

NO. 34423-8-II

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

PIERCE COUNTY, et al.,

Respondents/Cross-  
Appellants,

v.

STATE OF WASHINGTON, et al.,

Appellants/Cross-  
Respondents.

REPLY BRIEF OF  
RESPONDENTS/CROSS-  
APPELLANTS

FILED  
COURT OF APPEALS  
DIVISION II  
07 JUN 11 PM 1:17  
STATE OF WASHINGTON  
BY  DEPUTY

ORIGINAL

**TABLE OF CONTENTS**

	<b>Page</b>
A. PIERCE COUNTY WAS ENTITLED TO REFORMATION OF THE CONTRACTS TO MAKE THEM CONSISTENT WITH FEDERAL LAW AND POLICY .....	1
1. Pierce County has standing to pursue its contractual remedies .....	1
2. It is undisputed that the RSN Contracts required RSNs to use Medicaid funds for non-Medicaid purposes .....	1
3. The violation of federal Medicaid law and CMS policy triggered the “deemed amended” provision of the RSN contracts .....	3
4. The notion that PCRSN “voluntarily” signed the contracts does not alter the fact that the contracts themselves forced the RSN to spend Medicaid funds to provide non-Medicaid services .....	4
5. Federal law and policy required that Pierce County be given a voluntary choice with respect to the use of Medicaid savings .....	5
6. The trial court’s finding that the federal government tacitly approved the forced use of Medicaid savings, even if supported by substantial evidence, does not vitiate Pierce County’s ability to enforce the contracts .....	7
B. THE PLAIN LANGUAGE OF FORMER RCW 71.24.300 MANDATES A FINDING THAT WESTERN STATE HOSPITAL IS WITHIN THE BOUNDARIES OF PIERCE COUNTY .....	9
1. The Court is not permitted to ignore the plain language of the statute .....	9
2. The plain language of the statute is consistent with the stated legislative intent .....	10
3. The Legislative History, considered as a whole, does not support DSHS’s argument or the trial court’s conclusion .....	13
4. DSHS’s assurances to Pierce County reinforced the fact that WSH was available as Pierce County’s E&T facility .....	17

C. THE TRIAL COURT ERRED BY CONCLUDING THAT SOVEREIGN IMMUNITY INSULATES A STATE AGENCY FROM LIABILITY UNDER A CONTRACT WHICH IS AUTHORIZED BY STATUTE, BUT WHICH CONTAINS AN UNLAWFUL PROVISION ..... 18

## TABLE OF AUTHORITIES

	<b>Page</b>
<b><u>Cases</u></b>	
<i>Agrilink Foods, Inc. v. Dep't of Revenue</i> , 153 Wn.2d 392, 103 P.3d 1226 (2005).....	9, 11
<i>Alpental Community Club, Inc. v. Seattle Gymnastics Soc.</i> , 121 Wn.App. 491, 86 P.2d 784 (2004).....	4
<i>Arborwood Idaho, LLC. V. City of Kennewick</i> , 151 Wn.2d 359, 89 P.2d 217 (2004).....	9
<i>Architectural Woods v. State</i> , 92 Wn.2d 521, 598 P.2d 1372 (1979).....	18, 19
<i>Bullseye Distributing LLC v. State of Washington Gambling Comm'n.</i> , 127 Wn.App 231, 110 P.2d 1162 (2005) .....	18
<i>Eastlake Construction Co., Inc. v. Hess</i> , 35 Wn.App. 378, 655 P.2d 1150 (1982).....	1
<i>Sprague v. Sysco</i> , 97 Wn.App. 169, 982 P.2d 1202 (1997).....	1
<i>Washington State Nurses Ass'n v. Board of Medical Examiners</i> , 93 Wn.2d 117, 605 P.2d 1269 (1980).....	18
<b><u>Statutes</u></b>	
RCW 71.05.170 .....	16
RCW 71.24.016 .....	12
RCW 71.24.035(4).....	3
RCW 71.24.300 .....	9, 13, 14
RCW 71.24.300(1)(c) .....	10, 11, 16
RCW 71.24.300(1)(d).....	12, 14, 15, 16
RCW 71.24.300(5).....	11
RCW 71.24.300(6)(c) .....	12
RCW 71.24.300(c).....	10, 12
RCW 71.24.300(d).....	16
<b><u>Other Authorities</u></b>	
2nd Substitute Senate Bill 5400 (2SSB 5400).....	13
Journal of the Senate, April 21, 1989 .....	14

