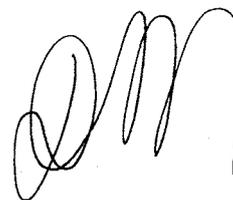


**ORIGINAL**

No. 36489-1-II

DIVISION II, COURT OF APPEALS  
OF THE STATE OF WASHINGTON



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ODYSSEY HEALTHCARE OPERATING B, LP AND ITS PARENT  
COMPANY, ODYSSEY HEALTHCARE, INC.,

Petitioner-Appellant

v.

WASHINGTON STATE DEPARTMENT OF HEALTH,

Respondent,

FRANCISCAN HEALTH SYSTEM; PROVIDENCE HOSPICES; and  
KING COUNTY HOSPITAL DISTRICT NO. 2, D/B/A EVERGREEN  
HOSPICE,

Intervenor-Respondents.

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ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT  
(Hon. Richard D. Hicks)

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APPELLANT'S OPENING BRIEF

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## I. INTRODUCTION

Odyssey Healthcare asks this Court to set aside the decision of the Department of Health (“Department”) denying its applications for certificates of need (“CON”) to provide hospice agency services to the residents of King, Snohomish, and Pierce Counties. A hospice agency cannot provide hospice services in the Medicaid or Medicare program without first having received a CON from the Department to serve the particular “planning area.” *See* RCW 70.38.105, RCW 70.38.025(6), WAC 246-310-010(31). Each county is a separate “planning area.” WAC 246-310-290(1)(f). For many years, CON applications for hospice services were reviewed under the general CON criteria, which are designed to ensure that a proposal meets a community need, will provide quality services, is financially feasible, and will foster containment of health care costs. *See* WAC 246-310-210 through -240.

In 2003, the Department decided to adopt a six-step mathematical formula known as the hospice need Methodology, to project the planning area’s need for additional hospice services. *See* WAC 246-310-290(7). In this appeal, Odyssey asks this Court to require the Department to apply this unambiguous six-step mathematical formula as was written in WAC 246-310-290 and adopted into rule by the Department. The Department is

attempting to change the unambiguous language of the Methodology by “interpreting” a selected step in the formula rather than making any necessary changes through the rulemaking procedures of the Administrative Procedure Act.

The six steps of the Methodology’s formula, however, are a clear and concise mathematical formula which the Department is not allowed to construe. When the language of a statute or rule is unambiguous, the courts will not “create legislation in the guise of interpreting it.” *Associated Gen. Contractors of Washington v. King County*, 124 Wn.2d 855, 865, 881 P.2d 996 (1994) (citation omitted). Nor may agencies “interpret” unambiguous regulations: “To defer to the agency’s position would be to permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation.” *Christensen v. Harris County*, 529 U.S. 576, 588, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000).

Certainly, the Methodology does not measure need as was intended. One of the steps of the Methodology is written in a way that will overstate a factor used in quantifying the projected need for hospice care, while other steps of the Methodology are written in a way that will understate factors in determining need. The Department attempted to change the Methodology in its evaluation of Odyssey’s CON applications by “interpreting” only one selected step of the Methodology’s formula

because it believed that step would overstate the projected need. Despite the fact that agencies may not “interpret” unambiguous regulations, the Department argued it should be allowed to do so because over-projecting the number of hospice agencies would be an “absurd result.” In so arguing, it ignored the fact that the Department’s interpretation of only one selected step leads to an equally “absurd result” – a “projection” of far fewer hospice users than its own surveys show are actually using hospice services. For example, in King County, it projected 2,754 patients would enter into hospice care in 2003 while 3,223 actually entered hospice in that county in that year, resulting in a 469 patient “over use.” Administrative Record (“AR”) 1264.

The Department’s under-projection of need for hospice services was further exacerbated when it based its decision to deny the CON applications on incomplete information in the surveys returned by the existing hospice providers. *See* AR 4233-4334; *see also, e.g.*, AR 1264. These surveys were developed and sent out after Odyssey had submitted its application, and not only did several hospice providers fail to respond, several returned surveys with incomplete responses. The Department knew that the survey responses, and therefore the data, were incomplete because 25 percent of the hospice providers did not return the survey and the data was on its face either incomplete or inaccurate. *Id., see also, e.g.*,

AR 1243. Because of the way the Methodology is mathematically formulated, incomplete data will *a fortiori* lead to an understatement of the “statewide use rate” in the Methodology and therefore underestimate the projected need for additional hospice services. On that basis alone, this Court should find that Odyssey has been substantially prejudiced by the Department’s failure to follow its prescribed procedures and that the Department’s Order denying the CON applications is arbitrary and capricious.

## **II. ASSIGNMENTS OF ERROR**

1. The Thurston County Superior Court erred in entering the Order Denying Petition for Judicial Review dated June 11, 2007, and filed June 13, 2007. Clerk’s Papers (“CP”) 225-226. Specifically, the superior court erred in concluding in paragraph 2 that “[t]he Health Law Judge correctly interpreted the ‘methodology’ in WAC 246-310-290, and found no ‘need’ under the methodology for Odyssey’s proposed hospice agencies in Pierce, King, and Snohomish counties,” and in concluding in paragraph 3 that “[t]he Health Law Judge therefore was correct in denying Odyssey’s three Certificate of Need applications.” The superior court further erred in affirming the decisions of the Department and denying the Petition for Judicial Review.

2. The Department, through its final decision maker, the Health Law Judge (“HLJ”), erred in entering Prehearing Order No. 3: Order Granting Summary Judgment dated June 8, 2006, granting summary judgment to the Department and denying Odyssey’s summary judgment motion. CP 139-152, AR 5047-5060. Specifically, the HLJ erred in concluding the Department correctly interpreted WAC 246-310-290(7) and in concluding the Program did not err when it relied on incomplete survey data collected and analyzed after Odyssey submitted its CON applications.

### III. ISSUES

The following issues pertain to the Assignments of Error:

1. Is WAC 246-310-290(7), which sets forth a mathematical formula in a Methodology to quantify projected need for hospice services, an unambiguous rule that cannot be changed through administrative or judicial interpretation?

2. Did the Department erroneously interpret and apply the law and change the plain meaning of the hospice Methodology rule when it read Step 2’s language “[c]alculate the average number of total resident deaths over the last three years for each planning area” to instead mean “[c]alculate the average number of total resident deaths” for each of the

four categories of patients identified in Step 1 “over the last three years for each planning area”?

3. Is the Department’s interpretation of the hospice need Methodology internally inconsistent and not entitled to deference when it “interprets” Step 2 to avoid over-projecting hospice need but applies the literal language of Step 4 knowing it will under-project hospice need?

4. Did the Department engage in unlawful procedure and act arbitrarily and capriciously when it relied on survey data from existing hospice providers that was gathered after the CON application had been filed and the process for submission of information by the applicant and the public had been closed?

5. Was the Order of the Department denying Odyssey’s applications for CONs arbitrary and capricious when the Department used inaccurate and incomplete survey data from existing providers to evaluate Odyssey’s CON applications, particularly when it treated the providers’ non-responses as zero hospice admissions, which inevitably resulted in lower than actual statewide use rates and lower need projections?

