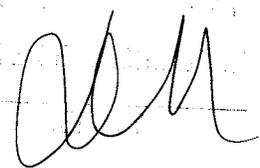


ORIGINAL

NO. 36489-1-II

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



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.

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

APPELLANT'S REPLY BRIEF

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I. LEGAL ANALYSIS

A. The Department's Interpretation of the Methodology Is Not Entitled to Deference.

Both the Department and Intervenors begin their respective responses by claiming the Department's interpretation of the hospice rule's Methodology is entitled to substantial deference. Washington State Department of Health's Respondent's Brief ("Department's Brief"), p. 4, Joint Brief of Intervenor Respondents ("Intervenors' Brief"), pp. 10-14. They claim the Department is entitled to deference because the substance of the hospice rule falls within the Department's specialized knowledge and experience. *Id.* However, the courts do not give deference to an agency's interpretation of legislation when the language of the statute or rule is unambiguous. *Children's Hosp. v. Dep't of Health*, 95 Wn. App. 858, 869, 975 P.2d 567 (1999). The Department's Health Law Judge found, and Intervenors concede, that the rule's Methodology is unambiguous. *See* AR 5053, Brief of Intervenors, p. 20, n.4.

Even if the Methodology was found to be ambiguous, the Department's interpretation would not be entitled to deference because such mathematical formulae are not within the Department's specialized expertise. While the Department may have expertise and experience regarding the substantive provisions of the Health Planning and Development Act, chapter 70.38 RCW (the "Act"), that expertise does not extend to the formulation, testing, and implementation of a complex mathematical formula. Nothing in the record demonstrates the

Department has the mathematical expertise to undertake the development of this type of formula. Deference is only given to agency-adopted formulae and methodologies when the agency has specialization or expertise regarding the formula in question. *See Utter v. Dep't of Social and Health Services*, 140 Wn. App. 293, 300, 165 P.3d 399 (2007).

Intervenors rely on *US West Communications v. Washington Util. and Transportation Com'n*, 134 Wn.2d 48, 949 P.2d 1321 (1997), to support their assertion that the Department's interpretation of the Methodology is entitled to deference. *See* Intervenors' Brief, pp. 10, 21. In *US West Communications*, the court held the Utilities and Transportation Commission ("UTC") had been directed by statute to have ratemaking expertise and accordingly it had the discretion to select a ratemaking methodology from the group of recognized approaches. *Id.* at 54. Thus, unlike here, the UTC was entitled to deference because it was required to have ratemaking expertise on staff and it was selecting nationally recognized ratemaking methodologies. *Id.* at 56, 59.

Similarly, the courts in other cases have directly or inferentially accorded deference to agency-selected methodologies when the methodology is based on scientific or established mathematical principles. *See, e.g., Welch Foods v. Benton County*, 136 Wn. App. 314, 318, 148 P.3d 1092 (2006) ("[t]he County used a trended-investment assessment methodology, a cost approach commonly used by county tax assessors"); *Northwest Pipeline Corp. v. Adams County*, 132 Wn. App. 470, 472, 131 P.3d 958 (2006) (Department of Revenue uses a methodology based on a

market value, income, and “cost approach, each of which is a recognized approach for valuating property taxes”); *In the Matter of the Personal Restraint Petition of Donald T. McCarthy*, 161 Wn.2d 234, 239, 164 P.3d 1283 (2007) (“Department of Corrections conducts an end of sentence offender review based on ‘methodologies . . . recognized by experts in the prediction of sexual dangerousness’”).

Here, the Department did not select a methodology from recognized and established sources; it did not create a formula based on one used by state, federal, or other agencies to measure and project hospice use; and it did not hire or have experts on staff with expertise in need projection methodologies. Rather, it designed its own Methodology “from scratch” with a committee of existing hospice providers, without even testing it prior to implementation.¹ To Odyssey’s knowledge, no other agency or organization has adopted or recognized the Department’s Methodology. The Department is not entitled to deference with regard to the formulation or interpretation of its Methodology.