**A. PIERCE COUNTY WAS ENTITLED TO REFORMATION OF THE CONTRACTS TO MAKE THEM CONSISTENT WITH FEDERAL LAW AND POLICY.**

**1. Pierce County has standing to pursue its contractual remedies.**

DSHS argues that Pierce County lacks standing to challenge the unlawfulness of the contracts because there is no private right of action to enforce the Medicaid Act, and also because Pierce County was not injured as a result of DSHS's failure to fund the services that DSHS required Pierce County to provide. DSHS Reply Brf. at 32, 34. This argument wholly misses the mark. Pierce County is not seeking to enforce rights under Title XIX or any other federal statute; rather, it is seeking to enforce contract terms that require that unlawful aspects of the contract be amended to conform to state and federal law. Trial Ex. 6, Special Terms and Conditions, Section 3, p. 4 of 36. DSHS makes no argument that the County lacks standing to enforce this provision of its contracts. *Sprague v. Sysco*, 97 Wn.App. 169, 176, 982 P.2d 1202 (1997) (party has standing if it demonstrates injury to a legally protected right); *Eastlake Construction Co., Inc. v. Hess*, 35 Wn.App. 378, 381, 655 P.2d 1150 (1982) (as a party to a contract, plaintiff is entitled to sue to enforce it).

**2. It is undisputed that the RSN Contracts required RSNs to use Medicaid funds for non-Medicaid purposes.**

The undisputed record establishes that the forced expenditure of Medicaid funds for non-Medicaid purposes under the contract was contrary to federal Medicaid law and policy in effect at the time the subject contracts were in force. Trial Ex. 45; RP Dula 11/14/05 at 86-87.

Furthermore, DSHS does not dispute that it provided insufficient state-only monies to pay for the non-Medicaid services that the RSN contract required Pierce County to provide. RP Lucas 11/22/05 at 46. This situation required Pierce County to use its Medicaid savings to fulfill the requirements of the RSN contracts, and in particular to fulfill the requirements that were supposed to be paid for with state-only funds. RP Dula 11/14/05 at 42, 83, 87; RP Lewis 11/16/05 at 34-35; RP Lewis 11/17/05 at 99.

DSHS argues, nevertheless, that the forced expenditure of Medicaid monies for non-Medicaid purposes did not violate federal law and policy because the contracts do not expressly set forth such a requirement. DSHS Reply Brf. at 39. While DSHS undoubtedly did its best to conceal the fact that it was violating Medicaid rules and policy from the federal government, the contracts on their face clearly required Pierce County to provide mandatory services that were not funded with state-only money. RP Stewart 11/10/05 at 12-30. Furthermore, even if the use of Medicaid funds for non-Medicaid services was not clearly required on the face of the contracts, Pierce County's claim would still be viable: CMS policy prohibited DSHS from requiring RSNs to use Medicaid funds for non-Medicaid services. A contract which, in operation and effect, requires the RSN to use Medicaid funds to provide services not covered by Medicaid or to serve persons not eligible for Medicaid "conflicts" with CMS policy to the same extent as a contract that expressly requires those expenditures.

**3. The violation of federal Medicaid law and CMS policy triggered the “deemed amended” provision of the RSN contracts.**

The fact that the contracts required Pierce County to spend Medicaid dollars to provide state-only services in violation of Medicaid law and policy triggered the “deemed amended” provision of the RSN contracts. That provision calls for amending the contracts if they violate state or federal statutes, regulations or CMS policy guidance.<sup>1</sup>

Any provision of this Agreement which conflicts with state and federal statutes, or regulations, or CMS (previously known as HCFA) policy guidance is hereby amended to conform to the provisions of state and federal law and regulations.