#### **IV. STATEMENT OF THE CASE**

##### **A. Statement Of Facts**

###### **1. Nature and scope of CON requirements.**

Under Washington’s CON law, “[n]o person shall engage in any undertaking which is subject to certificate of need review . . . without first having received from the Department either a certificate of need or an exception granted in accordance with this chapter.” RCW 70.38.105(3). The development of “a new health care facility” requires a CON (RCW 70.38.105(4)) and a “hospice agency” that provides services to individuals in their homes or temporary residences (such as nursing homes) is a “health care facility” (RCW 70.38.025(6)). The services provided by hospice agencies include symptom and pain management for terminally ill individuals, and emotional, spiritual, and bereavement support for the individuals and their families. RCW 70.127.010(13). One consideration in the review of CON applications is “[t]he need that the population served or to be served by such services has for such services.” RCW 70.38.115(2)(a).

**2. The Department adopts a numerical methodology rule to determine when need exists for new hospice agencies in a particular county.**

**a. A task force of existing hospice providers begins work to draft a hospice need methodology.**

In 2003, the Department formed a committee of existing hospice providers to develop rules that would establish a hospice “need methodology.” WSR (Washington State Register) “Proposed Rules” 03-03-097 (January 17, 2003).<sup>1</sup> The Methodology was to calculate and predict whether there existed a sufficient level of need for additional hospice services in a particular county to warrant granting a CON to a new “hospice agency.”<sup>2</sup> *Id.* A “hospice agency” provides hospice services at the patient’s residence under the direction of an interdisciplinary team composed of at least a nurse, social worker, physician, spiritual counselor, and a volunteer.<sup>3</sup> RCW 70.127.010(11). Because of the nature of hospice services, the investment for a hospice agency is primarily in trained staff rather than infrastructure or equipment. E.g., AR 721, 741, 744, 812-814.

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<sup>1</sup> <http://apps.leg.wa.gov/documents/laws/wsr/2003/03/03-03-097.htm>; *see also* AR 1278, 3877-3887.

<sup>2</sup> The proposed rules did not include any requirement that an existing hospice provider receive a CON before increasing the level of services provided.

<sup>3</sup> Hospice services are distinguished from “hospice care centers” which are homelike building facilities, where hospice services are provided to residents. *See* RCW 70.127.010(12).

The drafters of the rule decided that in order to be a viable business, a hospice agency would need to serve an average daily census (“ADC”) of 35 patients. AR 1939, 3879-3883. Average daily census generally represents the average number of individuals receiving services on any given day of the year. *See* AR 1939; WAC 246-310-290(1)(a). The reasoning was that if the Methodology projects a need for hospice services of 35 ADC above the “current hospice capacity” (measured by a three-year average of the existing hospice agencies’ service levels), there is a sufficient level of need to make a hospice agency viable. AR 1939; *see also* WAC 246-310-290(7)(f) and (g).

Apparently, the committee drafting the proposed rules discontinued its work after the departure of the Department employee who was “spearheading” the project; there are draft reports in Department files but no final report was ever issued. AR 1930; *see also* AR 4157. Nor did the Department run test data through the mathematical formula to test whether the Methodology actually measured projected need before the rule’s adoption. AR 1930-1931; *see also* AR 4157-4158. On March 18, 2003, the Department adopted the hospice rules, with an effective date of

April 19, 2003, which became codified as WAC 246-310-290. WSR 03-07-096 (March 19, 2003)<sup>4</sup>.

**b. Overview of hospice need methodology as adopted into rule by the Department.**

The Methodology the Department adopted as part of the hospice rules is a six-step mathematical formula that requires several calculations to “project the need for hospice services.” WAC 246-310-290(7). Each of these steps is briefly described here, and will be more fully discussed at in the “Argument” section of this brief.

**Step 1:** Step 1 calculates “four statewide predicted hospice use rates.” WAC 246-310-290(7)(a). This calculation is performed for each of four age/diagnosis subgroups: cancer patients sixty-five and over; cancer patients under sixty-five; noncancer patients sixty-five and over; and noncancer patients under sixty-five. Step 1 predicts the percentage of persons in each subgroup who will use hospice services on a statewide basis. The calculation takes a three year average of the hospice admissions statewide and divides that number by the three year average of the number of statewide total deaths. For example, if in the average year 500 persons in the group “65 and over with cancer” were admitted to hospice, and in the average year there were 1,000 deaths in the group “65

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<sup>4</sup> <http://apps.leg.wa.gov/documents/laws/wsr/2003/07/03-07-096.htm>

and over with cancer,” the “predicted hospice use rate” for this group would be 50%. As a matter of basic math, any hospice admissions that are not counted in the statewide hospice use rates in Step 1 will lead to lower than actual statewide use rates. For example, if there were 500 persons admitted to hospice and only 400 admissions were counted, and there were 1000 deaths in that subgroup, the statewide use rate would be erroneously calculated as 40% rather than 50% and would “under-predict” the percentage of persons who will use hospice services.

**Step 2:** Step 2 directs: “Calculate the average number of total resident deaths over the last three years for each planning area.” WAC 246-310-290(7)(b). Since each county is a separate planning area<sup>5</sup> (WAC 246-310-290(1)(f)), this calculation simply involves obtaining statistics from the Department’s Center for Health Statistics for the county’s total death count for each of the three years. *See* AR 1225.

**Step 3:** Step 3 directs: “Multiply each hospice use rate determined in Step 1 by the planning areas average total resident deaths determined in Step 2.” WAC 246-310-290(7)(c). Under this step, the first factor in each calculation is a statewide average hospice use rate, expressed as a percentage. The second factor is the number of deaths in the particular county. Thus, the Methodology uses a calculation to project the potential

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<sup>5</sup> The remainder of this brief will refer to the planning area simply as the “county.”

volume of hospice services in each county without regard to the “use rate” of that particular county. As a matter of basic math, in counties where a higher percentage of patients use hospice services than in other parts of the state, this “statewide averaging” means the projected use will be lower than the actual use. Thus, this part of the formula under-predicts hospice use for any counties with “above-average” use rates.<sup>6</sup>

The average use rate for each sub-group of patients established in Step 1 is then multiplied “by the planning areas average total resident deaths determined in Step 2.” Standing alone, this factor would tend to over-predict hospice use because, according to its plain meaning, it applies each subgroup’s percentage use of hospice to the county’s average total resident deaths and not to the number of deaths in each age/diagnosis subgroup as directed in Step 1.<sup>7</sup>

**Step 4:** Step 4 directs a simple addition: “Add the four subtotals derived in Step 3 to project the potential volume of hospice services in each planning area.”

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<sup>6</sup> This under-prediction of actual use in more densely populated urban counties is one reason the Department “predicts” that fewer patients will use hospice than are actually using hospice, a prediction that flows from this step in the Methodology. See discussion at pp. 22-23. Compare this provision with the requirement that in review of CON applications, the Department is to determine “[t]he need that *the population served or to be served* by such services has for such services.” RCW 70.38.115(2)(a).

<sup>7</sup> The Department decided to “interpret” Step 2 to avoid this result, as discussed at p. 21, *infra*.

**Step 5:** Step 5 directs: “Inflate the potential volume of hospice service by the one-year estimated population growth (using OFM data).” This calculation of the Methodology looks beyond existing hospice use to forecasting growth in the future need for hospice services. If one reads the reference to “potential volume of hospice services” as the total number resulting from the calculation in Step 4, application of the literal language of this step under-predicts future hospice use. The vast majority of residents who use hospice services are 65 and older, and this group is growing three times the rate of the general population. Thus, applying a single lower average population growth factor necessarily will under-predict the future need.<sup>8</sup>

**Step 6:** Step 6 directs: “Subtract the current hospice capacity in each planning area from the above projected volume of hospice services to determine unmet need.” WAC 246-310-290(7)(f). This step in turn involves the calculation of “current hospice capacity” in each county, which generally is defined in WAC 246-310-290(1)(c) as the average number of admissions in the county for the last three years of operation.