¹The Intervenor states the “Department formed a committee of experts in health planning and hospice services to come up with a workable health planning forecasting methodology.” Intervenor’s Brief, p. 11. Intervenor does not cite any authority for their claim that these hospice providers were experts in developing mathematical formulae. The numerous flaws in the Methodology, and the fact that the Department never tested the formula, well-illustrate the lack of any mathematical background or expertise that went into the development of the Methodology’s formula. *See* AR 1930, 4158.

B. The Court's Holding in *Dep't of Ecology v. Campbell & Gwinn* Does Not Allow the Department to Change the Plain Language of Step 2 of the Methodology.

Citing to *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 43 P.3d 4 (2002) ("*Gwinn*"), both the Department and Intervenors repeatedly assert that the plain language of Step 2 of the Methodology can be read to include the additional calculations performed by the Department.² *Gwinn* allows the plain meaning of a statute to be determined from all that the Legislature has said in the statute and related statutes, and requires statutory provisions to be read "within the context of the regulatory and statutory scheme as a whole." *Id.* at 11, 12. The Department and Intervenors, however, never examine the statutory and regulatory context of the hospice rule beyond asserting "absurd result" and the mathematical steps in the Methodology must build on one another.

Viewing the Methodology's formula in the statutory context envisioned by *Gwinn*, a first observation is that hospice services do not fall within the Act's codified legislative purpose of controlling health care costs through the planned addition of health facilities, equipment, and tertiary services. *See* RCW 70.38.015. The Department states that the theory behind the Act's requirement for Certificate of Need ("CON") review is to avoid excess capacity because it drives up health care costs, but it does not examine the Act's purpose in relation to the unique nature

²The Department's interpretative calculation at Step 2 is to take the three-year average of deaths for each of the four sub-groups in Step 1, multiply those four numbers by the four sub-groups' hospice use rates determined in Step 1, and then add those four subtotals together. This is a far cry from "[c]alculate the average number of total resident deaths over the last three years for each planning area." WAC 246-310-290(7)(b).

of hospice services. Department's Brief, p. 3. Although hospice services are included in the definition of a "health care facility" (RCW 70.38.025(6)), hospice does not require costly physical facilities, equipment, or medical specialists like the other facilities and services included within the definition (e.g., hospitals, nursing homes, kidney dialysis centers, ambulatory surgery centers). Hospice services are by definition "symptom and pain management provided to a terminally ill individual, and emotional, spiritual, and bereavement support for the individual and family" in their place of residence. WAC 246-310-290(1)(e). The services are provided through teams of nurses, social workers, consulting physicians, and others. WAC 246-310-290(1)(d).

Thus, while hospice may be defined as a health care facility, it is not a facility at all. Excess hospice capacity does not mean there are empty beds, operating rooms, or dialysis stations. It simply means hospice agencies cut back on staff hired to provide home-based comfort care for patients. Accordingly, an inaccurate projection of hospice need does not drive up costs or interfere with the planned addition of health facilities, equipment, or tertiary services. *See* RCW 70.38.015.

Additionally, if consideration is given to all the Legislature has said, then assessing need based on a statewide use (capacity) rate in Step 1 of the Methodology is inconsistent with what the Legislature has said about how to assess need. Under RCW 70.38.115(2), CON review shall include consideration of the need of the population served or to be served by the services, and the "impact of the proposal on the cost of and charges

for providing health services in the community to be served.” (Emphasis added); *see also* RCW 70.38.025(9). The need for hospice services must therefore be determined by looking at the population in the county planning areas where Odyssey proposes to offer its services. *See* RCW 70.38.115(2)(a), WAC 246-310-290(1)(g). Thus, when the Department decided to interpret Step 2 to include the four sub-calculations based on Step 1’s statewide average use rates, it interpreted Step 2 contrary to what the Legislature “has said.” Both Steps 1 and 2 now fail to review services based on the county-wide “community to be served.” *Id.*

Likewise, the Intervenors’ assertion, again based on *Gwinn*, that the “plain meaning” of Step 2 has to be read as a “linked series of calculations in the Methodology,” also requires further scrutiny. Intervenors’ Brief, pp. 14, 17; *see also* Department’s Brief, p. 17. *Gwinn* requires Step 2 to be viewed in the statutory context and scheme of the rule to determine legislative intent. *Gwinn* at 11. The hospice rule specifically references the four age and cancer related groups identified in Step 1 of the Methodology when it intended to do so. Step 3 states “[m]ultiply each hospice use rate determined in Step 1,” and Step 4 states “[a]dd the four subtotals derived in Step 3.” However, no such reference to Step 1’s four groups is included in Step 2. Had the Department intended to have Step 2’s calculation apply to these four subgroups of patients, it would have included the necessary language, just as it did in Steps 1, 3, and 4. The legislative intent was not to include the four sub-calculations the Department seeks to now add through interpretation.