Trial Ex. 6, Special Terms and Conditions, Section 3, p. 4 of 36.<sup>2</sup>

This clause ensures that entities contracting with DSHS are not required to choose between refusing to sign an illegal contract, and thereby surrendering their local mental health systems to DSHS,<sup>3</sup> or acquiescing to blatantly illegal terms. Instead, the “deemed amended”

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<sup>1</sup> DSHS contends that Pierce County failed to identify any statute that conflicted with the contract, implying that Pierce County failed to identify how the contract conflicted with federal law. DSHS Brf. at 32. This is misleading because the “deemed amended” provision of the contract calls for amending the contract if it conflicts with any *statute, regulation or CMS policy guidance*. The 1998 letter from CMS set forth CMS policy regarding the use of Medicaid savings.

<sup>2</sup> This provision from the 2001 contract is substantially similar to the “deemed amended” provision in the 2003 contract. *See*, Trial Ex. 7, Section 2, p. 12 of 41.

<sup>3</sup> Former RCW 71.24.035(4) provided that if the RSN fails to provide the mental health services required by contract and statute, those responsibilities revert to DSHS. DSHS informed Pierce County that if it did not sign the RSN contract, DSHS would assume the operations of the RSN or contract with a managed care organization to provide services. RP Lewis 11/16/05 at 32-33. DSHS also informed Pierce County that if it took over the RSN, it would discontinue two important services that Pierce County provides: 1) crisis triage, and 2) services to mentally ill offenders at the Pierce County jail. RP Lewis 11/16/05 at 29-30.

provision affords a remedy to the contractors to judicially compel DSHS to conform its contracts to applicable law. In this way, the clause not only affords flexibility to conform to changing federal guidelines, but more importantly avoids costly and disruptive standoffs between DSHS and RSNs over contract terms that DSHS seeks to impose.

**4. The notion that PCRSN “voluntarily” signed the contracts does not alter the fact that the contracts themselves forced the RSN to spend Medicaid funds to provide non-Medicaid services.**

DSHS makes much of the trial court’s finding that PCRSN “voluntarily” signed the RSN contracts and argues that Pierce County has not challenged this finding on appeal. DSHS Reply Brf. at 39. These arguments are a red herring, as DSHS well knows. Pierce County’s position is that the trial court’s finding that the contracts were voluntarily executed is immaterial as a matter of law; therefore, it is not necessary to overturn that finding in order to reverse the judgment.<sup>4</sup>

Since 1998, Medicaid policy has prohibited states from contractually requiring PHPs to use their Medicaid dollars for non-Medicaid eligible persons or to purchase non-Medicaid services. Trial Ex.

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<sup>4</sup> Even if it was necessary for this Court to address whether the trial court’s finding was properly supported, where the appellant’s brief makes the nature of the challenge clear and the challenged finding is argued in the text of the brief, the Court may excuse a failure to assign error. *Alpental Community Club, Inc. v. Seattle Gymnastics Soc.*, 121 Wn.App. 491, 86 P.2d 784 (2004). Here, Pierce County challenged all findings of fact and conclusions of law associated with the trial court’s dismissal of the Medicaid contract claim. Pierce County Brf. at 4. Moreover, Pierce County expressly argued that the court’s findings that Pierce County voluntarily spent Medicaid savings, and that CMS “tacitly” agreed with DSHS’s actions, were neither supported by the weight of the evidence nor did they have any bearing on the legality of the contract. Pierce County Brf. at 62-65. DSHS clearly responded to this argument at DSHS Brf. at 35-36.

45. The RSN contracts did just that. RP Dula 11/14/05 at 83, 87; RP Stewart 11/10/05 at 83. The fact that the contract required, rather than allowed, the RSNs to use Medicaid savings to provide non-Medicaid services was the offending factor that gave rise to Pierce County's right to reform the contract to make it legal. Whether or not Pierce County signed the contracts "voluntarily" does not alter the illegal nature of the contract, which by its terms must be amended to comply with the law.

Pierce County's signature on the contract also did not waive Pierce County's right to enforce the contractual provision requiring amendment. PCRSN was entitled to voluntarily sign the contract and rely on the "deemed amended" provision to bring unlawful contractual requirements into compliance with federal Medicaid law. Accordingly, the fact that the RSN could have refused to enter into the agreement is irrelevant, and it was error for the trial court to seize on this fact to deny the relief that the contract so clearly provided.