After applying these six steps of the mathematical formula, the Department is to “[d]etermine the number of hospice agencies in the

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<sup>8</sup> Unlike Step 2, the Department applied the literal language of Steps 4 and 5 in reviewing Odyssey’s CON applications, and applied a single general population growth factor. AR 1936-1937.

proposed planning area which could support the unmet need with an ADC of thirty-five.” WAC 246-310-290(7)(g). For example, if one hospice agency was seeking a CON, the Department would have to determine if the applicant had met its requirement to “demonstrate that they can meet a minimum ADC of thirty-five patients by the third year of operation.” WAC 246-310-290(6). Neither existing nor new hospice providers are limited to the number of patients they may serve; the only question is whether there is a sufficient minimal level of need to make a new hospice agency financially feasible. AR 3885.

The calculation of the critical ADC factor is also directed by rule. In order to accurately calculate ADC, it is necessary to have accurate data regarding the number of admissions to hospice agencies and the average length of stay (“ALOS”). The ALOS is defined as the average of how long each admitted person stays in hospice care. WAC 246-310-290(1). This definition section of the rule specifies that the Center for Medicare and Medicaid Services (CMS) data is to be used to determine the ALOS stay in Washington. In contrast, Step 1 in the Methodology allows the applicant to calculate the statewide use rates using “CMS and department of health data or other available data sources.” WAC 246-310-290(7)(a).

**3. Odyssey applies for certificates of need to provide hospice services to residents of Snohomish, King, and Pierce Counties.**

Under the Department's new hospice rules, applications for a CON to establish a Medicare Certified/Medicaid Eligible hospice agency had to be submitted according to a set schedule. This schedule requires letters of intent to be submitted during the month of September and applications to be submitted during the month of October. WAC 246-310-290(3)(a) and (b). The first application period was in October 2003. Odyssey submitted three separate applications for CONs for hospice agencies to serve the residents of Pierce, King, and Snohomish Counties. (AR 713-899, 1284-1462, 2280-2456.) HCR Manor Care and its branch organizations, Heartland Home Health Care Services and Heartland Hospice (collectively "Heartland"), also filed CON applications in this period to establish hospice agencies to serve residents in King, Snohomish, and Pierce Counties. *See, e.g.*, AR 1219-1222. The Department placed Odyssey's and Heartland's applications under concurrent review since both applicants sought to provide hospice services in the same three county service areas. *See* WAC 246-310-290(2), (9).

The contents of an application for a hospice agency must include the calculation of the Methodology's six-step mathematical formula to show a projected need for additional hospice service in each of the

counties. By statute, the Department is required to “specify information to be required for certificate of need applications.” RCW 70.38.115(6). By rule, the Department has specified that “the required information shall include what is necessary to determine whether the proposed project meets applicable criteria and standards.” WAC 246-310-090(1)(a)(i). Thus, WAC 246-310-290(6) contemplates the applicant will apply the hospice Methodology in its application to demonstrate they can meet the ADC of thirty-five patients by the third year of operation.

Odyssey’s and Heartland’s consultants assisting in completion of their respective applications attempted to calculate the projected need using the new rule’s six-step mathematical formula. *See, e.g.*, AR 713-899, 1284-1462, 2286-2456; *see also, e.g.*, 1226-1230. They encountered some difficulty in doing so. *See, e.g.*, AR 4873-4877, 726-731. First, the Department had anticipated that the CMS data necessary to determine the ADC and calculate many of the key factors in the Methodology would be available.<sup>9</sup> The applicants discovered that Step 1 of the Methodology’s formula could not be performed using CMS data because a change in the Health Insurance Portability and Accountability Act (“HIPAA”)

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<sup>9</sup> For example, WAC 246-310-290(7)(a) provides that in Step 1 of the Methodology, the applicant is to “[c]alculate the following four statewide predicted hospice use rates using CMS and department of health data or other available data sources.” Also, as stated above, CMS data is required to demonstrate that the agency would have “a minimum average daily census (ADC) of thirty-five patients by the third year of operation.” *See* WAC 246-310-290(1)(a).

regulations made the data unavailable to the Department and applicants. AR 1941. Additionally, both applicants found that when the mathematical formula was calculated (with data from what they believed were reasonable alternative data sources), the calculation produced a result that showed a substantial need for additional hospice agencies. *See, e.g.*, AR 4934. Because resolving these issues with the CMS data and the results of the Methodology were critical to completion of the applications, both Odyssey and Heartland contacted the Department to ask what data the Department wanted applicants to use, to inquire about the formula's resulting high level of need, and whether the Department would accept "alternative" calculations of the Methodology to further support need for their respective proposed programs. *See, e.g.*, AR 4874-4877. The Department did not respond to these inquiries or requests. AR 1941. Odyssey therefore provided the Department the calculation of the mathematical formula as written, and three "alternative" calculations, all of which included explanations as to why the calculations were statistically valid and showed need for additional hospice services. *See, e.g.*, AR 713-899, 726-731, 1229. Heartland similarly submitted the Methodology's formula calculated as set forth in the Methodology and two "alternative" calculations that it demonstrated were statistically valid. AR 4934 - 4937.

**4. The Department reviews Odyssey's CON applications using incomplete data from post-application surveys.**

The Department began its review of the Odyssey and Heartland applications on January 28, 2004. AR 1222. Since CMS data was not available, the Department decided to conduct its own survey of the existing hospice providers to obtain data on hospice use rates and ADC. *See* AR 1224-1225. These surveys were sent to the state's hospice providers after the date the applications were required to be submitted and after the Department placed Odyssey's and Heartland's applications under review. AR 4233-4334. A public hearing was held on both Odyssey's and Heartland's applications on March 30 and 31, 2004. AR 1222. Since not all the surveys had been returned, the survey data was not available at the time of the public hearings. *See* AR 1932, 4233-4334.

Following the public hearings, the Department allows the applicants and interested persons to submit written rebuttals in response to the information presented at the public hearing and then closes the application review record. However, for the Odyssey and Heartland CON applications, the public hearing record was kept open so that more of the surveys could be returned. AR 1222. Nevertheless, several surveys were not returned and many of the surveys that were returned did not contain complete data. *See* AR 4233-4334, 1264, 1931-1932. The Department

did not contact or otherwise require providers who failed to return their survey forms to submit them. *See* AR 1931-1932. Instead, the Department assigned “zeros” for the admissions of those providers who failed to respond. AR 4357, 4290-4291, 1264. The Department also did not require providers that returned incomplete surveys to submit missing data, but for some purposes estimated the data based on the incomplete responses. AR 1264. In sum, Odyssey and Heartland were unable to review the survey data, include the data in their calculations of the Methodology’s formula, or even request the Department to obtain complete survey data, during the entire application review process. *See e.g.*, AR 1931–1932, 2816.

On January 21, 2005, the Department issued three *Concurrent Review Evaluations of the Certificate of Need Applications submitted by Odyssey*, one each for Pierce, King, and Snohomish Counties (collectively “Evaluations”), denying Odyssey’s three applications. AR 2793-2810, 1239-1256, 1811-1828. On the same day, the Department issued three *Concurrent Review Evaluations of the Certificate of Need Applications submitted by Heartland* and also denied these applications. AR 2775-2792, 1221-1238, 1792-1810. The Department denied all of the CON applications submitted by Odyssey and Heartland asserting there was no need for additional hospice services in Pierce, King, or Snohomish

counties. *Id.* Since the Department found no need for additional hospice services, it also found Odyssey's and Heartland's applications did not meet the other three CON criteria.<sup>10</sup> *Id.*, *see also* AR 1929-1930.

