Statute, RCW 74.46.531(4)” to grant the Appellants’ untimely request for rate modification. Br. Appellants at 33. This complaint is addressed by the APA provision that allows for judicial review to evaluate a claim that a party’s “rights are violated by an agency’s failure to perform a duty that is required by law to be performed.” RCW 34.05.570(4)(b). The Appellants also claim the Department’s refusal to apply Judge Wickham’s Life Care order to them is “contrary to law and is arbitrary and capricious” and also unconstitutional.

¹² The Appellants argued in their APA petition for judicial review that the superior court should “order the Department of Social and Health Services to revise the Medicaid rates under chapter 74.46 RCW and the regulations promulgated thereto, for nursing facility residents established by the Department for the July 1, 2006 and July 1, 2007 rate-setting periods.” CP at 104.

E.g., Br. Appellants at 32, 40-45. These complaints are also addressed by the APA, which allows for judicial review of any agency action, including the agency's exercise of discretion, if the party claims the action was unconstitutional, outside the statutory authority of the agency, or arbitrary or capricious. RCW 34.05.570(4)(c). All of the Appellants' claims in this case are the type of claims that RCW 34.05.570 explicitly mentions as being reviewable under the APA.

If the Department's denial of the untimely request under RCW 74.46.531 was reviewable by the courts at all, it was reviewable under the APA. As argued above, neither a writ of mandamus nor a declaratory judgment action is available for judicial review of an agency action reviewable under the APA. *E.g.*, RCW 7.16.360; RCW 7.24.146. Furthermore, it is well-settled that when an agency action is reviewable by the superior court under the APA, then the APA is the exclusive avenue for judicial review. *E.g.*, RCW 34.05.510; *Diehl*, 153 Wn.2d at 213. And "if APA review was available, the extraordinary writs are not." *Bock*, 91 Wn.2d at 98. A party's legal claims, even if they have merit, "cannot survive dismissal unless the named plaintiffs have properly invoked the superior court's jurisdiction." *Davis*, 159 Wn. App. at 443.

The superior court lacked jurisdiction to hear Appellants' claims for declaratory relief and a writ of mandamus, and the court properly dismissed the case on that basis.

D. The Department Properly Denied Appellants' Late Request For Modification Of Their 2006 And 2007 Medicaid Rates.

As argued above, the superior court correctly dismissed the Appellants' action for mandamus and declaratory judgment for lack of subject matter jurisdiction. "Lack of jurisdiction over the subject matter renders the superior court powerless to pass on the merits of the controversy brought before it." *Skagit Surveyors*, 135 Wn.2d at 556.

But if this Court were to determine that the courts have jurisdiction in this action for mandamus and declaratory judgment, the Department respectfully requests that this case be remanded to the superior court for consideration of Appellants' claims. In the alternative, if this Court considers Appellants' claims on the merits, the claims should be denied.

1. If the courts have jurisdiction over Appellants' mandamus or declaratory judgment claims, this case should be remanded to the superior court on the merits

The superior court did not rule on the merits of any of the substantive arguments that Appellants raised in their complaint or motion for summary judgment. CP at 596-598. Appellants concede in their opening brief that the superior court "did not rule on these points" raised

in their complaint and motion for summary judgment. Br. Appellant at 27. Even though the superior court dismissed on jurisdictional grounds, many of the issues raised by Appellants in this appeal involve the merits of their substantive claims: that the Appellants are entitled to a writ of mandamus; that the Department is estopped from denying it committed an error in setting the 2006 and 2007 rates; that the Department acted arbitrarily and capriciously; and that the Department violated the equal protection clause. But these substantive claims are issues the superior court never reached. If this Court determines that the superior court does have subject matter jurisdiction to consider Appellants' claims in this action for mandamus and declaratory judgment, the Department respectfully requests that this Court remand this case to the superior court.

2. If this Court considers Appellants' substantive claims, those claims should be denied

In the event that this Court decides there is jurisdiction to consider the merits of the Appellants' claims and decides that this Court should rule on those claims, the Department is providing limited briefing below on why Appellants' arguments lack merit and should be denied. The Department disputes all of the substantive claims raised by Appellants in this case.

a. Mandamus does not lie because the decision whether to belatedly adjust a nursing facility's Medicaid rate is a discretionary agency act

“Mandamus is an extraordinary remedy appropriate only where a state official is under a mandatory ministerial duty to perform an act required by law as part of that official’s duties.” *Freeman v. Gregoire*, 171 Wn.2d 316, 323, 256 P.3d 264 (2011). In addition, the mandate “must define the duty with such particularity ‘as to leave nothing to the exercise of discretion or judgment.’” *Id.* (quoting *SEIU Healthcare 775NW v. Gregoire*, 168 Wn.2d 593, 599, 229 P.3d 774 (2010)).

Under RCW 74.46.531, the Department must review every request for rate modification, no matter how untimely. When a request is made beyond the 28-day deadline, the Department has no mandatory ministerial duty to correct a facility’s rate, but rather the Department “has the authority to correct the rate if it agrees an error or omission was committed.” RCW 74.46.531(4). In this case, there is no dispute that the Department reviewed Appellants’ late request. *See* CP at 530-32. While the request was denied, nothing in RCW 74.46.531 mandates that the Department grant a late request for rate modification, even if the Department determines that an error was made. The decision to provide relief after the 28-day deadline has passed is entirely an act of agency discretion. And, as discussed above, RCW 74.46.531 and RCW 74.46.421

prohibit the Department from granting a late request if that request would result in an increase in total payments in excess of the amount identified in that year's biennial appropriations act. In this case, lack of remaining dollars in the 2006 and 2007 biennial appropriations was one of the Department's stated reasons for denying the request. CP at 531.

Because RCW 74.46.531 merely gives the Department discretion to grant a late request, there is no mandatory duty that could be compelled through mandamus. Appellants' petition for a writ of mandamus must be denied.

b. The Department is not collaterally estopped from denying Appellants' late request for rate modification

The Department acknowledges that the vendor rate increase issue was previously litigated by the Life Care facilities, and that Judge Wickham's APA order was final as to the Life Care facilities. CP at 403-05. But collateral estoppel does not preclude the Department from denying a rate modification on the vendor rate increase issue to Appellants, facilities that did not obtain APA review from the superior court and that instead made an untimely request to the Department for rate modification under RCW 74.46.531.

Here, Appellants are in a dramatically different position than the Life Care facilities, in part because Appellants chose not to timely appeal

their 2006 and 2007 rates when issued. The Department cannot be collaterally estopped from refusing to grant Appellants the relief that the Life Care facilities obtained because (1) the parties are not identical; (2) the issues are not identical; (3) collateral estoppel would cause an injustice to the Department; and (4) there was a legislative clarification of the vendor rate increase statute shortly after the Life Care litigation.

First, Appellants were not parties to the Life Care APA case. Washington courts have never considered the question of whether a nonmutual party may use collateral estoppel offensively against the state.¹³ But other jurisdictions, including the United States Supreme Court, have generally concluded that nonmutual collateral estoppel is not available against the government in civil cases. *E.g.*, *U.S. v. Mendoza*, 464 U.S. 154, 160, 104 S. Ct. 568, 78 L. Ed. 2d 379 (1984) (a rule allowing nonmutual collateral estoppel against the government “would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue”); *Hercules Carriers, Inc. v. Florida Dep’t of Transp.*, 768 F.2d 1558, 1579 (11th Cir. 1985) (holding that “the rationale outlined by the Supreme Court in *Mendoza* for not applying nonmutual collateral estoppel against the government is

¹³ Two cases have allowed the doctrine to be used defensively. *See Public Utility Dist. No. 1 of Pend Oreille Cnty., v. Tombari Family Ltd. P’ship*, 117 Wn.2d 803, 819 P.2d 369 (1991); *Seattle Exec. Servs. Dep’t v. Visio Corp.*, 108 Wn. App. 566, 577, 31 P.3d 740 (2001).

equally applicable to state governments.”). In deciding not to appeal from an erroneous but non-precedential superior court decision construing RCW 74.46.431 (the statute where vendor rate increases are directed), the Department did not waive its ability to argue for a proper construction of the statute in future cases.

Second, the issues in Appellants’ case are not identical to the issues in the Life Care litigation. For instance, under the errors or omissions clause of RCW 74.46.531 the Department can approve a late request for rate modifications only “subject to the provisions of RCW 74.46.421.” RCW 74.46.531(6). And RCW 74.46.421, the budget dial statute, prohibits a rate increase for a prior fiscal year that would cause the total allocated budget for that prior fiscal year to be exceeded. RCW 74.46.421(4)(c). If the vendor rate increase issue is re-litigated, the amount of remaining funds in the 2006 and 2007 appropriations must be a factor in determining if Appellants’ payment rates can be adjusted.

Third, collateral estoppel would be a great injustice to the Department because the Department justifiably relied on the finality of Appellants’ 2006 and 2007 Medicaid rates when Appellants failed to challenge the vendor rate increase issue by the mandatory appeal deadline. Like collateral estoppel, mandatory appeal deadlines are also fundamental in providing finality to litigation.