**5. Federal law and policy required that Pierce County be given a voluntary choice with respect to the use of Medicaid savings.**

DSHS suggests that, because it "voluntarily provided" a combination of state-only and Medicaid funds to Pierce County, it was entitled to dictate how those funds would be used. DSHS Reply Brf. at 39. Like many of DSHS's points, this argument is apparently intended to draw the Court's attention away from the relevant question, which under the relevant federal standards is not whether the state voluntarily provided funds, or whether the PHP-contractor voluntarily executed a contract, but

whether the contract gave the PHP-contractor a voluntary choice as to how to use Medicaid savings. On this – the relevant issue – DSHS has no response.

In its 1998 letter to State Medicaid Directors, CMS’s predecessor acknowledged that some states had required in their contracts with PHPs that PHPs use their savings to provide services to persons who are not eligible for Medicaid. CMS clearly disapproved of this contract requirement that the states imposed and asserted, “We view this practice as an inappropriate subsidy for services for the uninsured.” CMS allowed, however, that the PHP was permitted to use the savings voluntarily to provide services to non-Medicaid individuals as long as the contract did not require it to do so.

In accordance with CMS policy at the time, PCRSN voluntarily used its savings to purchase Puget Sound Hospital in 2000 to expand the evaluation and treatment beds in Pierce County and to meet its obligation to provide 85% of evaluation and treatment (“E&T”) services within Pierce County. Under the federal policy existing at the time, this was an appropriate and permissible use of the RSN’s savings.

CMS’s prohibition on the contractually required use of Medicaid savings clearly was directed at the states and their contracts with PHPs. It had nothing to do with whether the states voluntarily provided non-Medicaid funds to the PHPs. Accordingly, DSHS’s argument that it voluntarily provided state-only funds to Pierce County along with Medicaid funds is no defense to the evidence that DSHS required Pierce

County to use its Medicaid savings to provide non-Medicaid services under the contract.

**6. The trial court's finding that the federal government tacitly approved the forced use of Medicaid savings, even if supported by substantial evidence, does not vitiate Pierce County's ability to enforce the contracts.**

The trial court's finding that the federal government "tacitly approved" the forced expenditure of Medicaid funds for non-Medicaid purposes lacks the necessary evidentiary support. Furthermore, even if federal regulators were slow to respond, their inaction provides no legal basis to deny Pierce County its contractual remedies. With regard to whether the trial court's finding was supported by substantial evidence, the record shows that the Federal Government's policy on the use of Medicaid savings became increasingly strict over time. In 1998, years before the subject contracts came into force, CMS announced its policy prohibiting States from contractually requiring PHPs to use Medicaid savings for non-Medicaid purposes. Trial Ex. 45. In 2001, CMS stepped up enforcement of the policy by investigating reports that Medicaid-eligible persons were not receiving necessary services as a result of Medicaid funds being diverted to provide services to non-Medicaid eligibles. Trial Ex. 49 at 620. Finally, in 2004, when it concluded that the voluntary use was impossible to enforce, CMS announced that states and their PHP contractors could no longer use Medicaid savings for non-Medicaid purposes under any circumstances, whether they did so voluntarily or not. Trial Ex. 386. While CMS did not single out Pierce

County for enforcement, its letters to Medicaid directors put them on notice that it was aware of the practice of forcing prepaid health plans to use Medicaid funds to pay for non-Medicaid services, and that it did not approve. Under this set of facts, substantial evidence did not support a finding by the trial court that the federal government tacitly approved of RSNs' use of Medicaid dollars for non-Medicaid purposes. Indeed, there was no evidence that the federal government approved of DSHS's policies, tacitly or otherwise. To the contrary, all of the evidence was to the effect that CMS continuously tried to stop the practice of forced use of Medicaid savings and, having failed in doing so, simply eliminated the option of using them "voluntarily." Trial Ex. 45; Trial Ex. 49 at 620; Trial Ex. 386.

Furthermore, the contractual provisions in question require the contracts to be amended to conform to what the federal law and policy actually is. The Government's failure to vigorously enforce those laws and policies did not change the federal requirements. Therefore, even "tacit" approval of a practice on the part of the government does not change the fact that the contract conflicted with Medicaid policy because it offered no choice to the RSNs about spending Medicaid dollars. This conflict gave rise to PCRSN's contractual right to judicially enforce the contract.