**5. In the Evaluations, the Department applies the Methodology using incomplete data and applying different interpretive approaches.**

Each of the Department's Evaluations summarized its application of the six steps of the Methodology and found no need for additional hospice services. *Id.* The Department noted that under "Step 1," each of the four statewide use rates are calculated by "dividing the average number of hospice admissions over the last three years for patients [of the age/diagnosis subgroup] by the average number of past three years statewide total deaths [for the age/diagnosis subgroup]." *See, e.g.*, AR 1224-1225. After describing this part of the formula, the Department found it did not matter that not all of the surveys were returned or that some had incomplete information because all of the surveys had been returned by the providers in King, Snohomish, and Pierce Counties. *See, e.g.*, AR 1224-1225. The Department did not acknowledge that this step

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<sup>10</sup>The Department also concluded that Odyssey's applications did not meet the structure and process of care CON criteria because Odyssey did not provide reasonable assurance that its proposed programs would be in conformance with applicable state and federal licensing and certification requirements. On reconsideration, the Department found that the additional evidence Odyssey provided satisfied the structure and process of care CON criteria. AR 1280-1282.

calculates a statewide use rate, and that if any state admissions in the numerator are omitted while the denominator remains the same, the resulting percentage will be lower than actual.

In its application of Step 2, the Department stated it had decided not to apply the literal language of the Methodology. Instead, the Department interpreted the calculation of the “average number of total resident deaths over the last three years” as the total number of deaths for each of the four categories of patients identified in Step 1.” *See, e.g.*, AR 1225 (underlining in original); *see also* WAC 246-310-290(7)(b). The Department “interpreted” this step to add the underlined language because it believed the rule as written would over-project the predicted need for hospice services:

The department concludes that calculating the number of persons likely to seek hospice can only be reasonably determined by interpreting “total” in Step 2 to mean the total number of deaths for each of the four categories of patients identified in Step 1.

AR 1225; *see also* AR 1274. Thus, “total number of deaths” became interpreted as specific to the subgroups identified in Step 1 even though this language is not contained in the language of the rule. The Department then applied the specific subgroup numbers it calculated in Step 2 to the multiplication in Step 3.

In contrast, the Department followed the literal language in applying Steps 4 and 5 of the Methodology and applied one population growth factor to all subgroups even though the age group 65 and older is more than 80% of the population served by hospice and even though this age-group is growing three times as fast as the general population. *See, e.g.*, AR 1225-1226. Although the Department noted that more accurate “age-specific population projections for each county were obtained from the state’s Office of Financial Management,” the Department did not use these age-specific population projections. *See, e.g.*, AR 1226.

The bottom-line result of the Department’s application of the six-step Methodology was that it found that the residents of Snohomish, King, and Pierce Counties were, according to the Department’s projections, using more hospice services than they should. For example, the Department found that for the year 2005, the actual current capacity (number of admissions per year, using a three-year average) in Snohomish County was 1,520 admissions, while the Department’s projected “potential volume” for Snohomish County was 955 hospice admissions. AR 1264. The Department recorded this result in the “unmet need patient days” in Snohomish County as a negative number. *Id.* The same was true for King County (“projected” need for 2005 – 2,785; “current capacity” – 3,223) and Pierce County (“projected” need for 2005 – 1,304; “current capacity”

- 1,837). The Department also showed the excess of projected need under a column marked “unmet need” as negative numbers. *Id.* Based on these absurd results, there is clearly a fundamental flaw in the Department’s interpretation of the need Methodology.

On February 18, 2005, Odyssey submitted a “consolidated” request for reconsideration of the three denials. AR 3525-3760. The CON Program granted Odyssey’s request and the Department conducted a reconsideration hearing on May 11, 2005.<sup>11</sup> AR 3761-3762. Among other matters, Odyssey pointed out that the Department had not followed the plain language of the rule in its application of the Methodology, as required by caselaw involving statutory and rule construction. AR 3794-3796, 4152-4159. Odyssey also noted that “the CON Program’s own ‘supplemented’ interpretation of the methodology produces the absurd result of creating a mean that requires the highly populated metropolitan counties to reduce hospice services to meet the 2007 projections created under the methodology.” AR 4129; *see also* AR 4155-4159.

On October 5, 2005, the Department issued its *Reconsideration Evaluations of the Certificate of Need Applications Submitted by Odyssey HealthCare, Inc., Proposing to Establish a Medicare Certified/Medicaid Eligible Hospice Agency to Service the Residents of Pierce County, King*

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<sup>11</sup> Heartland did not ask for reconsideration or appeal the denial of its applications.

*County, and Snohomish County* (collectively “Reconsideration Evaluations”), again denying Odyssey’s three CON applications. AR 2819-2836, 1266-1283, 1836-1853. The Department did not change its application of the Methodology or its use of incomplete survey data. *Id.*, compare AR 2768-2817, 1214-1265, 17785-1835.

**B. Procedural History.**

Odyssey filed a request for an adjudicative proceeding to appeal each of the three denied CON applications on July 14, 2004. AR 1-90. Both Odyssey and the Department subsequently filed motions for summary judgment on the issue of the construction to be given the hospice rules and whether the rules were properly applied. AR 1907-1988, 2013-2047, 2068-2202. On June 8, 2006, the HLJ denied Odyssey’s motion for summary judgment and granted the Department’s motion holding that the mathematical formula contained in the Methodology was ambiguous and construed the formula’s calculations consistent with the Department’s interpretation. AR 5047-5060. Odyssey filed a petition for judicial review in Thurston County Superior Court seeking review of the Department’s denial of each of the three (consolidated) CON applications. CP 4-77. The Honorable Richard D. Hicks denied Odyssey’s petition, holding that the Methodology portion of the hospice rules was ambiguous and could be construed as interpreted by the Department. CP 225-226.

## V. STANDARD OF REVIEW

Under the APA, chapter 34.05 RCW, the appellate courts “look to the administrative record, and not the superior court findings or conclusions, when conducting review.” *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm’n*, 123 Wn.2d 621, 633, 869 P.2d 1034 (1994). The APA provides the court shall grant relief from an agency order in an adjudicative proceeding if it determines that any of nine standards for such relief set forth in RCW 34.05.570(3) are met. Odyssey contends three of those standards are met here.

First, “[t]he agency has erroneously interpreted or applied the law” under RCW 34.05.570(3)(d). This Court reviews the interpretation of statutes and implementing regulations under the error of law standard, under which the Court may substitute its judgment for the agency’s. *Nationscapital Mortgage Corp. v. Dept. of Financial Institutions*, 133 Wn. App. 723, 738, 137 P.3d 78 (2006). Whether an agency’s construction of law is accorded deference depends on whether the law is ambiguous. *Waste Mgmt. of Seattle, Inc.* at 628. Washington courts do not accord deference to an agency’s rule where no ambiguity exists. *See Bauer v. State Employment Security Dept.*, 126 Wn. App. 468, 473, 108 P.3d 1240 (2005) (“[o]nly when the court is reviewing an agency’s interpretation of an ambiguous statute is the agency’s interpretation of the statute afforded

deference”). Further, the deference the courts give to an agency’s interpretation depends on the validity and persuasiveness of the reasoning and consistency with later agency pronouncements.

Second, the court may reverse an agency action if “[t]he order is arbitrary or capricious.” RCW 34.05.570(3)(i). A court may reverse an agency action under this standard if the action was “willful and unreasoning, and taken without regard to the attending facts or circumstances.” *Children’s Hosp. & Med. Ctr. v. Dep’t of Health*, 95 Wn. App. 858, 871, 975 P.2d 567 (1999), review denied, 139 Wn.2d 1021 (2000). “Judging whether an agency’s decision was arbitrary and capricious involves evaluating the evidence considered by the agency in making its decision.” *Children’s*, 95 Wn. App. at 871.