Intervenors also allege “Odyssey fails to limit *Gwinn’s* holding on the plain meaning rule” and then spend several pages trying to distinguish the court’s decision in *Edelman v. State ex rel. Public Disclosure Com’n of Washington*, 152 Wn.2d 584, 99 P.3d 386 (2004). Intervenors’ Brief, pp. 18-20, *see also* Department’s Brief, pp. 15-16. Obviously, the facts in *Edelman* are different from the case here, but the Supreme Court’s analysis is on point. The Supreme Court refused to extend its holding in *Gwinn* and add language to the statute at issue in *Edelman* when that language was not included in the plain wording of the statute’s provisions. In so holding, the Court declined to rely upon *Gwinn*, despite the dissent’s cite to that authority. *Id.* at 599. Likewise, the Court refused to add language to a statute in *Hangartner v. City of Seattle*, 151 Wn.2d 439, 459-460, 90 P.3d 26 (2004), rejecting a strong dissent based on *Gwinn*.

This Court also applied restraint on the application of *Gwinn* in its recent decision in *Kitsap County v. Central Puget Sound Growth Management Hearings Bd.*, 138 Wn. App. 863 P.3d 863, 875-878, 638 (2007). In refusing to add absent language to a statute, this Court first quoted *Gwinn’s* holding that “all that the Legislature has said in the statute and related statutes” can be looked to in determining legislative intent. *Id.* at 158. But, in the next sentence, this Court states: “[a] reviewing body may not add words where the legislature has chosen to exclude them.” *Id.* at 878, *citing Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003). The Court then held that if the statute specifically designates the things on which it operates, it must be inferred that the

Legislature intended all omissions. This Court therefore refused to add a date into the statute's plain language, even though the statute contained a specific reference to the date in an earlier section. *Id.*

Intervenors have not pointed to any cases where, under the holding in *Gwinn*, courts have allowed agencies to "add words where the legislature has chosen to exclude them." *See Kitsap County* at 878. While *Gwinn* allows the courts to look at all the Legislature has said, and the statute's regulatory context and scheme, it has not been extended to allow the addition of language. The Department's and Intervenors' reliance on *Gwinn* as justification for adding language directing four additional calculations is misplaced.

C. The Methodology Produces an Unreasonable Result.

The Departments and Intervenors attempt to circumvent the Methodology's plain language by repeatedly asserting that the rule must be construed in order to prevent an absurd result. Department's Brief, pp. 10-15, Intervenors' Brief, pp. 11-13, 25. In fact, this mantra of absurdity is the only justification the Department and Intervenors have given for construing the admittedly unambiguous language in Step 2. Based on this premise, they add language allowing four sub-calculations to be performed, and the results added together, all the while still maintaining that they have not construed the provision's language. Statutory language is ambiguous only when it is subject to more than one reasonable interpretation. *Lee's Drywall Co., Inc. v. State Dep't of Labor & Indus.*, 2007 WL 4170626 (Wn. App. Div. 2), ___ P.3d __ (2007). Step 2's

unambiguous language is subject to only one reasonable interpretation. “Calculate the average number of total resident deaths over the last three years for each planning area” means calculate the county’s three-year average resident deaths. The result is exactly the result called for by the calculation and that result is not absurd.