**B. THE PLAIN LANGUAGE OF FORMER RCW 71.24.300 MANDATES A FINDING THAT WESTERN STATE HOSPITAL IS WITHIN THE BOUNDARIES OF PIERCE COUNTY**

**1. The Court is not permitted to ignore the plain language of the statute.**

DSHS has offered some confusing and contradictory bits of purported “legislative history” concerning former RCW 71.24.300 in an effort to muddy the plain language of the statute, which requires RSNs to treat 85% of short-term patients within their boundaries. The trial court erred by ignoring the plain language of the statute and by considering the legislative history where the statute was not ambiguous. *See, Agrilink Foods, Inc. v. Dep’t of Revenue*, 153 Wn.2d 392, 397, 103 P.3d 1226 (2005). Courts are not permitted to simply ignore terms in a statute. *Arborwood Idaho, LLC. V. City of Kennewick*, 151 Wn.2d 359, 367, 89 P.2d 217 (2004).

The Court’s role in interpreting a statute is to give effect to the intent of the legislature, which should be gleaned from the words themselves, regardless of a contrary interpretation by the administering agency. *Agrilink Foods*, 153 Wn.2d at 397 (2005). Only if the language is ambiguous should the Court resort to legislative history. A statute is ambiguous if it can be reasonably interpreted in more than one way, but a court will not find ambiguity merely because one can imagine a variety of alternative interpretations. *Id.* Here, the trial court erred when it went beyond the clear and unambiguous language of the statute and relied upon the legislative history. If the Court had restricted its review to the plain

words of the statute, it would have concluded that Western State Hospital is within the boundaries of Pierce County Regional Support Network, and that short-term placements at Western State Hospital fulfill PCRSN's requirement to provide within its boundaries E&T services for 85% of short-term patients.

**2. The plain language of the statute is consistent with the stated legislative intent.**

Former RCW 71.24.300(1)(c), on its face, required that RSNs “provide within the boundaries of each regional support network evaluation and treatment services for at least eighty-five percent of persons detained or committed for periods up to seventeen days.” The purpose of requiring that 85% of short-term patients receive treatment “within the boundaries” of the RSN is consistent with the overall purpose of the Community Mental Health Services Act, which is to provide services to mentally ill persons in their communities where possible. *See*, former RCW 71.24.300(c) (identifying original intent of “serving persons in the community”). To that end, the statute permits exceptions to the “within the boundaries requirement” where the E&T services are provided in “**neighboring or contiguous** regions” [emphasis added]. *Id.* Clearly, the point of the 85% requirement was both to ensure that short-term patients were not cut off from their communities and, presumably, their support systems, while receiving E&T services, as well as to promote continuity of care after discharge. DSHS admits as much. DSHS Reply Brf. at 41.

Although DSHS agrees that the purpose of RCW 71.24.300(1)(c) was to ensure that short-term patients be treated in their communities, DSHS asks the Court to read extra terms into the statute so that it requires short-term patients be treated in community *facilities*, which DSHS suggests are any facilities other than the state hospital. *Id.* This reading of the statute adds a term that the Legislature did not include and, presumably, did not intend. *See, Agrilink Foods, Inc. v. Dep't of Revenue*, 153 Wn.2d at 397 (2005) (refusing to read requirement into tax statute concerning perishable meat products that “finished meat products” also be perishable where the plain language of the statute did not contain such a requirement).

Here, the statute required that RSNs provide services in the “community” and “within the boundaries of the RSN,” not in a “community hospital” or “community facility” or “evaluation and treatment facility.” The Legislature knew how to distinguish the concept of community hospitals from state hospitals when it wanted to do so. *See*, former RCW 71.24.300(5) (defining “periods of stable community living” following long-term commitments at the state hospitals as including patient stays in “local evaluation and treatment facilities,” but explicitly excluding stays in state hospitals). If the Legislature wanted to exempt state hospitals from the requirement that 85% of E&T services be provided within the boundaries of the RSN, it easily could have specified that such services take place in “local evaluation and treatment facilities and not the state hospitals,” as it did in RCW 71.24.300(5). Instead, the

Legislature chose to focus on proximity to the patient's home by requiring that the majority of E&T patients be served within the boundaries of the RSN or in neighboring RSNs. Former RCW 71.24.300(c).