Third, the court may grant relief under RCW 34.05.570(3)(c) if “[t]he agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure.”

## **VI. SUMMARY OF ARGUMENT**

When the Methodology is applied according to its plain language, all parties agree that Odyssey would have shown the need for a new hospice agency in each of the three counties in which it submitted an application. However, the Department seeks to interpret the one step of the multi-step Methodology where it contends the plain language would

over-predict the need for hospice services. At the same time, it turns a blind eye or insists on applying the “literal language” in other steps of the Methodology that under-predict the need for hospice services, even when that literal application projects fewer persons should be using hospice than are actually using the services.

This Court should apply the well-recognized principles of statutory construction that the plain language of a rule will not be construed, and that the courts will not undertake the legislative or executive duties of rewriting statutes or rules. These principles are particularly applicable here, where the Department has chosen to adopt a mathematical formula into rule that is precise and clear in its terms.

Moreover, the Department’s interpretation of the Methodology is internally inconsistent. The Department asserts it must “interpret” a step that would “over-predict” need while insisting it must apply the plain language of other steps that “under-predict” need while insisting it must apply the plain language of other steps that materially “under-predict” need. This internally inconsistent approach is entitled to no deference. Indeed, this approach leads to an absurd result that should not be substituted for the plain language of the clear and unambiguous rule.

## VII. ARGUMENT

### A. **The Hospice Need Methodology Must Be Followed As Written Consistent With Well-Recognized Principles Of Statutory Construction.**

There is no basis for departing from the plain language of the Methodology. This is particularly true where the Department's reading would create an internal inconsistency by "interpreting" a step to a claimed overstatement of the predicted need and then applying the "literal language" of another step that materially under-predicts the need.

#### 1. **The plain language of a clear and unambiguous rule must be applied by the agency and by the court.**

Where language of a statute is plain, unambiguous, and well understood according to its natural and ordinary sense and meaning, the enactment is not subject to interpretation. *State v. Thorne*, 129 Wn.2d 736, 762-763, 921 P.2d 514 (1996). If the rule's provisions are unambiguous, the rules of statutory construction do not allow an agency or court to "interpret" the rule, even if the agency is dissatisfied with the results the plain language produces. "If a statute is clear on its face, its meaning is to be derived from the language of the statute alone." *Kilian v. Atkinson*, 147 Wn.2d 16, 20, 50 P.3d 638 (2002) (citation omitted). "Where a regulation is clear and unambiguous, a court should apply its

plain language and may not look beyond the language to consider the agency's interpretation." *Children's*, 95 Wn. App. at 868 (citations omitted). See also *Multicare Med. Ctr. v. Department of Social & Health Servs.*, 114 Wn.2d 572, 591, 790 P.2d 124 (1990) ("when faced with an unambiguous regulation, the court may not speculate as to the intent of the regulation or add words to the regulation . . . [o]ur task is not to question the wisdom of a particular regulation; rather, our review is limited to determining what the regulation requires") (internal citations omitted). Only when the language of a statute is ambiguous can the courts construe the provisions. *In Re Boot*, 130 Wn.2d 553, 565, 925 P.2d 964 (1996).

There are significant jurisprudential reasons why courts have declined to "construe" unambiguous laws and regulations that have broader implications than the particular rule in the particular case. The first reason is grounded in separation of powers principles. Construction of ambiguous legislative language is a judicial function, but amendment of the language is not. In *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006), the court noted the longstanding rule that "[c]ourts may not read into a statute matters that are not in it and may not create legislation under the guise of interpreting a statute. . ." (quoting *Kilian v. Atkinson*, 147 Wn.2d at 20). Courts have recognized that if the Legislature, or executive agencies like the Department, need to correct their adoption of

unambiguous language or include omitted language, the courts cannot perform that task for them in the form of judicial legislation. *See, e.g., In re Parentage of C.A.M.A.*, 154 Wn.2d 52, 69, 109 P.3d 405 (2005) (declining to add language to a statute and stating: “[w]e show greater respect for the legislature by preserving the legislature’s fundamental role to rewrite the statute rather than undertaking that legislative task ourselves”) and *Vannoy v. Pacific Power & Light Co.*, 59 Wn.2d 623, 629, 369 P.2d 848 (1962) (noting words may have been omitted inadvertently from a statute “but it is beyond the power and function of this court to read them in”). *See also U.S. Dept. of Air Force v. Federal Labor Relations Authority*, 952 F.2d 446, 452, n.6 (D.C. Cir. 1991) (declining to construe an unambiguous regulation because “it is the executive, not the judiciary, which wields rulemaking power under our constitutional regime and must be held accountable for it”).

There is a second jurisprudential reason why courts should not, through judicial construction, add omitted text to an executive agency’s unambiguous rule. Changing the plain language of a rule adopted under the APA would allow the agency to promulgate rule amendments without adherence to the procedural requirements that the Legislature has put in place. *See* RCW 34.05.310 - .395. This concern was expressed at the federal level in *Christensen v. Harris County*, 529 U.S. 576, 588, 120 S.

Ct. 1655, 146 L. Ed. 2d 621 (2000) when the Court observed that to defer to an agency interpretation that is contrary to the unambiguous language of the regulation “would be to permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation.” *Id.* at 588.

Thus, if the rule’s provisions are unambiguous, the rules of statutory construction do not allow the Department to add new calculations to the Methodology’s formula, even if the Department is dissatisfied with the results produced by the formula.

**2. The Department’s hospice need methodology is not ambiguous.**

The Department’s hospice rules and Methodology are unambiguous. The Methodology’s six-step formula can be readily performed as written because the plain language of the Methodology directs the calculations. Indeed, all of the parties were admittedly able to “literally” perform the calculations, including Step 2 of the Methodology. CP 118-119, 175-176.

It is also readily apparent that when the steps of the Methodology are read together, the rule was written to use specific language when referencing the four individual subgroups created in Step 1 of the Methodology. The calculation required under Step 2 is to determine the “average number of total resident deaths over the last three years for each

planning area” without any reference to the subgroups. WAC 246-310-290(7)(b). In contrast, Step 3 of the Methodology clearly references “each hospice use rate determined in Step 1” and in Step 4, the Methodology requires the addition of “the four subtotals derived in Step 3.” But, in Step 2, there is no citation to “Step 1,” to the “four subtotals,” or any other reference to the four patient age groups. The use of different terms in the different steps, and Step 2’s omission of any reference to Step 1’s four subgroups, further emphasizes the plain meaning that was intended. *See In re Detention of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002) (“to express one thing in a statute implies the exclusion of the other” and “omissions are deemed to be exclusions”).

The Department argued below that the plain language of this rule can be disregarded under the authority of the Supreme Court’s holding in *Department of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). *Gwinn* allows a statute’s plain language to be reviewed in the context of related provisions and statutes to determine what the plain language of the statute and related statutes show with regard to the provision in question. *Id.* The Department, however, reads this holding far too broadly as shown by subsequent holdings of the Supreme Court. In *Edelman v. State ex rel. Public Disclosure Com’n. of Washington*, 152 Wn.2d 584, 99 P.3d 386 (2004), for example, the Supreme Court reviewed

whether a provision of the Public Disclosure Act (RCW 42.17.660) limiting campaign contributions by corporate and other related entities was ambiguous and could therefore be construed through an interpretive rule. The Public Disclosure Commission (“PDC”) argued that its rule merely interpreted a “gap” in the statute’s language since the language did not address what happens when a parent organization “stays out” of a state campaign. *Id.* at 589-590.