Moreover, any absurdity produced by the Methodology is not solely due to the calculation in Step 2. Indeed, if “the steps are building blocks, one building on the other” as the Department asserts, then what is being built, one on the other, are imperfections in the formula. Department’s Brief, p. 14, citing the Health Law Judge’s decision, AR 5053-5055. In Odyssey’s opening brief (pp. 44-45), Odyssey included a chart to show how calculations performed at other steps of the Methodology contribute to an inaccurate projection of hospice use. To summarize:

- In Step 1 of the formula, the Department used incomplete and non-returned “zeroed-out” survey data, which resulted in hospice admissions not being counted in determining capacity. This reduces the numerators in the equations in Step 1, and thereby creates an inaccurate and lower percentage of hospice use than is actually occurring. When this error is carried through the remainder of the calculations required under the formula, it results in an under-prediction of projected hospice use.

- At Step 3, the Department uses a “statewide average” as the measure for predicting hospice admissions in each county for which a CON application is filed. This understates the hospice use in Washington’s highly populated counties and results in an under-prediction of projected hospice use.
- At Step 3, the formula over-predicts projected hospice use when it fails to multiply each subgroup’s use rate by the total resident deaths instead of total deaths in each sub-group.
- At Step 5, the inflation for population growth fails to break out the growth by the under 65 and 65 and older age groups even though the population of patients 65 and older is growing at a rate three times faster than the general population. Coupled with the fact that the vast majority of hospice patients are in the rapidly increasing 65 and older population, this failure produces a significant under-prediction of projected hospice use.

The reality is that the entire Methodology is fraught with flaws and, as a result, it inaccurately predicts future hospice need. The Department’s dissatisfaction with the outcome produced by its formula cannot be remedied by only construing Step 2. The Department’s remedy is to amend its rule.

The Department, however, simply refuses to undertake this rulemaking effort. Instead, it asks this Court to change one section of its rule under the pretext of judicial interpretation. It is outside

jurisprudential boundaries to change the Methodology's plain language to add the Department's desired sub-calculations. Courts are not allowed to speculate as to the intent of a regulation or add words to it, even if the Department is dissatisfied with the outcome produced by its rule when plainly read. *See Children's Hosp. v. Dep't of Health*, 95 Wn. App. 858, 868, 975 P.2d 567 (1999).

D. A Mathematical Formula Is Not Subject to Interpretation.

Odyssey cited several cases in its opening brief (pp. 35-36) where courts have recognized the "literal exactness of a mathematical formula" to support its argument that a math formula cannot be changed through interpretation without creating a new formula. The Department and Intervenors have cited no authority to the contrary.³ Instead, Intervenors and the Department attempt to minimize the holding in *Shearson Lehman Bros., Inc. v. Hedrich*, 639 N.E. 228 (Ill. 1994) and argue its holding is unpersuasive because it did not involve statutory construction or the interpretation of a rule. Department's Brief, p. 16, Intervenors' Brief, p. 22. Again, the court in *Shearson Lehman Bros.* did not allow an arbitrator to substitute his interpretation of benefits due under a deferred compensation plan for "the unambiguous mathematical calculations provided in the agreements." *Id.* at 29. An unambiguous mathematical

³Intervenors refer again to *US West Communications, Inc.*, 134 Wn. 2d 48, but that case says nothing about interpreting mathematical formulae under the rules of statutory construction. Intervenors' Brief, p. 21.

calculation is not subject to interpretation whether it is found in a statute, rule, or deferred compensation contract.

Laurenzano v. Blue Cross and Blue Shield of Massachusetts, Inc. Retirement Income Trust, 191 F. Supp. 223 (2002), offers guidance regarding the fixed nature of mathematical formulae. The court analyzed issues associated with damages due plaintiffs for future ERISA-required COLA payments that were not factored into lump sum benefit payments. The court prefaced its ruling by stating “this case is not about the Constitution or civil rights or liberty or justice; this case is about addition, multiplication, statistics, and – most of all – economics.” *Id.* at 242. The Court then found there would be significant differences in the amount of damages awarded depending on the mathematical formula selected:

. . . when the Court wrote its opinion on liability, it was well aware that the Trust would try to gain on damages what was being lost on liability. How? With the math, of course. Depending on the interest rates used to determine present value, the Trust’s damages vary widely, from tens of millions of dollars to virtually nothing. Rather than allow the Trust to propose new math for its present value function, the Court simply held that the Trust should continue to use the same old math, but with the addition of the projected COLA payments in the lump sum distributions.

Id. at 242. Like the Trust in *Laurenzano*, the Department here asks the Court to use “new” math to change its unwanted result. This Court should decline to do so.