The Legislature amended Ch. 71.24 in 2006, after this lawsuit had been concluded in the trial court, to increase the percentage of E&T patients that had to be served within the boundaries of the RSN; but the amended statute continued to permit RSNs to seek short-term treatment in neighboring or contiguous regions. The Legislature also added a second exception which permitted the RSNs to have "individuals detained or committed for periods up to seventeen days at the state hospitals." RCW 71.24.300(6)(c). The amended statute reiterated that the Legislature's intent was to maintain persons within the *geographic boundaries* of the RSN:

The legislature further intends to explicitly hold regional support networks accountable for serving people with mental disorders within their **geographic boundaries** ... Within funds appropriated by the legislature for this purpose, regional support networks shall develop the means to serve the needs of people with mental disorders **within their geographic boundaries**.

RCW 71.24.016 [emphasis added]. The amended statute did not require that short-term treatment take place in specific facilities, as DSHS suggests, nor did it exclude WSH as a provider of short-term treatment. To the contrary, it specifically permitted the RSNs to obtain short-term treatment for their mental health patients at WSH. This exception finds precedence in former RCW 71.24.300(1)(d), which required the RSNs to

“provide for the care of all persons needing evaluation and treatment services for periods up to seventeen days according to chapter 71.05 RCW in appropriate residential settings, **which may include state institutions.**” [Emphasis added]. Clearly, the statute that was in effect at the time this lawsuit was filed, as well as the amended statute, contemplated that RSNs would use E&T services at state hospitals. In the case of Pierce County, the E&T beds at Western State Hospital are “within the boundaries” of Pierce County RSN. The unambiguous language of former RCW 71.24.300, together with the stated intent of providing E&T services to persons near their homes, permits no other conclusion than that E&T beds at WSH count toward PCRSN’s requirement to provide within its boundaries E&T services to 85% of short-term patients.

**3. The Legislative History, considered as a whole, does not support DSHS’s argument or the trial court’s conclusion.**

DSHS has seized upon a memo from a legislative analyst for the House Human Services Committee in support of its argument that E&T beds at WSH, although within the geographic boundaries of Pierce County RSN, do not count when determining whether PCRSN has met its 85% requirement. DSHS Reply Brf. at 43. DSHS fails to mention that the conclusion of the legislative staffer directly contradicts the position of the bill’s sponsor, Senator Janice Niemi.

The Journal of the Senate related to 2SSB 5400 contains a Point of Inquiry in which Senator Niemi expressed her understanding that Pierce and Spokane Counties would be treated differently than the other RSNs:

There are many, many ways to solve this and what we are trying to say is that there isn't a [single] way for everybody to solve it. You can do it as you wish and as it suits your community. **Pierce and Spokane are in different situations because they have state hospitals there and we expect a different solution.**

Journal of the Senate, April 21, 1989 at 2448 (emphasis added). Senator Niemi further explained that while King County had developed an E&T facility, Pierce County could continue using WSH:

**In the case of Pierce County, they probably would have some of those short term in Western ...**

*Id.* (emphasis added). This statement by the bill's sponsor acknowledges that Pierce and Spokane RSNs are in a different position than the other RSNs because they have state hospitals within their boundaries, and it conveyed to her colleagues that Pierce and Spokane RSNs would be permitted to use the state hospitals to meet their short-term E&T requirements. As such, this discussion by the bill sponsor completely contradicts the conclusion of the legislative staffer upon which DSHS relies, and renders the legislative history less than illuminating.