Lastly, there has been a major factual change since Life Care's APA hearing on the vendor rate increase issue: the Legislature amended the vendor rate increase statute shortly after Judge Wickham's ruling to clarify that the Department's interpretation had been correct. Laws of 2009, ch. 570, § 1(4)-(7); Laws of 2009, ch. 564, § 206(1) (both laws clarifying that, unlike what Judge Wickham ruled, the vendor rate increase "shall not be compounded" with vendor rate increases from prior years). While normally a statutory enactment is presumed to be prospective, an exception applies if an amendment is meant to clarify the Legislature's original intent. *Johnson v. Continental West, Inc.*, 99 Wn.2d 555, 562, 663 P.2d 482 (1983). When an amendment comes shortly after controversies begin to arise regarding a statute's meaning, the courts can deem "the amendment as clarifying, remedial and curative in nature. . . . [and the amendment] should be construed to accomplish its purpose." *Id.* The Legislature's clarification of the vendor rate increase statute shortly after Judge Wickham's ruling is sufficient evidence of legislative intent for a different outcome in re-litigation of the issue. See Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 Wash. L. Rev. 805, 841-42 (1985) (among the factors to be considered in evaluating whether the application of collateral estoppel will work an injustice is whether there has been a major factual change

since the first proceeding and whether the first determination was manifestly erroneous).

Collateral estoppel does not preclude the Department from denying Appellants' late request for rate modification. The Department cannot be collaterally estopped from refusing to grant the Appellants the relief that the Life Care facilities obtained in their APA case because the parties are not identical, the issues are not identical, collateral estoppel would cause an injustice to the Department, and there was a legislative clarification of the vendor rate increase statute shortly after the Life Care litigation.

c. The Department's denial of the late request for rate modification was not arbitrary or capricious

“An agency’s decision is arbitrary and capricious if the decision is the result of willful and unreasoning disregard of the facts and circumstances.” *Overlake Hosp. Ass’n v. Dep’t of Health*, 170 Wn.2d 43, 50, 239 P.3d 1095 (2010). Thus, an agency’s decision will not be reversed as being arbitrary and capricious unless the agency action was a “willful and unreasoning action, taken without regard to or consideration of the fact and circumstances surrounding the action.” *Kendall v. Douglas, Grant, Lincoln, & Okanogan Cntys. Pub. Hosp. Dist. No. 6*, 118 Wn.2d 1, 14, 820 P.2d 497 (1991). Furthermore, a court “will not set aside a discretionary decision absent a clear showing of abuse.” *ARCO Prods.*

Co. v. Utils. & Transp. Comm'n, 125 Wn.2d 805, 812, 888 P.2d 728 (1995) (quotation omitted).

When a nursing facility makes a late request for rate modification, the Department “has the authority to correct the rate if it agrees an error or omission was committed.” RCW 74.46.531(4). While the Department thus has discretionary authority to grant a late request, that authority is “subject to the provisions of RCW 74.46.421,” which prohibits the Department from increasing a facility’s payment rate if the amount appropriated by the Legislature would be exceeded. RCW 74.46.531(6); RCW 74.46.421.

In this case, the denial letter stated that the Department “will not invoke RCW 74.46.531, the ‘errors and omissions’ section, because it does not feel that an error was made.” CP at 531. The Department explained that “the Department believes that its method of applying the vendor rate increase was exactly in keeping with the Legislature’s intention.” CP at 530. In support of the Department’s conclusion that its actions were consistent with legislative intent, the Department explained that after Judge Wickham issued his ruling in the Life Care case, the “Legislature acted to clarify that the Department’s method of applying the vendor rate increase was in fact what it had intended.” *Id.*; see also Laws of 2009, ch. 570, § 1(4)-(7); Laws of 2009, ch. 564, § 206(1).

Furthermore, the Department explained that the appropriated funds for the 2006 and 2007 rates years were already exhausted. CP at 531. The Department is not authorized to make a rate adjustment under the errors or omissions law because doing so would exceed the amount appropriated for the 2006 and 2007 budgets. RCW 74.46.531(6); RCW 74.46.421.

The Department's decision to deny Appellants' untimely request for rate modification was well-reasoned, and it considered the facts and circumstances. The decision was not arbitrary or capricious.

d. The Department does not violate equal protection by providing a remedy to a party to a lawsuit that it does not provide to others that failed to join that lawsuit

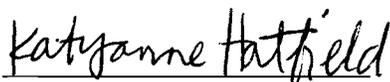
The Appellants' equal protection clause argument fails because the Appellants are not similarly situated to the Life Care facilities. Life Care timely challenged the vendor rate increase issue by exhausting administrative remedies, invoking the superior court's jurisdiction under the APA, and obtaining a superior court order requiring the Department to recalculate Life Care's rates. CP at 403-05. Appellants did none of these things and have no such order. Appellants are not similarly situated to the Life Care facilities, and the equal protection clause is inapplicable.

V. CONCLUSION

The superior court does not have jurisdiction in this action for mandamus and declaratory judgment action. The Department respectfully requests that this Court affirm the superior court's dismissal for lack of subject matter jurisdiction.

RESPECTFULLY SUBMITTED this 28th day of November, 2011.

ROBERT M. MCKENNA
Attorney General


KATY A. HATFIELD,
WSBA No. 39906
Assistant Attorney General
Attorneys for Department of
Social and Health Services

CONFIDENTIAL
11 NOV 12 PM 12:55
STATE OF WASHINGTON
DEPT. OF JUSTICE

PROOF OF SERVICE

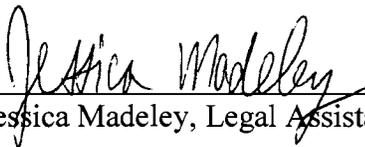
I certify that I served a copy of the Department's Response Brief

on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid via Consolidated Mail Service
Thomas Grimm
1201 3rd Ave Ste 3400
Seattle, WA 98101-3034
- ABC/Legal Messenger
- E-mail: Grimm@ryanlaw.com
- UPS Overnight Mail
- State Campus Delivery
- Hand delivered by: _____.

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

DATED this 28th day of November, 2011, at Tumwater, WA.



Jessica Madeley, Legal Assistant

APPENDIX

- A. **Superior Court's Order Of Dismissal For Lack Of Subject Matter Jurisdiction, March 11, 2011. Clerk's Papers: 596-598**
- B. **Board's Final Order, July 15, 2010. Clerk's Papers: 59-76**
- C. **Department's Denial Of "Errors Or Omissions" Request, December 2, 2009. Clerk's Papers: 530-532**
- D. **Judge Wickham's Order In Life Care's APA Case, September 5, 2008. Clerk's Papers: 403-405**
- E. **RCW 74.46.531 - The "Errors Or Omissions" Statute**
- F. **RCW 74.46.421 – The "Budget Dial" Statute**

3

FILED
SUPERIOR COURT
THURSTON COUNTY, WA

2011 MAR 11 AM 11:45

BETTY J. GOULD, CLERK

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

EXPEDITE
 No Hearing Set
 Hearing is Set
Judge: Honorable Paula Casey

STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

FILED
MAR 11 2011

EVERGREEN WASHINGTON
HEALTHCARE FRONTIER, L.L.C.
d/b/a Frontier Rehabilitation & Extended
Care, et al.,

NO. 10-2-01832-5

ORDER GRANTING STATE
DEFENDANT'S MOTION TO
DISMISS FOR LACK OF
SUBJECT MATTER
JURISDICTION

Plaintiffs,

v.

DEPARTMENT OF SOCIAL AND
HEALTH SERVICES, STATE OF
WASHINGTON,

Respondent.

THIS MATTER came before the Court on cross-dispositive motions filed by the parties.

Plaintiffs, nursing facilities operating in Washington State, filed two actions in this Court: (1) an Amended Complaint for Declaratory Judgment and Writ of Mandamus seeking this Court to order the State Department of Social and Health Services (Department) to recalculate the Plaintiffs' July 1, 2006 and July 1, 2007 nursing facility Medicaid payment rates, and (2) a Petition for Judicial Review under the Administrative Procedure Act (APA).

In the case docketed 10-2-01832-5 (the Complaint for Declaratory Judgment and Writ of Mandamus), the Department filed a Motion to Dismiss for Lack of Jurisdiction (or

ORDER OF DISMISSAL FOR LACK OF
SUBJECT MATTER JURISDICTION

ATTORNEY GENERAL OF WASHINGTON
7141 Cleanwater Dr SW
PO Box 40124
Olympia, WA 98504-0124
(360) 586-6565

1 alternatively a Motion for Summary Judgment) and the Plaintiffs filed a Motion for
2 Summary Judgment. The parties' respective motions were argued before this Court on
3 February 11, 2011. Thomas H. Grimm, Attorney at Law, represented the Plaintiffs; Katy A.
4 King (now Hatfield), Assistant Attorney General, represented the Department.