E. If the Court Decides to Construe Step 2 of the Methodology's Formula, It Must Also Similarly Construe Step 5 of the Formula.

Even if this Court decides that it can construe a mathematical formula, it should nevertheless decline to rewrite one step of the Methodology's formula without analyzing the impact of that re-write on the formula's other steps and calculations. The Department and Intervenors, however, ask this Court to look no further than Step 2 in "interpreting" the Methodology. Such a limited review would preclude the Court from addressing the internal inconsistency created when the Department interprets Step 2 but does not interpret Step 5.

In defending the Department's interpretation of Step 2, Intervenors quote the Health Law Judge's finding that "[i]t is logical to rely upon the underlying premise that patients, depending on their age and diagnosis, use hospice care at different rates as indicated in the language and mathematical results of Step 1." Intervenors' Brief, p. 17, citing AR 5054. This same logic, however, applies equally to Step 5 when the Methodology requires inflation of "the potential volume of hospice service by the one-year estimated population growth (using OFM data)." WAC 246-310-290(7)(e). The Department admittedly has OFM data that divides the population by the under age 65 and 65 and over patient groups, but it did not perform the population-based subset of calculations at Step 5 that it performed at Step 2. *See infra* Sec. H.1. of this Reply. If the Department truly wanted to obtain a more accurate projection of hospice

need, then it would interpret both Steps 2 and 5 of the Methodology consistently.⁴

F. The Department’s Methodology Improperly Measures Need in Washington’s Most Densely Populated Counties.

The Department misconstrues Odyssey’s arguments regarding the Methodology’s use of statewide use rates and discounts them as merely complaints about policy decisions made by the Department. Department’s Brief, pp. 17-18. The issue, however, is not about policy but the accurate projection of hospice need. When need is measured based on a statewide use rate, the most populated counties in this state end up with a substantial negative need for hospice services. This creates the truly absurd result of highly populated King, Pierce, and Snohomish counties having a current “negative” hospice capacity of hundreds of patients. AR 1264 (Appendix at 19). For example, based on Step 1’s statewide use rate, King County has 488 patients beyond what it should have according to the Methodology’s calculations, even though these are real patients who are in need of, and receiving, hospice services. The question must therefore be asked whether these 488 terminal patients in King County should not be receiving end-of-life comfort care as the Methodology concludes.

⁴Intervenors allege this inconsistent interpretation should be disregarded because Odyssey “has not met its burden of demonstrating” that this application of Step 5 “would have led to its applications being approved.” Intervenors’ Brief, p. 32. While this calculation is not in the record, Odyssey disagrees with this assertion. Also, Odyssey met its burden by submitting three viable and justified Methodology runs in its application. AR 713-899.

The Department attempts to divert the issue by stating that the Methodology's finding of a negative need of 488 patients in King County simply reflects the number of patients served above the statewide average and that existing agencies must therefore be meeting the demand. Department's Brief, p. 19. This argument proves the point. Having 488 patients above the statewide average use rate shows the use rate has no relevance to King County. King County's true use rate must recognize these 488 patients. Because King County is the most densely populated county in the state, its utilization of hospice will always be far above the statewide average since Washington's numerous sparsely populated rural counties' utilization of hospice is significantly lower and will always bring down the statewide average.

The Department also does not want to draw attention to how the Methodology allows King, Pierce, and Snohomish counties' existing providers to absorb all the growth in demand for hospice services. The Methodology is based on a fixed average daily census of 35 patients, which means that if a hospice agency has an average daily census of 35 patients it is presumed to be a financially viable agency. *See* WAC 246-310-290(1)(a), (7)(g). Thus, if an average daily census of 35 patients is attributed to the actual number of patients reported by King County's existing providers, the result is King County's seven existing providers are providing the equivalent of almost ten additional hospice agencies.⁵

⁵When Odyssey's application was denied, King County's existing providers were absorbing (based on an average daily census of 35 patients) the equivalent of 4 additional

Likewise, the existing providers in Pierce County are currently providing the equivalent of over four additional hospice agencies, and Snohomish County's providers are providing the equivalent of nearly three additional agencies. The Department's assertion that literally performing Step 2 produces a need for far too many additional hospice agencies is no more absurd than finding the Methodology, as written, allows all additional need to be forever absorbed by existing providers.