The Court rejected the PDC’s arguments and, despite a dissent citing *Gwinn*, found that the plain language of the statute did in fact address this situation. In a rationale analogous to this case, the Court stated:

However, as the Court of Appeals correctly noted, the plain language does address it. RCW 42.17.660(2) specifies a relationship between entities in which those entities are considered a single entity for purposes of campaign contribution limits. . . . If the legislature intended to create an exemption for situations in which the parent organization does not participate, it would have done so in the language of the statute. It didn’t.

. . . We will not strain to find ambiguity where the language of the statute is clear. *State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass’n*, 140 Wn.2d 615, 632, 999 P.2d 602 (2000). We hold that no ambiguity exists in the language of RCW 42.17.660 that requires the PDC to interpret the statute’s effect upon affiliated subsidiary or local entities if the parent or umbrella does not make a contribution.

*Id.* at 590-591.

Here, splitting out the three-year average resident deaths by the four categories determined in Step 1 for statewide use rates, multiplying these four numbers of deaths by the four utilization rates, and then adding those four sums together, would require not only additional language to be inserted into the rule, but also adding a whole subset of calculations to a mathematical formula. Step 2's plain language only states calculate "the average number of total resident deaths over the last three years" for each county. The Department cannot include new language to its rule through its issued Evaluations. If the Department had wanted to make this language and subset of calculations part of its Methodology's formula it could have done so, but "it didn't."

**3. The department's Methodology is a precise mathematical formula and the calculations of the formula must be followed as written.**

Even a cursory review of the six steps of the Methodology shows that it is a mathematical formula in nature. Each step starts with mathematical directives: "calculate," "multiply," "add," "inflate," and "subtract." When these steps are performed, the series of precise mathematical calculations produces a number that is used to determine the number of hospice agencies "which could support the unmet need with an ADC of thirty-five." WAC 246-310-290(7)(g). Although the Methodology is a mathematical formula, the Department and trial court

allowed the Department to add its subset of calculations to Step 2 of the formula under the guise of statutory construction.

When an agency has chosen to adopt a mathematical formula into rule, there is even less basis to “interpret” the rule. *See, e.g., Unum Real Estate Corp. v. Graves*, 256 A.D. 417, 419, 10 N.Y.S.2d 846, 848, *aff’d* 81 N.Y. 844, 24 N.E.2d 495 (1939) (“[t]here is no warrant for ‘construction’ of a statute which is mathematically clear in its terms . . .”); *In re New Jersey Individual Health Coverage Program’s Readoption of N.J.A.C. 11:20-1*, 179 N.J. 570, 583-584, 847 A.2d 552, 559 - 560 (2004) (Board of Insurance Company “cannot change the statutory formula for the sharing of losses under the guise of administrative interpretation”); *Parker v. Wakelin*, 123 F.3d 1, 4 (1997) (the prohibitions in the commerce clause are not to be read “with literal exactness of a mathematical formula,” quoting *Home Bldg. & Loan Ass’n. v. Blaisdell*, 290 U.S. 398, 428, 54 S. Ct. 231, 236, 78 L. Ed. 413 (1934)); *see also Shearson Lehman Bros., Inc. v. Hedrich*, 266 Ill. App.3d, 24, 29, 203 Ill. Dec. 189, 639 N.E.2d 228, 232 (1994). Thus, while the data that is to be inserted into the various calculations of the Methodology’s formula may be ambiguously described, the formula’s framework and the calculations to be performed pursuant to that framework are clear and precise. If that mathematical formula is changed to add to its framework a set of new or different

calculations, and produce a different result (using the same data set), then a new mathematical formula has been created.

This fundamental characteristic of mathematical formulae was recognized by the court in *Shearson Lehman*. There, the court reviewed an arbitration panel's determination of whether three Shearson Lehman employees had been wrongfully discharged, and the amount of compensation due to these employees under a percentage formula contained in the company's deferred compensation agreements. If the employees had been wrongfully terminated and the plan fully vested, the terms of the agreements would have entitled them to an amount equal to their contributions to the plan plus 11 percent interest. If the employees had been properly terminated before the plan had vested, they would receive an amount equal to their contributions to the plan plus five percent interest. The arbitration panel, however, awarded the employees an amount that was tied to treasury bonds. The court held the arbitration panel exceeded its authority in awarding the employees an amount not based on "the precise and unambiguous mathematical formulas provided in the deferred compensation agreement." *Id.* at 29.

Although the Department admits that Step 2 of the Methodology's formula is plain on its face and can be literally calculated as written (*see* AR 5053), the Department never tested the formula at the time of

adoption. Thus, when it found that the outcome produced by its formula was not what it envisioned, it decided to change the formula under the guise of “interpretation.” Such an “interpretive” change of a mathematical formula not only runs afoul of the strict rules of statutory construction, it belies basic principles of mathematics.

The Department’s reformulation of the formula can be shown by looking at the second and third steps of the Methodology in their mathematical terms. As stated, Step 1 the Methodology requires the calculation of the four statewide predicted hospice use rates for the four subgroups of patients by taking the average number of hospice admissions over the last three years for each of the four groups of patients and dividing that number by the current statewide total of deaths for the same group of patients. If written out mathematically, using patients under age 65 who died from cancer as an example, this step of the formula is as follows:

$$\frac{\text{Year 1 admits} + \text{Year 2 admits} + \text{Year 3 admits}}{3 \text{ years}} = X$$

This result, reflected as X, is then divided by the current statewide total of deaths under sixty-five,<sup>12</sup> reflected as Y:

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<sup>12</sup>The calculation for patients in the subgroup of patients age 65 and over who died from cancer varies slightly from the above calculation for the other three patient groups. Instead of calculating the three year average admissions and then dividing that number by *the current statewide total of deaths of patients under sixty-five with cancer*, the

$$\frac{X}{Y} = C \text{ (the statewide use rate for patients } < 65 \text{ w/cancer.)}$$

Step 2 of the Methodology requires calculating “the average number of total resident deaths over the last three years for each planning area.” This formula is:

$$\frac{\text{Year 1 total resident deaths} + \text{Year 2 TRD} + \text{Year 3 TRD}}{3 \text{ years}} = D$$

Step 3 of the formula requires each of the hospice use rates determined in Step 1 to be multiplied by “the planning areas average total resident deaths determined in Step 2.” This formula is:  $C \times D = E$

When written mathematically, it can be readily seen that what the Department did was alter the second and third steps of the formula by first splitting out the three-year average total resident deaths into the four patient groups, multiplying each groups’ number of resident deaths by the each groups’ use rates, and then adding those four figures together. Taking Pierce County as an example, the following chart first shows the literal interpretation of Step 2 of the Methodology’s mathematical formula:

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calculation for the 65 and over with cancer group requires taking the three year average admissions and then dividing that number by the *average number of past three year’s statewide total deaths* for this subgroup of patients. The Department has never explained this discrepancy, which is assumedly an error in drafting the formula.