5 The Court has considered the oral arguments of counsel and reviewed all of the
6 briefing and authority submitted by the parties regarding these two cross motions, as well as
7 the Declaration of Katy A. King and attached Exhibits A-F; the Declaration of Bill Ulrich
8 and attached Appendices A-B; the Declaration of Sandra Whitley and attached Appendices
9 A-D; the Declaration of Amy Seils and attached Appendices A-C; the Declaration of Dale
10 Patterson and attached Appendices A-C; and the Declaration of Thomas Grimm and attached
11 Appendices A-G. Additionally, the Court has taken judicial notice that the Plaintiffs have a
12 currently-pending Petition for Judicial Review under Thurston County Cause Number 10-2-
13 01833-3.

14 Based on the foregoing, the Court finds and concludes as follows:

15 1. Within 28 days of the issuance of July 1, 2006 and July 1, 2007 nursing facility
16 Medicaid payment rates, the Plaintiffs did not challenge under WAC 388-96-904 the
17 Department's application of the vendor rate increase. Instead, at a later date, the Plaintiffs
18 requested under RCW 74.46.531 that the Department re-calculate the Plaintiffs' July 1, 2006
19 and July 1, 2007 nursing facility Medicaid rates. The Department's Office of Rates
20 Management considered and denied the request made under RCW 74.46.531. The Plaintiffs
21 sought review of the denial to the Department's Board of Appeals (Board). The Board
22 dismissed the case for lack of subject matter jurisdiction.

23 2. There was a plain, speedy, adequate remedy available to the Plaintiffs in this case, but it
24 is no longer available.
25
26

- 1 3. There is no authority for this Court under either chapter 7.16 RCW or chapter
2 7.24 RCW to order a declaratory judgment or a writ of mandamus in this case.
3
4 4. This Court lacks subject matter jurisdiction to hear this case.

5 NOW, THEREFORE, IT IS ORDERED THAT:

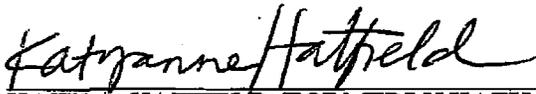
6 The case is dismissed for lack of subject matter jurisdiction. The Plaintiffs' Petition
7 for Judicial Review under the APA remains pending before this Court.
8

9 Dated this 11th day of March, 2011.

10
11 
12 HONORABLE PAULA CASEY

13 Presented by:

14
15 ROBERT M. MCKENNA
16 Attorney General

17 
18 KATY A. HATFIELD (FORMERLY KATY A. KING), WSBA No. 39906
19 Assistant Attorney General
20 Attorneys for Respondent

21 Copy Received and Notice of Presentation Waived:

22 RYAN SWANSON & CLEVELAND PLLC

23 
24 THOMAS H. GRIMM, WSBA No. 3853
25 Attorneys for Petitioners
26

**STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES
BOARD OF APPEALS**

In Re:	Docket No.
FRONTIER REHAB & EXTENDED CARE FACILITY	01-2010-N-0214
EVERGREEN AMERICANA HEALTH & REHAB CENTER	01-2010-N-0215
EVERGREEN TACOMA HEALTH & REHAB CENTER	01-2010-N-0216
EVERGREEN CENTRALIA HEALTH & REHAB CENTER	01-2010-N-0217
WHITMAN HEALTH & REHAB CENTER	01-2010-N-0219
SEATTLE MEDICAL & REHAB CENTER	01-2010-N-0220
HEALTH & REHAB OF NORTH SEATTLE	01-2010-N-0221
TALBOT CENTER FOR REHAB & HEALTHCARE	01-2010-N-0222
EVERGREEN SHELTON HEALTH & REHAB CENTER	01-2010-N-0226
EVERGREEN BREMERTON HEALTH & REHAB	01-2010-N-0229
EVERGREEN PARK ROYAL HEALTH & REHAB	01-2010-N-0231
EVERGREEN ENUMCLAW HEALTH & REHAB	01-2010-N-0233
CANTERBURY HOUSE	01-2010-N-0235
EVERGREEN NO CASCADES HEALTH & REHAB	01-2010-N-0237
SEQUIM HEALTH AND REHABILITATION	01-2010-N-0241
PORT ANGELES CARE CENTER	01-2010-N-0242
CRESTWOOD CONVALESCENT CENTER	01-2010-N-0243
NORTH AUBURN REHABILITATION AND HEALTH CENTER	01-2010-N-0244
ISLAND HEALTH AND REHABILITATION CENTER	01-2010-N-0245
EVERGREEN NURSING AND REHABILITATION CENTER	01-2010-N-0246
PUGET SOUND HEALTHCARE CENTER	01-2010-N-0247
PACIFIC SPECIALTY AND REHABILITATIVE CARE	01-2010-N-0249
RIVERSIDE NURSING AND REHABILITATION CENTER	01-2010-N-0251
KITTITAS VALLEY HEALTH AND REHABILITATION CENTER	01-2010-N-0252
THE GARDENS ON UNIVERSITY	01-2010-N-0253
FRANKLIN HILLS HEALTH AND REHABILITATION CENTER	01-2010-N-0254
ALDERCREST HEALTH AND REHABILITATION CENTER	01-2010-N-0256
FIR LANE HEALTH AND REHABILITATION CENTER	01-2010-N-0257

MAILED
JUL 15 2010
DSHS
BOARD OF APPEALS
Office of the Attorney General
Olympia Social & Health Servs. Div.
RECEIVED
JUL 16 2010

COPY

BREMERTON HEALTH AND REHABILITATION CENTER	01-2010-N-0259
FOREST RIDGE HEALTH AND REHABILITATION CENTER	01-2010-N-0260
AVAMERE OLYMPIC REHAB OF SEQUIM	01-2010-N-0313
AVAMERE HERITAGE REHAB OF TACOMA	01-2010-N-0314
ST FRANCIS OF BELLINGHAM	01-2010-N-0315
AVAMERE SKILLED NURSING OF TACOMA	01-2010-N-0332
AVAMERE BEL AIR OF TACOMA	01-2010-N-0334
AVAMERE HIGHLANDS MEMORY CARE & REHAB	01-2010-N-0336
RICHMOND BEACH REHAB LLC	01-2010-N-0338
AVAMERE GEORGIAN HOUSE OF LAKEWOOD	01-2010-N-0340
DISCOVERY NURSING & REHAB CENTER	01-2010-N-0463
TOPPENISH NURSING & REHAB	01-2010-N-0466
SULLIVAN PARK CARE CENTER	01-2010-N-0467
PRESTIGE CARE OF EDMONDS	01-2010-N-0468
ROYAL VISTA CARE CENTER	01-2010-N-0469
SAN JUAN REHAB & CARE CENTER	01-2010-N-0470
SHUKSAN HEALTHCARE CENTER	01-2010-N-0471
FIDALGO CARE CENTER	01-2010-N-0472
HOQUIAM HEALTHCARE INC dba PACIFIC CARE CENTER	01-2010-N-0473
EMERALD HILLS HEALTHCARE CENTER	01-2010-N-0474
PARK MANOR HEALTHCARE LLC	01-2010-N-0475
WASHINGTON CARE CENTER	01-2010-N-0651
ORCHARD PARK	01-2010-N-0655
EMERALD CARE	01-2010-N-0699
MADELEINE VILLA HEALTH CARE CENTER	01-2010-N-0711
LEON SULLIVAN HEALTH CARE CENTER	01-2010-N-0716
SELAH CONVALESCENT	01-2010-N-0717
MIRA VISTA CARE CENTER	01-2010-N-0722
FOREST VIEW TRANSITIONAL HEALTH CARE CENTER	01-2010-N-0866
GOOD SAMARITAN HEALTH CARE CENTER	01-2010-N-0867
MT BAKER CARE CENTER	01-2010-N-0868
MT SI TRANSITIONAL HEALTH CARE CENTER	01-2010-N-0869
OLYMPIA MANOR	01-2010-N-0870
PARK ROSE CARE CENTER	01-2010-N-0871
REGENCY CARE CENTER AT ARLINGTON	01-2010-N-0872
REGENCY AUBURN	01-2010-N-0873
REGENCY CARE CENTER AT MONROE	01-2010-N-0874
REGENCY MANOR	01-2010-N-0875
REGENCY AT NORTHPOINTE	01-2010-N-0876

REGENCY AT THE PARK
 REGENCY AT PUYALLUP
 REGENCY AT RENTON
 REGENCY AT TACOMA
 SHARON CARE CENTER
 VALLEY CARE CENTER
 ARDEN REHABILITATION & HEALTHCARE
 NORTHWEST CONTINUUM
 BELLINGHAM HEALTH CARE & REHAB
 SERVICES
 RAINIER VISTA CARE CENTER
 LAKEWOOD
 VENCOR OF VANCOUVER
 HERITAGE HEALTHCARE
 EDMONDS REHAB & HEALTHCARE
 QUEEN ANNE HEALTHCARE
 NORTH CENTRAL CARE CENTER
 WILLOW SPRINGS CARE
 FOSS HOME AND VILLAGE
 CAREAGE OF WHIDBEY
 LINDEN GROVE
 CRESCENT HEALTH CARE
 LIVING CARE RETIREMENT COMMUNITY
 MESSENGER HOUSE
 NISQUALLY VALLEY
 UNIVERSITY PLACE
 BETHANY AT PACIFIC
 BETHANY AT SILVER LAKE
 CAROLINE KLINE GALLAND HOME
 KIN ON HEALTH CARE CENTER
 MISSION HEALTHCARE AT BELLEVUE
 WESLEY HOMES HEALTH CENTER
 IDA CULVER HOUSE
 SEATTLE KEIRO
 JOSEPHINE SUNSET HOME
 MARTHA AND MARY HEALTH SERVICES