G. The Department's Use of Its Survey Data in Step 1 of the Methodology Produces an Absurd Result.

According to Intervenors, the plain language in WAC 246-310-290(7)(a) that allows the applicant and Department to calculate hospice use rates using "other available data sources" means the data must only be "available" to the Department. Intervenors' Brief, p. 35. If that were true, then an applicant could not complete the Methodology with the correct data and include the run of the Methodology in its application as required by the Department. In fact, the Department has consistently taken the position that the burden is initially on the applicant to submit an application that meets the CON criteria. *See* WAC 246-310-090(1)(a). The hospice rules reflect this in WAC 246-310-290(8) by stating: "In addition to demonstrating need under subsection (7) of this section" (subsection (7) being the Methodology's steps), an applicant "must meet

hospices. *See* AR 1264. Since the Department has denied every hospice application since its rules were adopted (except one in a rural county), the existing providers have continued to absorb the need (the equivalent of nearly ten additional hospice agencies in King County alone). *See* Family Home Health and Hospice Evaluation, <http://www.doh.wa.gov/hsqa/FSL/CertNeed/Docs/Decisions/07-5evalrecon.pdf>.

the other certificate of need requirements.” (Emphasis added.) Even more troubling, the Department violated its own rules when it failed to respond to Odyssey’s pre-application questions regarding what data source should be used to perform the Methodology after Odyssey discovered CMS data was not available. *See, e.g.*, AR 4874-4877. The Department admittedly failed to answer these inquiries, thereby violating its own rules requiring it to provide such information to applicants. *See* WAC 246-310-090(1).⁶

H. Odyssey’s Opening Brief Advances Issues Raised in the Proceedings Below and Intervenors’ Request to Strike Argument Related to Those Issues Should Be Denied.

Intervenors ask this Court to strike three sections of Odyssey’s brief, Sections VII.B, VII.C, and VII.D, claiming that Odyssey is presenting new theories that were not raised below. Brief of Intervenors, p. 29. In support, they cite RAP 2.5(a) which provides in relevant part: “The appellate court may refuse to review any claim of error which was not raised in the trial court.” (Emphasis added.) The rule does not confine the parties and the court to consideration of only the precise authorities presented in the trial court. Rather, the courts distinguish between “[n]ew issue versus new authority” and consider authority raised for the first time on appeal, and not argued in the trial court, “as long as it relates to the same general theory that was argued.” 2 Washington State Bar Ass’n,

⁶WAC 246-310-090(1)(a) states: “A person proposing an undertaking subject to review shall submit a certificate of need application in such form and manner and containing such information as the department has prescribed and published as necessary to such a certificate of need application.” Additionally, WAC 246-310-200(2)(c) states: “At the request of the applicant, the department shall identify the criteria and standards it will use prior to the submission and screening of a certificate of need application . . .”

Washington Appellate Practice Deskbook §§ 17.2(3) (3d ed. 2005); *see also Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990). The three sections of Odyssey’s brief that Intervenor’s ask to be stricken address the same claims of error and issues advanced below.

1. Section VII.B of Odyssey’s Brief advances Odyssey’s claims regarding interpretive consistency.

In Section VII.B of its brief, Odyssey cites to the Department’s subsequent determination in Family Home Health and Hospice (“Family Home”) to support its argument that the Department’s interpretation of Step 2, but not Step 5, makes the rule internally inconsistent.⁷ The Department and Intervenor’s ask this Court to strike the Family Home analysis, even though it bears directly on this issue, because they claim it raises a new issue which this Court should disregard under its discretionary power to refuse to review a new claim of error.⁸ Intervenor’s Brief, p. 30. Neither RAP 2.5(a), nor the law relating to matters that may be considered on judicial review, support the Intervenor’s request to strike.