<b>STEP 2 (AR 3256)</b>	<b>THREE YEAR TOTAL DEATHS</b>	<b>THREE YEAR AVERAGE</b>
	15,706	5,235

The next chart shows how the Department calculated the three year average number of total resident deaths for each category of patients set forth in Step 1 when it performed Step 2 of the formula:

<b>STEP 1</b>	<b>AGE/CANCER</b>	<b>DOH SUBCALCULATION OF # YR. AVG # OF DEATHS</b>
	65 and older w/cancer	877
	Under 65 w/cancer	419
	65 and older w/o cancer	2,997
	Under 65 w/o cancer	1,037
Total: 5,330		

The final chart shows how the Department then took the sub-calculations it derived and used those four sub-sets of numbers to perform the multiplication required in Step 3 of the formula (“multiply each hospice use rate determined in Step 1 by the planning areas average total resident deaths determined in Step 2.”):

<b>STEP 3 AR 3256</b>	<b>AGE/CANCER</b>	<b>RATE OF HOSPICE UTILIZATION</b>	<b>DOH SUBCALCULATION – # OF DEATHS X USE RATE</b>
	65 and older w/cancer	54.07%	X 877 = 474.19
	Under 65 w/cancer	44.7%	X 419 = 187.29
	65 and older w/o cancer	16.39%	X 2,997 = 49.12
	Under 65 w/o cancer	9.11%	X 1,037 = 94.47
			Total: 805.07

As shown by this last chart, the Department then added these four sub-totals together (805.07) and proceeded to perform the remaining steps of the formula as literally written.<sup>13</sup> CP 118. The Department's sub-calculations at Step 2 changed the formula and hence the result. In fact, the result between the literal application of the formula and using the Department's subset of four additional calculations is an 87 percent variation. Such variances illustrate precisely why courts have found mathematical formulae to be unambiguous and not subject to change through interpretation.

**B. Deference Should Not Be Accorded To An Agency's Interpretation Of A Rule That Is Internally Inconsistent And Inconsistent With Its Later Interpretations.**

It is anticipated that the Department will renew its argument made in the superior court that the Department's interpretation is entitled to deference. The courts give no deference to an agency's interpretation of legislation where the language of the statute or rule is unambiguous. *Children's*, 95 Wn. App. at 869. Moreover, even if a rule is ambiguous, courts will not accord an agency's interpretation deference where there are unexplained inconsistencies between the interpretation applied by the agency in the case under review and the interpretations the agency has

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<sup>13</sup>Likewise, the remaining four steps of the Methodology are simple mathematical formulae that can be written in math terms.

applied in prior and subsequent cases. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944) (deference the court will show an agency’s interpretation “depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control”). This Court has noted that the consistency of an agency’s reasoning is among the factors that bear upon the amount of deference to be given an agency’s ruling. *See Western Telepage, Inc. v. City of Tacoma*, 95 Wn. App. 140, 146-147, 974 P.2d 1270, 274 (1999), *aff’d*, 140 Wn.2d 599, 998 P.2d 884 (2000).

Implementation of this principle is illustrated in *Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 367 (4<sup>th</sup> Cir. 1994):

Our first step in conducting this review is to determine whether to accord deference to the interpretation of the cross-appeal regulations applied by the Board in this case. . . . In making this determination, we are struck by the inconsistency between the interpretation applied by the Board here and the interpretations the Board has applied in cases prior *and subsequent to this case*. This inconsistency is of sufficient importance that we will examine it in some detail.” (Footnote omitted and emphasis added.)

The same is true in the instant case. There is a striking inconsistency between the interpretation applied by the Department to Step 2 and the interpretation it has applied in this case and subsequent to this case. To

quote *Malcomb*: “This inconsistency is of sufficient importance that we will examine it in some detail.”

Additionally, there is an irreconcilable internal inconsistency in the way the Department has interpreted the Methodology in this case and subsequent to this case. The Department rejects applying a “literal reading” of Step 2 on the grounds that the Methodology should be read in a way that generates a predicted number of such residents that are likely to seek hospice services. *See, e.g.,* AR 1243, 1274-1275. Yet, the Department provides no explanation as to why it took the opposite approach and applied a literal reading of Step 4, combining disparate population growth rates for the age-groups under 65 and over 65 despite the fact the latter age group comprises the vast majority of hospice use and is growing three times faster than the under 65 population.

The Department’s literal reading of the “plain language” of Steps 4 and 5 of the Methodology materially under-predicts the number of residents likely to seek hospice services. Although the Department provides Odyssey no acknowledgement of this result, it articulated the reasons it has decided to take this “literal” approach in a recent application of the Methodology in the evaluation of another hospice CON application. *See* Certificate of Need “Archive of Program Decisions” *CN07-05 - Reconsideration Evaluation - Family Home Care* at <http://www>.

doh.wa.gov/hsqa/ FSL/CertNeed/Docs/Decisions/07-05evalrecon.pdf, last visited October 14, 2007. At issue in that case was whether the Department misapplied Steps 4 and 5 of the Methodology “by using the same estimated population growth rate for all age groups when the population age 65 and older, who account for over 82% of hospice admissions, is growing at a rate almost three times that of the general population.” *Id.* at 9. The Department responded by insisting that the plain language of Step 4 meant that the age-specific subgroups had to be added together, and that likewise in the following Step 5, the plain language did not allow the significant difference in population growth to be a factor that could be taken into account. The Department states: “The plain language of step #4 requires the four subtotals from step #3 to be added together for each planning area. The language in step #4 is not ambiguous.” Further, “[t]he department concludes that the adoption of [Family Home Care’s] deviation through step #5 – ultimately ignoring step #4 – is not merely an interpretation of the steps in the methodology. Rather it is a modification of the methodology that would require an amendment to the rule under WAC 246-310-290.” *Id.* at 11. The Department took these positions even though it had obtained “[t]he age-specific population projections for each county” from the state’s Office of Financial Management (*Id.* at 7), and noted from the Program’s rule

making files that the “committee relied upon the underlying premise that patients, depending on their age and diagnosis, use hospice care at different rates.” *Id.* at 11. This is akin to the old adage of having one’s cake and eating it too.

The Department’s failure to recognize dramatic differences in hospice use and population growth at these steps of the Methodology, contrary to its approach at Step 2, shows its selective interpretation:

Step	Calculation	Impact on Hospice Use Prediction
1	For each of four sub-groups, calculates the statewide percentage of patients who use hospice. <b>Math step:</b> for percentage calculation, numerator is the number of statewide hospice admissions for the group and the denominator is the statewide total deaths for the group.	If some hospice admissions are not counted in the numerators, the result will be inaccurate and lower percentages which are less than the actual use rates.  UNDER-PREDICTS
2	Calculates the average number of total resident deaths for each planning area (i.e., county)	Uses Washington State vital statistics for death counts.
3	Multiplies each subgroup statewide hospice use rate by the county total resident deaths. <b>Note:</b> This is the only aspect of the Methodology that the Department determined it should adjust through interpretation, and it did so through “interpretation” of Step 2.	(a) For those counties with higher than average hospice admissions, use of a “statewide average” to predict hospice admissions means the predicted use in those counties will be lower than the actual use.  UNDER-PREDICTS  (b) Multiplying each subgroup use rate by total resident death instead of total deaths in that subgroup over-estimates future need for hospice.  OVER-PREDICTS
4	Adds the four subtotals derived in Step 3.	Merely reflects the sum total of the previous under-predictions and over-predictions.

Step	Calculation	Impact on Hospice Use Prediction
5	Inflates the potential volume of hospice service by the one-year estimated population growth (using OFM data).	Applies an average population growth across all age groups irrespective of hospice use. Since the population of patients 65 and older is growing at a rate 3 times faster than the general population, applying the lower average population growth factor will not take into account actual increase in this population's hospice use.  UNDER-PREDICTS
6	Subtracts the current hospice capacity in each planning area from the projected volume of hospice services to determine unmet need.	Accuracy of unmet need figure depends on accuracy of projected volume of hospice services as calculated in Steps 1 through 5; also depends on accuracy of surveys and calculation of current hospice capacity.