01-2010-N-0877
 01-2010-N-0878
 01-2010-N-0879
 01-2010-N-0880
 01-2010-N-0881
 01-2010-N-0882
 01-2010-N-0883
 01-2010-N-0884
 01-2010-N-0885

 01-2010-N-0886
 01-2010-N-0887
 01-2010-N-0888
 01-2010-N-0889
 01-2010-N-0890
 01-2010-N-0891
 01-2010-N-0892
 01-2010-N-0893
 02-2010-N-1038
 02-2010-N-1226
 02-2010-N-1291
 02-2010-N-1292
 02-2010-N-1293
 02-2010-N-1511
 02-2010-N-1513
 02-2010-N-1516
 02-2010-N-1518
 02-2010-N-1519
 02-2010-N-1522
 02-2010-N-1524
 02-2010-N-1525
 02-2010-N-1527
 02-2010-N-1627
 02-2010-N-2259
 03-2010-N-0721
 03-2010-N-1060

Appellants

ORDER ON MOTION TO DISMISS
(NHR)

NATURE OF ACTION AND FINDINGS OF FACT RELEVANT TO MOTION TO DISMISS

1. The Department of Social and Health Services ("DSHS," or "Department") administers the cooperative federal-state Medicaid program in Washington pursuant to Title XIX of the Social Security Act (42 U.S.C. §1396-1396v). As part of this program, the Department compensates nursing care facilities for services to their Medicaid-eligible residents by means of the "nursing facility Medicaid payment system." See *RCW 74.46.010 et seq.* The Office of

Rates Management, within the Department's Aging and Disability Services Administration (ADSA), administers the nursing facility Medicaid payment system.

2. The Appellants are skilled nursing homes operating in the state of Washington and are contractors with the Department in the Medicaid program under Title XIX of the federal Social Security Act.

3. The amount of Medicaid reimbursement paid to licensed nursing homes by the Department is facility-specific and is determined using adjusted cost reports submitted by each of the facilities. Notice of each facility's prospective per patient per day rate (rate) is mailed in late June of each year with the rate effective July 1 of that year. The rate is made up of adjusted costs reported in seven separate areas of care and investment activities. These areas include *Direct Care* (RCW 74.46.506), *Therapy Care* (RCW 74.46.511), *Support Services* (RCW 74.46.515), *Operations* (RCW 74.46.521), *Property* (RCW 74.46.435), *Financing Allowance* (RCW 74.46.437), and *Variable Return* (RCW 74.46.433). Because the reported costs vary among the facilities, the rate paid by the Department to each of the nursing homes will also vary.

4. The Legislature directed that the *Direct Care* and *Operations* components of the rate effective July 1, 2006, be based on each facility's 2003 cost reports (commonly referred to as *rebased*). The *Therapy Care* and *Support Services* components of the rate were not *rebased* during the 2006 legislative session and continued to be based on the facilities' 1999 cost reports. The *Property* and *Financing Allowance* components are rebased annually.

5. After determining the *Direct Care* and *Operations* components of the Appellants' July 1, 2006 rate based on the 2003 cost reports, the Department adjusted the component rates for economic trends and conditions by a factor of 1.3 percent, an amount set forth in the biennial appropriations act for fiscal year 2007 (July 1, 2006 through June 30, 2007). This is referred to as a *vendor rate increase (VRI)* and was made pursuant to the then applicable statute RCW 74.46.431(4)(d), (7)(b), and the biennial appropriations act for fiscal year 2007.

6. On or before June 30, 2006, the Department sent each of the contracting licensed nursing homes in the state a cover letter titled *July 1, 2006 MEDICAID RATES FOR NURSING HOMES*, a rate computation worksheet, and a document titled *DESCRIPTION OF JULY 2006 NURSING FACILITY MEDICAID PAYMENT RATE SETTING*.¹ The cover letter contained the following information relevant to this decision:²

The July 1, 2006 Medicaid payment rate is subject to administrative review in accordance with RCW 74.46.770 and WAC 388-96-901 and -904. To appeal this rate, you must submit a written request in writing within twenty-eight (28) calendar days after receiving this notice of the rate. The contractor or a partner, officer, or authorized employee of the contractor must sign the request for administrative review. The request must state the reasons for the appeal and include all necessary supporting documentation. The appeal should be mailed to the Office of Rates Management at the address above.

If proof of the date of receipt of the Department's rate notification letter exists, then that date shall be used to determine the timeliness of your request for an administrative review conference. If there is no proof of the date of receipt of the Department's rate notification letter, then you will be deemed to have received notice by July 5, 2006 in accordance with WAC 388-96-904(1).

7. The July 2006 rate computation worksheets provide a step-by-step explanation as to how the facilities' rate components are calculated. For the *Direct Care* component, *Item*

¹ The material facts set forth in this decision are derived from the Department's June 18, 2010 Motion to Dismiss, Declarations, and attachments as well as the Appellant's response, Declarations, and attachments. The Appellants' requests for hearing have also been added to the record. The Appellants, in their response, did not challenge the facts as set forth in the Department's motion. Nor did the Appellants challenge the use of only two facilities' *Rate Computation Worksheets* as representative of rate notifications sent to all licensed facilities within the state. The Department has done this for administrative convenience and based on the unchallenged fact that the identifying parts of all appellant facilities' *Rate Computation Worksheets* are identical within the year issued (the *Item* number and *Item* description). The documents produced in discovery and copied to the BOA support this assertion. The undersigned notes that the July 2006 rate computation worksheet submitted by the Department as an example is for the nursing facility Staffholt Good Samaritan Center located in Blaine and is not an appellant in this case (Good Samaritan Health Care located in Yakima is an appellant in this case listed under Docket Number 01-2010-N-0867). Although Staffholt is not one of the 21 Life Care facilities which had timely challenged the July 1, 2006 rate, that facility is listed as one of the additional 8 facilities that did timely challenge the July 1, 2007, rate and is named as an appellant in the *Stipulation and Agreed Order* entered on September 30, 2008. See *Declaration of Katy A. King, Attachment C, p. 1*. Because the July 1, 2006 rate computation worksheet was submitted only for the purpose of illustrating how the rate computation was presented to all the state's contracted nursing home, because the Department's representative has asserted that the rate computation worksheets for each of the appellant facilities are available and can be provided upon request, and because the Appellants have not objected to the use of the Staffholt July 1, 2006, rate computation worksheet, the undersigned will accept it for purposes of this decision.

² Declaration of Edward Southon, Attachment A.

41 sets forth the total direct care costs taken from the individual facility's 2003 cost reports. This amount, after any adjustments, is divided by the facility's patient days for direct care reported in 2003 (*Item 32*) resulting in the facility's adjusted *Direct Care* cost per patient day or PPD (*Item 44*). This direct care PPD is then divided by the *Facility Average Case Mix* (FACMI –*Item 38*) resulting in the facility's cost per case mix and any limitations based on averaging (ceilings or corridors) are applied (*Item 48*). This amount is then multiplied by each facility's *Medicaid Average Case Mix* (MACMI - *Item 39*), resulting in the facility's *Case Mix Direct Care Rate PPD* (*Item 49*).³ This amount is then multiplied by the *Vendor Rate Increase* (VRI), which was 1.3 percent (multiplier of 1.013 - *Item 50*) for fiscal year 2007 pursuant to the biennial appropriations act. This direct care amount is adjusted further for low-wage worker/fee add-on considerations as well as any component allocated *Budget Dial* requirements (*Items 128 and 140* - only low-wage worker adjustments affected the *Direct Care* component amount in the examples provided for this motion to dismiss). This final *Direct Care* component amount of the rate is then set forth at *Item 141* and on the last page of the rate computation worksheets in summarizing the component allotment and the facility's total prospective per patient per day Medicaid rate.⁴

8. The July 2006 rate computation worksheets provide similar step-by-step explanations for the computation of the other rate components including the *Operations* component of the rate. The worksheets at *Section V, Item 75* reflect that the *Operations* component of the rate was also adjusted by the same amount (1.3 percent) for VRI. The two other components subject to VRI that were not rebased on the 2003 cost reports, (*Therapy Care and Support Services*), were adjusted for VRI based on cumulative increases from fiscal

³ The FACMI and MACMI are numerical values associated with the resident care acuity of a nursing facility based on average minutes of registered nurse, license practical nurse, and certified nursing assistance care provided to the residents. See RCW 74.46.496.