⁷In September 2007 (three months after the superior court ruled on Odyssey’s petition for judicial review), the Department issued the decision denying Family Home’s CON application to provide hospice services to residents of Spokane County. *See* Family Home, CN 07-05 at <http://www.doh.wa.gov/hsqa/FSL/CertNeed/Docs/Decisions/07-5evalrecon.pdf>. The written analysis in support of the Family Home denial was posted on its official website as a significant decision. *See* RCW 34.05.220, RCW 42.56.070(5). Family Home appealed the decision but the matter is stayed pending the outcome of this case.

⁸Contrary to the Department’s and Intervenor’s claim, Odyssey pointed out in its briefing to the superior court that “[i]t is also ‘absurd’ for the Department not to assess its modifications to the Methodology against the fact that Washington’s population is both increasing and rapidly aging . . .” CP 219.

While Intervenors assert that Odyssey's reference to the Family Home analysis is a "red herring" (Intervenors' Brief, p. 12-14), in fact, the Family Home analysis is wholly relevant to whether the Department's interpretation of the Methodology is persuasive and supportable. When an agency "interpretation" is not codified through rulemaking, it is entitled to respect only when it has the "power to persuade." See *Christensen v. Harris County*, 529 U.S. 576, 587, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000); *Skidmore v. Swift*, 323 U.S. 134, 140 (1944) (whether an agency's interpretation is entitled to weight depends 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.") (Emphasis added).

As discussed in Odyssey's opening brief and above, the Department's interpretation of Step 2 is based on errors of law and arbitrary interpretation. These flaws are underscored by the Department's recent decision in Family Home. The Department's stated reasoning for interpreting Step 2 in the Odyssey decisions was the substantial differences in hospice use by patients age 65 and over and cancer-related diagnosis. AR 5053; Department's Brief, p. 14. After apparently noting the Department's interpretation of Step 2 in the Odyssey decisions, Family Home asked the Department to undertake the same approach and account for the same population differences at Step 5 of the Methodology, and thereby avoid underestimating the projected need. The Department rejected Family Home's request in a less than reasoned analysis:

A review of the Program's historical files . . . shows that the committee relied upon the underlying premise that patients, depending on their age and diagnosis, use hospice care at different rates. This is confirmed by the age and diagnosis breakdowns identified in step #1. . . . The language in step #4 is not ambiguous. This approach has been upheld in an adjudicative ruling and in a subsequent superior court ruling.

. . .
Given the clear language in step #4, using four separate use rates and carrying out four separate calculations broken down by age cohort and diagnosis has the potential to increase the chances of errors and does not appear to increase accuracy. The department concludes that the adoption of FHC's deviation . . . 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.

Family Home, CN 07-05 at <http://www.doh.wa.gov/hsqa/FSL/CertNeed/Docs/Decisions/07-evalrecon.pdf>, p. 11 (emphasis added).

Thus, the Department departed from the plain language in Step 2 based on the premise that patients are likely to use hospice services at different rates depending upon age and diagnosis, but then rejected Family Home's request that it apply this same interpretation to Step 5. The Department's pronouncement in Family Home further evidences the lack of thoroughness and consistency in the Department's analysis, the "factors recognized by the Court that give the power to persuade."⁹ *See Skidmore*, 323 U.S. at 140 (1944).

⁹In addition, Intervenor's argue there is no inconsistency in the Department's interpretation of Steps 2 and 5 because the Department has taken the same position in all its decisions. Intervenor's Brief, p. 12. This reasoning would allow the Department to continue making its internally inconsistent interpretation so long as it did so in all subsequent decisions. The courts have not construed "consistency" so narrowly. *See*

Intervenors also argue that this Court should disregard the arguments Odyssey made based on the Department's Family Home decision because RCW 34.05.558 requires disputed "issues of fact" to be confined to the record on judicial review unless properly supplemented. Intervenors' Brief, p. 30. The Department's pronouncement of its reading of the law, in a determination posted on its own website, does not go to a "disputed issue of fact." Additionally, publications issued by public authorities are "self authenticating" under ER 902(e), and therefore courts acknowledge documents agencies post on their websites. *See Washington Indep. Telephone Assoc. v. Washington Util. and Transportation Com'n*, 149 Wn. 2d 17, 22 (n.2), 65 P.3d 319 (2003). Even if the existence of the Department's later interpretation of its rule was considered "an adjudicative fact," it would fall squarely within ER 201, which allows a court at any level to take judicial notice of facts that are "not subject to reasonable dispute." *See Office of Public Util. Counsel v. Public Util. Com'n of Texas*, 878 S.W.2d 598, 600 (Tex. 1994). There is no factual dispute as to what the Department stated in its Family Home analysis.