The legislative history of Ch. 71.24 RCW is further compromised by the fact that although a significant section of RCW 71.24.300 was never implemented, the legislators considered and discussed the statutory scheme without knowing that part of it would never take effect. Ch. 71.24 RCW as drafted contained a provision that would have transferred to the RSNs a portion of the funds earmarked for the state hospitals. *See* former RCW 71.24.300(1)(d). With that money, the RSNs were expected to take responsibility for providing all E&T services. The statute contemplated

that the RSNs could use the state hospitals to meet their E&T needs, provided they reimbursed the state hospitals for the use of the short-term treatment:

Regional support networks shall:

administer a portion of funds appropriated by the legislature to house mentally ill persons in state institutions from counties within the boundaries of any regional support network ... and provide for the care of all persons needing evaluation and treatment services for periods up to seventeen days according to chapter 71.05 RCW in appropriate residential services, **which may include state institutions.** The regional support networks shall reimburse the state for use of state institutions at a rate equal to that assumed by the legislature when appropriating funds for such care at state institutions during the biennium when reimbursement occurs. **The duty of a state hospital to accept persons for evaluation and treatment under chapter 71.05 RCW is limited by the responsibilities assigned to regional support networks under this section.**

Former RCW 71.24.300(1)(d) (emphasis added). This statute was never implemented, RSNs were never provided a portion of funds earmarked for the state hospital, and thus they never were required to pay for the use of WSH. Thus, the requirement that RSNs treat 85% of short-term patients within their boundaries became reality, while the administer-a-portion provision never took effect because the WSH funds were never transferred to the RSNs. The RSNs were required only to treat 85% close to home, and to treat the remainder in neighboring or contiguous RSNs. Under the circumstances, the legislative history is of little value because the discussions of the RSNs' responsibilities made it impossible to separate

comments related to the 85% requirement from comments related to the “administer a portion” requirement.

It is important to note that the language limiting the responsibilities of the state hospitals to accept short-term patients, which DSHS relies upon in its opening brief at page 43, is contained in both the non-implemented “administer a portion” section of the CMHSA and the ITA. *Compare*, Former RCW 71.24.300(d) with RCW 71.05.170. The final language of former RCW 71.24.300(d), as set forth above, reads:

The duty of a state hospital to accept persons for evaluation and treatment under chapter 71.05 RCW is limited by the responsibilities assigned to regional support networks under this section.

Similarly, the final language of former RCW 71.05.170 reads:

The duty of a state hospital to accept persons for evaluation and treatment under this section shall be limited by chapter 71.24 RCW.

DSHS argues that a proposed version of this provision would have relieved Pierce and Spokane Counties from the 85% requirement, but that the proposed language was omitted from the final legislation. DSHS interprets the omission to mean that the legislature affirmatively rejected the notion that Pierce County should be able to use WSH to meet its obligation to provide within its boundaries E&T services to 85% of its short-term patients. DSHS Brf. at 43. The fact that the provision is contained in the “administer a portion” statute (RCW 71.24.300(1)(d)), however, and not in RCW 71.24.300(1)(c) suggests that the Legislature intended that the duty of the state hospital to accept persons for E&T

services be limited not by the RSN's responsibility to provide for 85% of its E&T patients within its boundaries, but by the RSN's responsibility to administer a portion of funds earmarked for WSH. Accordingly, the legislative history that DSHS relies upon, which shows that the legislature considered but did not adopt language that would have limited WSH's duty to accept persons from RSNs other than Pierce and Spokane, is of no moment. The proposed language would have limited WSH's duty to accept short-term patients based upon the RSNs' duty to reimburse the state hospitals with the funds provided under the "administer a portion" statute, and not based upon whether the RSN had met its 85% requirement.

**4. DSHS's assurances to Pierce County reinforced the fact that WSH was available as Pierce County's E&T facility.**

DSHS attempts to distance itself from acknowledgments made by the former Acting Director of the Mental Health Division and the former Chief of Mental Health Services that it had, in the past, assured Pierce County that WSH was available as its E&T facility. DSHS Reply Brf. at 44-45. Ms. Terry subsequently approved PCRSN's purchase of Puget Sound Hospital so that Pierce County could meet the 85% requirement without using WSH. RP Lewis 11/16/05 at 9-10. There is additional support in the record for the fact that DSHS had, in the past, discouraged Pierce County from creating its own E&T facility which would have enabled the RSN to limit its use of WSH for short-term commitments. *See*, CP 394; CP 405 (second bullet point shows that in 2001, MHD