⁴ See *Declaration of Edward Southon*, Attachment B, pp. 1, 2, 5, 6, and 7.

years 2000 through 2007 as reflected in *Section III, Item 61*, and *Section IV, Item 68*, respectively, of the rate computation worksheets.⁵

9. The *Description of July 2006 Nursing Facility Medicaid Payment Rate Setting* document generally addresses application of the *VRI* by informing the facilities:

Beginning with July 1, 2006 rates, the *Direct Care* and *Operations* component rates are rebased to the 2003 cost report and subject to a vendor rate increase (*VRI*) of 1.3%. *Therapy Care* and *Support Services* component rates continue to be based on the 1999 cost report. Allowable costs in *Therapy Care* and *Support Services* were adjusted by a 2.1% *VRI* effective July 2001, a 1.5% *VRI* effective July 2002, a 3.0% *VRI* effective July 2003, a 2.4% *VRI* effective July 2004, and a 1.3% *VRI* effective July 2005. Effective July 1, 2006, a *VRI* of 1.3% is applied to *Therapy Care* and *Support Services*.

The description letter specifically identifies application of the 1.3% *VRI* effective July 1, 2006, in discussing individually the *Direct Care* and *Operations* components of the rate as well as the application of *VRIs*, effective in July of each year from 2001 through 2006, for the *Therapy Care* and *Support Services* components of the rate.⁶

10. Within 28 days of issuance of the July 1, 2006 Medicaid rates, twenty-one licensed nursing facilities operating in the State of Washington under the ownership of Life Care Centers of America Northwest Division, none of which are appellants in this case, filed requests for administrative review conferences (*ARC*) to challenge the Department's methodology of applying the multiplier of 1.013 to the *Direct Care* and *Operations* portions of the rate, rather than applying a multiplier based on the cumulative *VRIs* for fiscal years 2004 through 2006. It has not been argued and there is no evidence in the record that the 102 Appellant's named in the current case requested *ARCs* within 28 days of issuance of the rate notices to challenge the Department's use of 1.013 as the multiplier in applying the *VRI* to the *Direct Care* and *Operations* components of the July 1, 2006 Medicaid rate.

~~11. In 2007, the Legislature directed that the *Direct Care*, *Therapy Care*, *Support Services*, and *Operations* components of the rate be rebased on the 2005 cost reports. After~~

⁵ *Id* at p. 3.

⁶ See *Declaration of Edward Southon*, Attachment C, pp. 2, 3; and 4.

determining the *Direct Care*, *Therapy Care*, *Support Services*, and *Operations* components of the Appellants' July 1, 2007 rate based on the 2005 cost reports, the Department adjusted the component rates for economic trends and conditions by a factor of 3.2 percent (multiplier 1.032), the amount set forth in the biennial appropriations act for the 2008 fiscal year (July 1, 2007 through June 30, 2008). Again, this adjustment was made pursuant to the then applicable statute RCW 74.46.431 and the biennial appropriations act.

12. As in the previous year, the Department sent each of the contracting licensed nursing homes in the state a cover letter titled *July 2007 MEDICAID RATES FOR NURSING HOMES*, a rate computation worksheet, and a document titled *DESCRIPTION OF JULY 2007 NURSING FACILITY MEDICAID PAYMENT RATE SETTING*. The cover letter contained the following information relevant to this decision:⁷

The July 1, 2007 Medicaid payment rate is subject to administrative review in accordance with RCW 74.46.770 and WAC 388-96-901 and -904. To appeal this rate, you must submit a request in writing within twenty-eight (28) calendar days after receiving this notice of the rate. The contractor, partner, officer, or authorized employee of the contractor must sign the request for administrative review. In the request, you must state the reasons for the appeal and include all necessary supporting documentation. Mail your appeal to the Office of Rates Management at the address above.

If proof of the date of receipt of the department's rate notification letter exists, then that date shall be used to determine the timeliness of your request for an administrative review conference. If there is no proof of the date of receipt of the department's rate notification letter, then you will be deemed to have received notice by July 5, 2007 in accordance with WAC 388-96-904(1).

13. The July 2007 rate computation worksheets, again, provided a step-by-step explanation of the calculations used in determining each of the seven components of the facilities' Medicaid rate. The July 2007 rate computation worksheets, at *Section II, Part C, Item 50*, reflect that the *Direct Care* components of the rates were adjusted by 3.2 percent (multiplier of 1.032) based on the *VRI* for fiscal year 2008 (July 1, 2007 through June 30, 2008). The worksheets at *Section III, Item 56* reflect that the *Therapy Care* components of the rates were

⁷ Declaration of Edward Southon, Attachment D.

increased by 3.2 percent for *VRI*. *Section IV, Item 63* reflects that the *Support Services* component of each facility's rate was increased by 3.2 percent. And finally, *Section V, Item 71* of the rate computation worksheets reflect that the *Operations* components of the rates were also adjusted by the same amount (3.2 percent) for *VRI*.⁸

14. The *Description of July 2007 Nursing Facility Medicaid Payment Rate Setting* document generally addresses application of the *VRI* by informing the facilities:

Beginning with July 1, 2007 rates, the *Direct Care*, *Therapy Care*, *Support Services*, and *Operations* component rates are rebased to the 2005 cost report and subject to a vendor rate increase (*VRI*) of 3.2%.

The description letter specifically identifies application of the 3.2% *VRI*, effective July 2007, in discussing individually the *Direct Care*, *Therapy Care*, *Support Services*, and *Operations* components of the rate.⁹

15. Within 28 days of issuance of the July 1, 2007 Medicaid rates, the twenty-one Life Care Center nursing facilities (again none of which are appellants in this case) filed a continuing objection and request for an ARC to challenge the Department's methodology of applying the multiplier of 1.032 to the *Direct Care*, *Therapy Care*, *Support Services*, and *Operations* portions of the rate rather than applying a multiplier based on the cumulative *VRIs* for fiscal years 2006 through 2007. An additional 8 facilities also timely challenged the July 1, 2007 rate based on the same reasons. These 29 facilities and the Department entered into *Stipulation and Agreed Orders* on September 30, 2008, whereby the parties agreed to be bound by any final judgment entered in the previous year's challenge involving the *VRI* issue.¹⁰

16. The first 14 appellant facilities listed in the caption above, operating under the Evergreen Healthcare Management, LLC. (Evergreen), submitted a request for an ARC in 2007

⁸ See Declaration of Edward Southon, Attachment E, pp. 2 and 3.

⁹ See Declaration of Edward Southon, Attachment F, pp. 2 and 3.

¹⁰ See Declaration of Katy A. King, Attachment C.

to challenge, *inter alia*, the Department's use of 3.2 % *VR/* in determining the Evergreen facilities' July 1, 2007 rate. Evergreen's challenge regarding the *VR/* issue states:

The department has indexed 2005 costs for the purpose of setting rates applicable to the state fiscal year ended June 30, 2008 by the amount defined in the biennial appropriations act. The amount defined in the appropriations act is 3.2%. The purpose of indexing is to adjust historical costs to more closely reflect current costs based on changes in the cost of doing business. The cost reports ended December 31, 2005 are indexed through December 31, 2006. The start point of the index, therefore, is June 30, 2005 and covers a period of 30 months (2½ years). Using a factor of 3.2% to cover these 30 months amounts to an annual index rate of less than 1.3% per year . . . Use of the more industry specific SNF-Market-Basket index would provide similar results. Once again, the state has made representation to the federal government about adequacy of rates that are not supported by fact.¹¹

17. On October 26, 2007, the Department issued an ARC determination letter to Evergreen concluding, *inter alia*, that nursing homes could not challenge through the ARC process the Department's application of the economic trends and adjustment factor identified in the biennial appropriations act. Identifying Evergreen's challenge as a dispute with the amount of the *VR/* set forth in the biennial appropriations act, rather than the Department's methodology in applying only Fiscal Year 2008 *VR/* to the rate based on the 2005 cost reports, the Department concluded in the ARC determination letter:

Under WAC 388-96-901(3), the department has excluded from administrative review challenges based on the legal validity of a statute or regulation and/or failure to comply with federal law. Since Evergreen Healthcare wishes to raise a challenge to the department's application of the economic trends and adjustment factor identified in the biennial appropriations act (Chapter 522, Laws of 2007) to July 1, 2007 component rates for Evergreen Healthcare facilities, it must do so *de novo* in a court of proper jurisdiction as may be provided by law and not through administrative review as provided in WAC 388-96-904.¹²

18. It has not been argued nor is there any evidence that the Evergreen facilities requested an administrative hearing to contest the Department's denial set forth in the October 26, 2007 ARC determination letter as to the *VR/* issue. As with the July 1, 2006 rate, it is not argued and there is no evidence that the remaining 88 appellant facilities in this case requested

¹¹ Declaration of Dale Patterson, Appendix A, p. 9.

¹² *Id.*

an ARC within 28 days of issuance of the July 1, 2007 rate to challenge the Department's methodology in applying the *VRI* in determining each facility's Medicaid rate.