2. Section VII.C of Odyssey's Brief advances its claim that the Department's reading of Step 2 produces an absurd result.

Intervenors also seek to strike Section VII.C of Odyssey's brief asserting that Odyssey raises a newly claimed "absurd result" by showing

Morton v. Ruiz, 415 U.S. 199, 237 (1974) ("[T]he weight of an administrative interpretation will depend, among other things, upon 'its consistency with earlier and later pronouncements' . . . the [agency's] somewhat inconsistent posture belies its present assertion.").

the Methodology projects far fewer patients will be using hospice services than are actually currently using the services. Intervenor's Brief, p. 29-33, *see also* Sec. G of this Reply. This section of Odyssey's brief, however, advances the same claim and arguments Odyssey made before the Health Law Judge and the superior court. Accordingly, in its briefing below, Odyssey pointed out that "the Department's version of the Methodology will never achieve a valid assessment of the projected need" (CP 100-101); that using a *statewide* average hospice use rate to predict need in highly populated counties results in such counties being designated as "over served" (*Id.*); and that the Department's application of the Methodology results in a projected number of hospice patients that is less than the actual number who are actually using hospice care. It is therefore difficult to understand how Intervenor could characterize Odyssey's administrative and lower court arguments as a new claim of error.

3. Section VII.D of Odyssey's Brief advances its repeatedly raised claim that the Department acted arbitrarily and unlawfully when it put "zeros" for capacity into the formula.

Intervenor claims that Section VII.D of Odyssey's brief should be stricken because it raises "[a] new theory involving 'zeroing out' in the survey theory" that Odyssey did not argue below. Intervenor's Brief, p. 30. This is not a new theory. Odyssey thoroughly argued this issue before the superior court:

Finally, the survey undertaken by the Department was fatally flawed in any event because several hospice providers did not respond. The chart that the Department's

analyst produced as part of his review includes a column entitled ***‘current capacity’ that shows ‘zeros’ for 10 counties.*** AR 2185. Thus, Whatcom County was listed as having no current hospice capacity, highly populated Clark County shows only a ‘1’ for current capacity, highly unpopulated Douglas County shows ‘54’ and Walla Walla 119. *Id.* From the face of the chart of the Department’s survey results, it is apparent that the surveys did not have a hundred percent return and were inconsistent and inaccurate. *Id.*; AR 1931-1932. Again, ***this was critical since these statistics formed the foundation of the statewide average required in Step 1 of the methodology.***

CP 107 (emphasis added); *see also* CP 223 (n.4) (“As discussed, the Department chart of the survey responses shows ‘zeros’ for ‘current capacity’ in 10 of Washington’s 39 counties (25%)”).

These same flaws in the survey data were raised in the briefing before the Health Law Judge on cross-motions for summary judgment. *See, e.g.,* AR 2200. In fact, the Health Law Judge not only denied Odyssey’s motion for summary judgment by disregarding these “zeros” and their effect on calculating the statewide use rate, she granted the Department’s motion for summary judgment stating there were no issues of fact because she did not believe all these “zeros” would make a difference. AR 5058-5059.

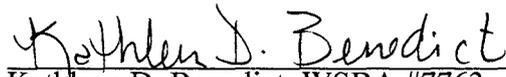
The Intervenors’ motion to strike the three sections of Odyssey’s brief should be denied.

II. CONCLUSION

This Court should reverse the superior court's order and remand the case with instructions to set aside the Department's order and direct that Odyssey's CON applications be approved.

RESPECTFULLY SUBMITTED this 2nd day of January, 2008.

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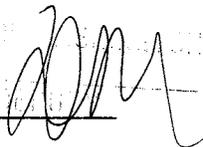


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ORIGINAL

No. 36489-1-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

APPEALS
COURT OF APPEALS
BY 

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.

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

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 2nd day of January, 2008, I caused to be served a true and correct copy of Appellant's Reply Brief on the following individuals in the manner indicated:

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