acknowledged that RSNs located near the state hospitals had greater access to state hospital beds for short-term patients); CP 436 (letter from Senator Winsley acknowledging that Pierce County used a higher percentage of short-term hospital beds at WSH because in the past, the State had discouraged Pierce County from establishing an evaluation and treatment facility). The long-standing construction of a statute by the administrative agency responsible for implementing it may be considered when a court construes a statute, if the agency construction is consistent with the statute. *See, Washington State Nurses Ass'n v. Board of Medical Examiners*, 93 Wn.2d 117, 121, 605 P.2d 1269 (1980); *Bullseye Distributing LLC v. State of Washington Gambling Comm'n.*, 127 Wn.App 231, 237, 110 P.2d 1162 (2005). Here, DSHS's original and long-held construction of the 85% requirement is consistent with the plain meaning of the statute and conflicts with its recently adopted view.

**C. THE TRIAL COURT ERRED BY CONCLUDING THAT SOVEREIGN IMMUNITY INSULATES A STATE AGENCY FROM LIABILITY UNDER A CONTRACT WHICH IS AUTHORIZED BY STATUTE, BUT WHICH CONTAINS AN UNLAWFUL PROVISION**

DSHS maintains that Ch. 39.76 RCW codifies the holding in *Architectural Woods v. State*, 92 Wn.2d 521, 598 P.2d 1372 (1979), where the Washington Supreme Court held that the State waives sovereign immunity on contracts whenever a statute authorizes a state agency to enter into specific types of contracts. DSHS further argues that the holding in *Architectural Woods* is limited to those situations where the State contracts with a private party. If it is true that *Architectural Woods*

applies only to private parties, then there would be no need for the legislature to exempt “intergovernmental transactions” from liability for interest on contracts as it later did in Ch 39.76 RCW.

Below, the trial court found that although the Legislature authorized the State to contract with RSNs to provide mental health services, it had not authorized DSHS to impose liquidated damages. Therefore, according to the court, the Legislature had not waived sovereign immunity to be sued with respect to the liquidated damages provision of the contract, and the State was not liable for prejudgment interest on the unlawfully withheld liquidated damages. This conclusion is erroneous.

*Architectural Woods* teaches that when the legislature authorizes a state agency to enter into a contract, it impliedly waives sovereign immunity and is liable to the same extent as a private party. The trial court misapplied the holding to mean that any provision of a contract that is not specifically authorized by the Legislature preserves the State’s sovereign immunity. This conclusion would effectively insulate the State from liability under every contract provision that is subsequently determined to be unauthorized and *ultra vires*, regardless of the consequences and injuries to the contracting party. The relevant inquiry is whether the agency was authorized by the legislature to enter into the type

of contract that it did, and not whether every provision of the contract was specifically authorized. Clearly, the trial court's conclusion was erroneous and should be reversed.

Respectfully submitted this 11<sup>th</sup> day of June, 2007.

BENNETT BIGELOW & LEEDOM, P.S.

By

  
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Attorneys for Respondents/Cross-  
Appellants Pierce County, PCRSN and  
PSBH

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**CERTIFICATE OF SERVICE**

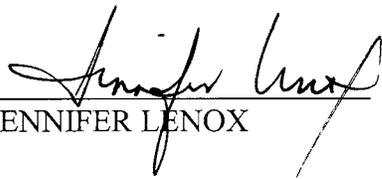
I, Jennifer Lenox, declare as follows:

I am a resident of the State of Washington, over eighteen years of age, and not a party to the within action. My business address is Bennett, Bigelow & Leedom, P.S., 1700 Seventh Avenue, Suite 1900, Seattle, WA 98101-1355.

On June 11, 2007, I caused the following document entitled: **REPLY BRIEF OF RESPONDENTS/CROSS-APPELLANTS** to be served by hand delivery by ABC Legal Services on today's date, directed to:

**Carrie L. Bashaw, Esq.**  
**Eric Nelson, Esq.**  
**William L. Williams, Esq.**  
**Office of the Attorney General**  
**7141 Cleanwater Lane SW**  
**Olympia, WA 98501**

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Seattle, Washington, on June 11, 2007.

  
\_\_\_\_\_  
JENNIFER LENOX

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