19. The Appellants submitted individual requests for hearing to challenge the Department's methodology in applying the *VRI* for purposes of calculating the facilities' July 1, 2006, and July 1, 2007 Medicaid rates. The Department's Board of Appeals (BOA) received these requests from December 30, 2009, through March 10, 2010. Where the persons signing the requests for hearing have stated their professional positions, they have self-identified themselves as CEOs, CEOs of Financial Service, Senior Directors of Reimbursement Services, Chief Financial Officers (CFO), Director of Analytical and Regulatory Reporting, Administrators, Owners, Senior Vice President of Reimbursement, Executive Directors, and Campus Administrators.

20. The Appellants submitted a *Motion For Partial Summary Judgment (Collateral Estoppel)* and the Department submitted a response to the Appellants' motion. The Department submitted a *Motion to Dismiss and Memorandum in Support Thereof* and the Appellants submitted a response to the Department's motion.

II. CONCLUSIONS OF LAW

1. The Department's motion to dismiss is based on the issue of jurisdictional authority to proceed which may be raised at any time. *Wash. Beauty Coll., Inc. v. Huse*, 195 Wash. 160, 80 P.2d 403 (1938); *see also J.A. v. Dep't of Soc. & Health Servs.*, 120 Wn. App. 654, 657, 86 P.3d 202 (2004). There is jurisdiction to address the Department's motion to dismiss under WAC 388-96-904, WAC 388-02-0215(2)(c) and (m), WAC 388-02-0085(1), and RCW 34:05.413(2).

2. When deciding cases for the Washington State Department of Social and Health Services ("Department"), Administrative Law Judges, and Review Judges acting as presiding or reviewing officers, are to hear and decide the issue anew (*de novo*).¹³

3. It is helpful if all parties in the administrative hearing process understand the unique characteristics and specific limitations of this hearing process. An administrative hearing is held under the auspices of the *executive branch of government* and a presiding administrative or review officer does not enjoy the broad equitable authority held by a superior court judge within the *judicial branch of government*. It is well settled in law and practice that administrative agencies, such as the Office of Administrative Hearings and the Board of Appeals, are creatures of statute, and, as such, are limited in their powers to those expressly granted in enabling statutes, or necessarily implied therein. *Taylor v. Morris*, 88 Wn.2d 586, 588 P.2d 795 (1977). It is also well settled that an ALJ's or a review judge's jurisdictional authority to render a decision in an administrative hearing is limited to that which is specifically provided for in the authorizing statute or Department rule found in the Washington Administrative Code (WAC). An ALJ or review judge, acting as a presiding or reviewing officer, is required to apply the Department's rules adopted in the WAC as the first source of law to resolve an issue. If there is no Department rule governing the issue, the presiding officer or review judge is to resolve the issue on the basis of the best legal authority and reasoning available, including that found in federal and Washington constitutions, statutes and regulations, and court decisions.¹⁴ The presiding officer may not declare any rule invalid and contractor challenges to the legal validity of a rule relating to the nursing facility Medicaid payment system must be brought *de novo* in a court of proper jurisdiction.¹⁵ The Department has incorporated RCW 74.46 into its nursing facility Medicaid payment system rules.¹⁶

¹³ WAC 388-02-215(1).

¹⁴ WAC 388-02-0220.

¹⁵ WAC 388-02-0225(1) and 388-96-901(3), respectively.

¹⁶ WAC 388-96-020.

4. Prior to rendering a decision in a case, a decision-maker must always first determine if he/she has jurisdictional authority to adjudicate the contested issue(s). Published appellate case law directs that the issue of subject matter jurisdiction cannot be waived and can be raised at any time. "Even in the absence of a contest, where there is a question as to jurisdiction, [the] court has a duty to, itself, raise the issue." *Riley V. Sturdevant*, 12 Wn. App. 808, 810, 532 P. 2d 640 (1975). "Jurisdiction relates to the power of the court, not to the rights of the parties as between each other. Jurisdiction cannot, therefore, be conferred by agreement or stipulation of the parties. Any judgment entered without jurisdiction is void. A party may waive personal jurisdiction, but not subject matter jurisdiction." *Sullivan v. Purvis*, 90 Wn. App. 456, 1998 Wash. App. LEXIS 196 (1998) (internal cites omitted). See also *Skagit Surveyors & Eng'rs, L.L.C. v. Friends of Skagit County*, 135 Wn.2d 542, 1998 Wash. LEXIS 473 (1998). Nor can subject matter jurisdiction be conferred by estoppel. *Rust v. W. Wash. State College*, 11 Wn. App. 410, 1974 Wash. App. LEXIS 1247 (1974). Without subject matter jurisdiction, a court or administrative tribunal may do nothing other than enter an order of dismissal. *Inland Foundry Co. v. Spokane County Air Pollution Control Auth.*, 98 Wn. App. 121, 124, 989 P.2d 102 (1999). Furthermore, the undersigned has regulatory authority, as well as a duty, to determine subject matter jurisdiction before attempting to address the merits of a case.¹⁷ Even if the Department had not submitted its motion to dismiss, the undersigned would have had to determine if jurisdiction existed prior to issuing a merits decision. This would have been necessary even if a full hearing on the merits had been conducted.

5. Time frames for submitting a hearing request are mandatory and jurisdictional. *Rust*, 11 Wn. App. at 415, citing to *Lewis v. Department of Labor & Indus.*, 46 Wn.2d 391, 281 P.2d 837 (1955); *Smith v. Department of Labor & Indus.*, 1 Wn.2d 305, 95 P.2d 1031 (1939); *Nafus v. Department of Labor & Indus.*, 142 Wash. 48, 251 P. 877 (1927). A presiding officer in

¹⁷ WAC 388-02-0085(5) and 388-02-0215(2)(c) and (m).

the administrative hearing process only has authority to conduct a full hearing and render a decision on the merits of a case when a timely request for hearing has been made.¹⁸

6. The undersigned's jurisdictional authority to hear a case on the merits relating to the Nursing Facility Medicaid Payment System under RCW 74.46 is established under WAC 388-96-904. That regulation provides:

(1) Contractors seeking to appeal or take exception to an action or determination of the department, under authority of this chapter or chapter 74.46 RCW, relating to the contractor's payment rate, audit or settlement, or otherwise affecting the level of payment to the contractor, or seeking to appeal or take exception to any other adverse action taken under authority of this chapter or chapter 74.46 RCW eligible for administrative review under this section, **shall request an administrative review conference in writing within twenty-eight calendar days after receiving notice of the department's action or determination.**

The relevant regulation further provides:

(5) A contractor seeking further review of a determination issued pursuant to subsection (4) of this section **shall apply for an adjudicative proceeding, in writing**, signed by one of the individuals authorized by subsection (1) of this section, **within twenty-eight calendar days after receiving the department's administrative review conference determination letter.** A review judge or other presiding officer employed by the department's board of appeals shall conduct the adjudicative proceeding.

WAC 388-96-904 (Emphasis added).

7. Based on these regulatory provisions, a review judge only has jurisdictional authority to conduct an administrative hearing on the merits of a nursing rate claim when an appellant nursing facility has requested a Department internal review known as an administrative review conference (ARC) within 28 days of receiving notice of the challenged action and then requests an administrative hearing within 28 days after receiving an adverse ARC determination letter.

8. The Department actions or determinations challenged by the Appellants in this case are the calculations of their respective July 1, 2006, and July 1, 2007 Medicaid rates. The Appellants do not argue that they did not receive notification of the rates for these two

¹⁸ RCW 34.05.413(2).

years in late June of each year. Nor do any of the Appellants assert that they submitted requests for an ARC to challenge the July 1, 2006 rate within 28 days of receiving the rate notice. The fourteen Evergreen Healthcare facilities argue that they did challenge the application 3.2% *VRI* in calculating the July 1, 2007 rate. It cannot be determined based on the evidence in the hearing record if the Evergreen facilities were simply challenging the amount of the *VRI* as established in the biennial appropriations act for fiscal year 2008 (a challenge to a statute that cannot be brought in this administrative forum) or if they were challenging the methodology used by the Department in not applying the *VRI* cumulatively for the intervening years since the cost reports used in rebasing the rate (2005). The latter challenge arguably could be and has been heard in this administrative forum as it deals with interpretation and application of a statute in determining a rate rather than a direct challenge to the biennial appropriations act, itself. What the Evergreen facilities intended in their challenge to the July 1, 2007 rate does not need to be determined as those facilities did not follow-up with a request for an administrative hearing within 28 days of issuance of the October 26, 2007 ARC determination letter denying their claim. The regulations, at WAC 388-96-904(7), give a nursing facility the right to challenge a denial for relief issued after an ARC by requesting an administrative hearing. If the Evergreen facilities challenge was to the methodology of application of the *VRI* rather than the amount of the *VRI* established for fiscal year 2008 by the biennial appropriations act, the facilities had an obligation to request an administrative hearing within 28 days of the October 26, 2007 ARC determination letter, notwithstanding the reasons given for denial by the Department in the determination letter.

9. The Appellants argue that there exists a relief process for *errors or omissions* under statute and they should have a right to an administrative hearing to challenge the Department's refusal or denial to grant relief under that statute regardless of the timing of the challenge. The relevant statute provides:

(1) The department may adjust component rates for errors or omissions made in establishing component rates and determine amounts either overpaid to the contractor or underpaid by the department.