As shown, the Department's subsequent interpretations of the formula are wholly counter to the Department's position that Step 2's plain language should be disregarded. *See Malcomb*, 15 F.3d at 367 n. 2.

**C. The Department's Interpretation Of The Methodology Produces An Absurd Result By Projecting Fewer Patients Will Use Hospice Than Were Actually Using Hospice At The Time Of The Projection, Creating A Negative Result.**

In the superior court, the Department focused solely on the over-prediction that would occur in the calculations of Steps 2 and 3, and turned a blind eye to the under-predictions that inhere in other aspects of the Methodology. It further attempted to justify its rejection of the plain language of Step 2 stating that "interpretations of regulations 'that result in unlikely, absurd, or strained consequences' should be avoided," citing *Glaubach v. Regence Blueshield*, 149 Wn.2d 827, 833, 74 P.3d 115 (2003) and other cases. CP 120. The Department apparently did not consider the

*Through the Looking Glass* result that flowed from its application of the Methodology – that the Department “predicted” that significantly fewer patients will use hospice than are actually using hospice in all three counties at issue. Such an interpretation is far removed from the need criterion established by the Legislature for reviewing CON applications, “[t]he need that the population served or to be served by such services has for such services.” RCW 70.38.115(2)(a).

The Department has simply never recognized that this result is “absurd.” This is well-illustrated by the Department’s Methodology worksheet listing each county’s current capacity and unmet need. AR 1264. King County, which has a high use of hospice services due to its high population and population density, is listed as having a negative unmet need of 488 patient admissions for 2003. This means that King County had 488 more patients admitted than it should have had based on the statewide average use rate and the Department’s interpretation of the Methodology. The absurdity is that if patients are admitted for the hospice end of life care, then those services are needed. Certainly, it would not be reasonable to deny these 488 admitted patients services so that King County’s use rate is not excessive. This would be an absurd result for a department charged with healthcare planning for Washington residents.

Nearly every other highly and densely populated county is similarly depicted as having too many people using hospice services under the Department's interpretation of the formula. Thus, for 2003, Clark County had 479 admissions in excess of need, Cowlitz County had 220, Franklin and Benton Counties combined had 73, Pierce County had 561, Skagit County had 110, and Snohomish County had 564. *Id.*<sup>14</sup> Further, the Department's reported decisions show that this "absurdity" has played out in the four years since the hospice rules were adopted. *See* <http://www.doh.wa.gov/hsq>. Since the first open application period in October 2003, every applicant seeking a CON for a hospice agency has been denied because the Methodology, with the additional calculations added by the Department, has resulted in no need. *Id.* This is despite a significant increase in population and corresponding aging population. AR 4148-4150.

**D. The Department Engaged In Unlawful Procedure And Acted Arbitrarily And Capriciously When It Relied On Untimely, Inaccurate, And Incomplete Survey Data from Providers.**

The CON law outlines a logical process for the submittal and review of CON applications. Under RCW 70.38.115(6), the Department is to "specify information to be required for certificate of need

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<sup>14</sup> In interesting contrast, according to the Department's survey returns, Adams, Asotin, Ferry, Garfield, Island, Jefferson, Klickitat, San Juan, Skamania, and even Whatcom County, had no hospice admissions.

applications” and the CON applicant is to submit the required information, using the data sources allowed or required by law. *See also* WAC 246-310-090(1)(a)(i). The information required to demonstrate need for a new Medicare-certified hospice agency is specified in WAC 246-310-290 and the specific data sources that an applicant may use in demonstrating need are set forth in WAC 246-310-290(7). Under that section, the applicant is to calculate statewide predicted hospice use rates “using CMS and department of health data or other available data sources.” WAC 246-310-290(7)(a). If the Department determines more information than that contained in the application is necessary to start the review process, “the department shall request additional information necessary to the application or to start the review process.” RCW 70.38.115(6). Once the application is submitted, the Department begins a “review” process. *See, e.g.,* WAC 246-310-290(2), (3). “Review” means to “look at something critically: to examine something to make sure that it is adequate, accurate, or correct.” *Encarta Dictionary*, online at [http://encarta.msn.com/dictionary\\_1861702043/review.html](http://encarta.msn.com/dictionary_1861702043/review.html), last visited October 14, 2007.

The Department did not follow its own procedures in reviewing Odyssey’s CON applications. Instead, it chose to conduct a survey after the CON application deadline, and to use the Department’s survey results as a substitute for CMA data and the data submitted by the applicants. It

made this decision despite the fact not all surveys were returned and information in the surveys was in large part inaccurate. *See* AR 1264, 4357. Although there are myriad ways in which these omissions and inaccuracies in the survey results contributed to arbitrary and capricious orders denying Odyssey’s CON applications, one need look only at the application of the survey data to Step 1 in the Methodology to conclude the Methodology was applied in a manner that was “willful and unreasoning, and taken without regard to the attending facts or circumstances.” *Children’s*, 95 Wn. App. at 871.

As noted above, Step 1 determines a statewide hospice use rate for each age/diagnosis subgroup by a simple mathematical formula:

$$\frac{\text{Year 1 admits} + \text{Year 2 admits} + \text{Year 3 admits}}{3 \text{ years}} = X$$

If there were actual admissions in Year 1, 2, or 3 that were not counted, the resulting value “X” would reflect a three-year average number of admissions that is lower than actual. That is exactly what happened here when some existing hospices did not report their admissions for some or all of these years, and the Department simply wrote “zero admissions” into the calculation, even though it knew the hospices were admitting patients to their hospice services. *See* AR 4357. For example, the surveys returned by Hospice of Spokane did not include any admissions for any counties it served in 2000. AR 4290-4291, 4357. Likewise, the

Department knew agencies were providing hospice services in other counties, but again it simply put in “0” for number of admissions. AR 4357. Thus, when the value “X” (average statewide total number of admissions to hospice) is then divided by “Y” (the current statewide total of deaths for the subgroup), the percentage result of this simple calculation will inevitably be a lower than the actual use rate because “X” is lower than actual use. The percentage figures applied throughout the Methodology will depend on the vagaries of what surveys existing providers decided to return and what boxes they filled out, not on any connection with reality. This problem, among others, was brought to the attention of the Department, but it persisted in ignoring these mathematical certainties. The HLJ likewise ignored these facts and mathematical principles. This is the epitome of arbitrary and capricious.

#### VIII. CONCLUSION

For the foregoing reasons, the Court should reverse the superior court’s order and remand for the setting aside of the Department’s order.

RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of October, 2007.

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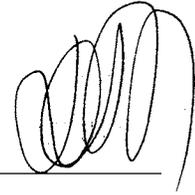
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**ORIGINAL**

No. 36489-1-II

DIVISION II, COURT OF APPEALS  
OF THE STATE OF WASHINGTON



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ODYSSEY HEALTHCARE OPERATING B, LP AND ITS PARENT  
COMPANY, ODYSSEY HEALTHCARE, INC.,

Petitioner-Appellant

v.

WASHINGTON STATE DEPARTMENT OF HEALTH,

Respondent,

FRANCISCAN HEALTH SYSTEM; PROVIDENCE HOSPICES; and  
KING COUNTY HOSPITAL DISTRICT NO. 2, D/B/A EVERGREEN  
HOSPICE,

Intervenor-Respondents.

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ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT  
(Hon. Richard D. Hicks)

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DECLARATION OF SERVICE

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The undersigned declares under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the 15th day of October, 2007, I caused to be served a true and correct copy of Appellant's Opening Brief on the following individuals in the manner indicated:

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