(2) A contractor may request the department to adjust its component rates because of:

(a) An error or omission the contractor made in completing a cost report; or

(b) An alleged error or omission made by the department in determining one or more of the contractor's component rates.

(3) A request for a rate adjustment made on incorrect cost reporting must be accompanied by the amended cost report pages prepared in accordance with the department's written instructions and by a written explanation of the error or omission and the necessity for the amended cost report pages and the rate adjustment.

(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. 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 RCW 74.46.780.**

RCW 74.46.531 (Emphasis added).

10. The review procedure adopted by the Department under RCW 74.46.780 is the ARC and administrative hearing process established under WAC 388-96-904.¹⁹ The statute relied upon by the Appellants for relief specifically denies a nursing facility the right to an administrative hearing when a late request has been submitted and the Department has decided not to grant the relief sought by the facility under the *errors and omissions* provision of RCW 74.46.531. The undersigned has no authority to hear late challenges brought under RCW 74.46.531 for *errors and omissions*.

11. The Appellants, in their response, argue, or at least infer, that the Department's rate notifications in late June of 2006 and 2007 were deficient in apprising the facilities of how the Department was applying the *VRI* in determining their respective rates. The Appellants received three documents, one explaining how to make an appeal of a rate and

¹⁹ See RCW 74.46.770(1).

two of which explained application of the *VR/* to prior years' cost reports in rebasing the respective rates for July 2006 and July 2007. As set forth in the *Findings of Fact 7* and *13*, above and supported by the unchallenged evidence, the rate computation worksheets provided a step-by-step explanation how the rate was calculated including the application of the singular *VR/* percentages for fiscal years 2007 and 2008 where the rate component was being rebased on either the 2003 or 2005 cost reports. If the appellant facilities' rate analysts had concerns about the actual amounts of the 1.3 % and 3.2% *VR/*s used in setting the 2006 and 2007 rates, they had a responsibility to question these amounts and if not satisfied with the Department's answer, to timely seek an ARC to preserve their right to access to the administrative hearing process. The rate computation worksheet documents show the difference between the cumulative application of the *VR/* for those rate components that were not being rebased in July 2006 (*Therapy Care* and *Support Services*) and the non-cumulative application of the *VR/* for those rate components that were being rebased (*Direct Care* and *Operations* in July 2006 and *Direct Care*, *Therapy Care*, *Support Services*, and *Operations* for July 2007). The rate description documents also point out the application of the 1.3% and 3.2% *VR/*s used in calculating each facility's rate. And finally, the common rate notices sent to all the contracting nursing facilities in the state were adequate enough to apprise at least 21 nursing homes of the methodology used by the Department as evidenced by the timely Life Care appeals. For these reasons and recognizing the experienced status of the individuals signing the late requests for hearing, the Appellants' argument that the rate notices sent to them in late June of 2006 and 2007 were inadequate in apprising them of how the rates were determined is not convincing.

~~12. The undersigned's authority to conduct a hearing can only exist when there has~~
been a timely request for an ARC pursuant to WAC 388-96-904(1) and a timely request for an administrative hearing if the nursing facility does not prevail at the ARC pursuant to WAC 388-96-904(5). Because the Appellants did not make a timely request for an ARC and a timely

request for an administrative hearing to challenge the Department's computation of their respective July 1, 2006 and July 1, 2007 Medicaid rates, the undersigned does not have jurisdictional authority to hear the challenges on the merits or to rule on the Appellants' motion for partial summary judgment and only has authority to dismiss the Appellants' appeal.

III. DECISION

Based on the conclusions entered above, the Department's motion to dismiss is granted. The prospective filing date deadlines, prehearing conference, and hearing set forth in the Scheduling Order issued on March 9, 2010, are hereby canceled.

DATED this ^{15th} day of July, 2010.



JAMES CONANT
Review Judge/Presiding Officer

Attached: Reconsideration/Judicial Review Information

Copies:
Thomas Grimm, Appellants' Representative
Katy King, AAG, Department's Representative, MS: 40124
Edward Southon, Program Administrator, MS: 45600



STATE OF WASHINGTON
DEPARTMENT OF SOCIAL AND HEALTH SERVICES
AGING AND DISABILITY SERVICES ADMINISTRATION
PO Box 45600 * Olympia, WA 98504-5600

December 2, 2009

Vendor Rate Increase Appeals

Your facility has appealed its rates from July 1, 2006 through June 30, 2008, and/or its July 1, 2008 and later rates, on the ground that the Department incorrectly applied the vendor rate increase when calculating such rates. For the reasons described below, your appeal is denied.

Your appeal is based on the September 5, 2008 decision of the Thurston County Superior Court in Life Care Center of America v. DSHS, No. 07-2-02172-5. There, the court ruled that the Department had erred in applying the vendor rate increase when calculating the facilities' Medicaid rates for July 1, 2006. In doing so, the court overruled the decision of the administrative law judge in the matter, who had previously ruled in favor of the Department. The Department chose not to appeal the ruling; however, that did not mean that the Department agreed with the order, or felt that it had acted incorrectly. Quite to the contrary, the Department believes that its method of applying the vendor rate increase was exactly in keeping with the Legislature's intention in passing the relevant appropriations act. We would note that in its 2009 session, the Legislature acted to clarify that the Department's method of applying the vendor rate increase was in fact what it had intended.

The Department recalculated the July 1, 2006 through June 30, 2008 rates of the facilities that were named plaintiffs in the Life Care case. The Department did not extend the Life Care ruling to facilities such as yours, which were not included in the suit, and the Department declines to do so now, as well. The Department's position has three bases:

First, the doctrine of "exhaustion of administrative remedies" applies. When the July 1, 2006 rates were sent out, the Department's method of applying the vendor rate increase was apparent. Other than the Life Care appellants, no facilities objected to the Department's method by filing appeals – which would seem to indicate that they agreed with the Department's understanding of how the vendor rate increase was to be calculated. Because these facilities, including yours, did not avail themselves of the administrative remedy available to them at the time, they forever lost the right to raise the issue.

Second, the Department does not believe that equity demands a different result. The Department did nothing to discourage any facility from filing an appeal on this issue, nor did it ever indicate that it would voluntarily extend the ruling to all facilities. The Department will not invoke RCW 74.46.531, the "errors and omissions" section, because it does not feel that an error was made. Believing as it does that the superior court ruling was contrary to the Legislature's intent, the Department has no reason to compound the mistake by extending it to all facilities. Further, the April 1, 2008 rates were mailed out in late March of 2008, so requests based on the Life Care decision - which were not made until after the court's ruling in September of 2008 - were obviously well past the statutory deadline for appeals. RCW 74.46.531 provides that, while the Department must review requests filed under it even when made untimely, any denial of such a late-filed request is final and may not be appealed further.

Third, there were - and are - no funds in the relevant appropriation period to pay for an extension of the ruling to all facilities; the settlement with the named plaintiffs in the Life Care case effectively exhausted the appropriated funds for SFYs 2007 and 2008, the relevant periods. Again, the Department would point to this as additional proof that its application of the vendor rate increase was correct. These funds were not in the appropriation for the simple reason that the Legislature never intended the vendor rate increase to be applied as the superior court ordered. Extending what the Department believes to be the court's erroneous decision to all facilities would require the Legislature to appropriate additional funds for the affected periods. The Department believed that in the budget circumstances of 2009 the Legislature would have absolutely no interest in doing so.

July 1, 2008 and later rates

We emphasize that the Department did extend the court's order in Life Care to rates for all facilities for the period July 1, 2008 through June 30, 2009. This was because the Department decided it had no choice but to apply the order to the Life Care appellants for the same period, even though by its own terms the superior court's order applied only to the period from July 1, 2006 to June 30, 2008. However, faced with having to extend the ruling to this later period for the Life Care appellants, we felt that, in this instance, equity did require extension of the ruling to all other facilities as well. That decision was described in the Notice that was mailed to all facilities on February 23, 2009. The resulting additional payments started to appear in Remittance Advices mailed to facilities beginning in April, 2009. Therefore, any appeal of July 1, 2008 to June 30, 2009 rates based on this issue was mooted.

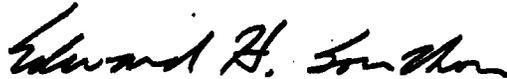
As noted previously, in 2009 the Legislature clarified that vendor rate increases are not intended to be applied cumulatively, thus effectively terminating any applicability of the Life Care ruling. Sec. 206 of c. 564, Laws of 2009, the operating budget for the period July 1, 2009 through June 30, 2011, provides in part:

There will be no adjustments for economic trends and conditions in fiscal years 2010 and 2011. The economic trends and conditions factor or factors defined in the biennial appropriations act shall not be compounded with the economic trends and conditions factor or factors defined in any other biennial appropriations acts before applying it to the component rate allocations established in accordance with chapter 74.46 RCW. When no economic trends and conditions factor for either fiscal year is defined in a biennial appropriations act, no economic trends and conditions factor defined in any earlier biennial appropriations act shall be applied solely or compounded to the component rate allocations established in accordance with chapter 74.46 RCW.

The Legislature's clarification was applied to the July 1, 2009 rates of all facilities.

Finally, we note that where multiple facilities under common ownership have filed appeals, only one letter has been sent to the common mailing address.

Sincerely,



Edward H. Southon, Manager
Nursing Home Rates

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

EXPEDITE (if filing within 5 court days of hearing)
 No hearing is set
 Hearing is set:
Date: September 5, 2008
Time: 9:00 a.m.
Judge/Calendar: Hon. Chris Wickham

FILED
SEP 05 2008
SUPERIOR COURT
BETTY J. GOULD
THURSTON COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

LIFE CARE CENTERS OF AMERICA,
INC., et al.,

NO. 07-2-02172-5

Petitioners,

ORDER REVERSING ADMINISTRATIVE
DECISION

vs.

DEPARTMENT OF SOCIAL AND
HEALTH SERVICES, STATE OF
WASHINGTON,

Respondent.

THIS MATTER came before the Court on judicial review of the Decision and Final Order issued by the Department of Social and Health Services on October 2, 2007, a copy of which is attached hereto as Appendix A ("Agency Decision"). This Court has reviewed: (i) the Agency Decision; (ii) the administrative record; (iii) the briefs submitted by the parties; and (iv) the oral arguments of counsel, and is otherwise fully advised concerning this case. Based upon the foregoing, the Court finds as follows:

1. The Court has jurisdiction to address this judicial review appeal of an administrative decision pursuant to RCW Chapter 34.05.510, et seq.

2. The Court previously entered on August 1, 2008, a Stipulation and Agreed Order of Dismissal re: Records Storage/Management Costs and Incidental Storage Costs Issue.

ORDER REVERSING ADMINISTRATIVE
DECISION - Page 1
375587.01|360923|0001|81sz01!.DOC

Exhibit 2
Page 1 of 3

INSLEE, BEST, DOEZIE & RYDER, P.S.
ATTORNEYS AT LAW
777 - 108th Avenue N.E.
Suite 1900
P.O. Box C-90016
Bellevue, Washington 98009-9016
(425) 455-1234

1 3. The sole remaining issue in this judicial review appeal is the "adjustment for
2 economic trends and conditions issue."

3 NOW, THEREFORE,

4 **IT IS HERBY ORDERED** as follows:

5 1. The Agency Decision is hereby **REVERSED** as to the adjustment for
6 economic trends and conditions issue.

7 2. This matter is hereby **REMANDED** to the Department of Social and Health
8 Services with the following instructions:

9 a. The Department shall adjust the Petitioners' July 1, 2006, direct care
10 and operations rate components for economic trends and conditions by the factors defined in
11 the biennial appropriations acts for all applicable periods, including fiscal years 2004, 2005,
12 and 2006. This requires an 8.2% vendor rate increase to the Petitioners' July 1, 2006,
13 direct care and operations rate components, as opposed to the 1.3% previously applied by
14 the Department.

15 b. Within ninety (90) days from the date of entry of this Order, the
16 Department shall: (i) recalculate the Petitioners' July 1, 2006, rates according to the terms
17 of this Order and other applicable provisions of chapter 74.46 RCW; (ii) issue revised
18 preliminary settlements; and (iii) pay the Petitioners' the difference between the rates so
19 recalculated and the rates previously paid.

20 3. Petitioners are awarded the following costs and statutory attorney's fees on
21 judicial review: filing fee (\$200.00); service of process (\$163.20); and statutory attorney's
22 fees (\$200.00), for a total of \$563.20.

ENTERED this 5th day of September, 2008.

CHRIS WICKHAM

Hon. Chris Wickham, Superior Court Judge

ORDER REVERSING ADMINISTRATIVE
DECISION - Page 2
375587.01|360923|0001|81sz011.DOC

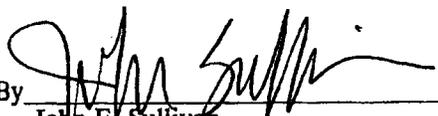
Exhibit 2
Page 2 of 3

INSLEE, BEST, DOEZIE & RYDER, P.S.
ATTORNEYS AT LAW
777 - 108th Avenue N.E.
Suite 1900
P.O. Box C-90016
Bellevue, Washington 98009-9016
(425) 455-1234

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

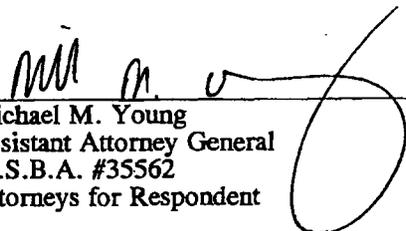
Presented by:

INSLEE, BEST, DOEZIE & RYDER, P.S.

By 
John F. Sullivan
W.S.B.A. #15426
Attorneys for Petitioners

Approved as to form and for entry; notice of presentation waived:

ROBERT M. MCKENNA
Attorney General

By 
Michael M. Young
Assistant Attorney General
W.S.B.A. #35562
Attorneys for Respondent

ORDER REVERSING ADMINISTRATIVE
DECISION - Page 3
375587.01|360923|0001|81sz011.DOC

Exhibit 2
Page 3 of 3

INSLEE, BEST, DOEZIE & RYDER, P.S.
ATTORNEYS AT LAW
777 - 108th Avenue N.E.
Suite 1900
P.O. Box C-90018
Bellevue, Washington 98009-9016
(425) 455-1234

RCW 74.46.531

Department may adjust component rates — Contractor may request — Errors or omissions.

(1) The department may adjust component rates for errors or omissions made in establishing component rates and determine amounts either overpaid to the contractor or underpaid by the department.

(2) A contractor may request the department to adjust its component rates because of:

(a) An error or omission the contractor made in completing a cost report; or

(b) An alleged error or omission made by the department in determining one or more of the contractor's component rates.

(3) A request for a rate adjustment made on incorrect cost reporting must be accompanied by the amended cost report pages prepared in accordance with the department's written instructions and by a written explanation of the error or omission and the necessity for the amended cost report pages and the rate adjustment.

(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. 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 *RCW 74.46.780.

(5) The department shall notify the contractor of the amount of the overpayment to be recovered or additional payment to be made to the contractor reflecting a rate adjustment to correct an error or omission. The recovery from the contractor of the overpayment or the additional payment to the contractor shall be governed by the reconciliation, settlement, security, and recovery processes set forth in this chapter and by rules adopted by the department in accordance with this chapter.

(6) Component rate adjustments approved in accordance with this section are subject to the provisions of RCW 74.46.421.

[1998 c 322 § 31.]

Notes:

***Reviser's note:** RCW 74.46.780 was repealed by 2010 1st sp.s. c 34 § 21.

RCW 74.46.421

Purpose of part E — Nursing facility medicaid payment rates.

(1) The purpose of part E of this chapter is to determine nursing facility medicaid payment rates that, in the aggregate for all participating nursing facilities, are in accordance with the biennial appropriations act.

(2)(a) The department shall use the nursing facility medicaid payment rate methodologies described in this chapter to determine initial component rate allocations for each medicaid nursing facility.

(b) The initial component rate allocations shall be subject to adjustment as provided in this section in order to assure that the statewide average payment rate to nursing facilities is less than or equal to the statewide average payment rate specified in the biennial appropriations act.

(3) Nothing in this chapter shall be construed as creating a legal right or entitlement to any payment that (a) has not been adjusted under this section or (b) would cause the statewide average payment rate to exceed the statewide average payment rate specified in the biennial appropriations act.

(4)(a) The statewide average payment rate for any state fiscal year under the nursing facility payment system, weighted by patient days, shall not exceed the annual statewide weighted average nursing facility payment rate identified for that fiscal year in the biennial appropriations act.

(b) If the department determines that the weighted average nursing facility payment rate calculated in accordance with this chapter is likely to exceed the weighted average nursing facility payment rate identified in the biennial appropriations act, then the department shall adjust all nursing facility payment rates proportional to the amount by which the weighted average rate allocations would otherwise exceed the budgeted rate amount. Any such adjustments for the current fiscal year shall only be made prospectively, not retrospectively, and shall be applied proportionately to each component rate allocation for each facility.

(c) If any final order or final judgment, including a final order or final judgment resulting from an adjudicative proceeding or judicial review permitted by chapter 34.05 RCW, would result in an increase to a nursing facility's payment rate for a prior fiscal year or years, the department shall consider whether the increased rate for that facility would result in the statewide weighted average payment rate for all facilities for such fiscal year or years to be exceeded. If the increased rate would result in the statewide average payment rate for such year or years being exceeded, the department shall increase that nursing facility's payment rate to meet the final order or judgment only to the extent that it does not result in an increase to the statewide weighted average payment rate for all facilities.

[2008 c 263 § 1; 2001 1st sp.s. c 8 § 4; 1999 c 353 § 3; 1998 c 322 § 18.]

Notes:

Severability – Effective dates – 2001 1st sp.s. c 8: See notes following RCW 74.46.020.

Effective dates – 1999 c 353: See note following RCW 74.46.020.