

STATE OF WASHINGTON  
DEPARTMENT OF HEALTH  
ADJUDICATIVE SERVICE UNIT

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JUN 09 2006

Attorney General's Office  
Agriculture & Health Division

In Re: )  
)  
Certificate of Need Application of )  
Odyssey Healthcare Operating B, LP )  
and its Parent Company, Odyssey )  
Healthcare, Inc, to Establish a )  
Medicare Certified/Medicaid Eligible )  
Hospice Agencies to Serve the )  
Residents of Pierce County )

Docket Nos:  
05-10-C-2015 CN  
05-10-C-2016 CN  
05-10-C-2017 CN

PREHEARING ORDER NO. 3:  
ORDER GRANTING  
SUMMARY JUDGMENT

In Re: )  
)  
Certificate of Need Application of )  
Odyssey Healthcare Operating B, LP )  
and its Parent Company, Odyssey )  
Healthcare, Inc, to Establish a )  
Medicare Certified/Medicaid Eligible )  
Hospice Agencies to Serve the )  
Residents of Snohomish County )

In Re: )  
)  
Certificate of Need Application of )  
Odyssey Healthcare Operating B, LP )  
and its Parent Company, Odyssey )  
Healthcare, Inc, to Establish a )  
Medicare Certified/Medicaid Eligible )  
Hospice Agencies to Serve the )  
Residents of King County )

APPEARANCES:

Petitioner, Odyssey HealthCare Operating BLP and its parent company, Odyssey HealthCare, Inc (collectively referred to as Odyssey) by  
Benedict Garratt, PLLC per  
Kathleen Benedict, Attorney at Law

PREHEARING ORDER NO. 3  
ORDER GRANTING PARTIAL  
SUMMARY JUDGMENT

Page 1 of 14

Docket No. 05-10-C-2015CN (Lead), 05-10-C-2016CN & 05-10-C-2017CN

Respondent, Department of Health Certificate of Need Program (Department), by  
The Office of the Attorney General, per  
Richard McCartan, Assistant Attorney General

Intervener, Providence and Home Care of Snohomish County and Hospice of Seattle  
(collectively referred to as Providence) by  
Bennett, Bigelow & Leedom, PS per  
Stephen Pentz, Attorney at Law

Intervener, Franciscan Health System-West dba Franciscan Hospice (Franciscan), by  
Ogden Murphy Wallace, PLLC per  
Donald Black, Attorney at Law

Odyssey HealthCare and the Certificate of Need Program (the Program) each moved for summary judgment. In their motions, Odyssey and the Program argue that there is no material fact at issue, and that the case may be resolved through summary judgment based upon the correct interpretation of WAC 246-310-290(7). This regulation outlines a six step methodology to determine whether there is a need for additional in-home hospice services. The interveners filed briefs agreeing that there are no material facts at issue, and arguing that the Program's interpretation of the rule is correct under the rules of statutory construction.

### I. ISSUES

Did the Program correctly interpret WAC 246-310-290(7) in its analysis of Odyssey's three certificate of need (CN) applications for in-home hospice care agencies in Pierce, King and Snohomish Counties?

Did the Program correctly apply WAC 246-310-290(7) when it relied upon data gathered from survey results obtained after Odyssey filed its CN applications?

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## II. PROCEDURAL BACKGROUND

In October 2003, Odyssey filed three separate applications for CNs to establish in-home hospice agencies to serve the residents of Pierce, King and Snohomish counties. In January 2005 Program denied Odyssey's applications and issued its underlying analysis that is the basis for those denials. Program concluded there is not a need for the new agencies pursuant to the need criteria (methodology) set forth in WAC 246-310-290(7).<sup>1</sup>

In reaching its conclusion that there is not need for new in-home hospice agencies in Pierce, King and Snohomish counties, Program relied on the survey data from existing in-home hospice providers in Washington state. Odyssey challenges the reliance on this data because it was not available at the time Odyssey filed its applications.<sup>2</sup>

In February 2005, Odyssey submitted a request for reconsideration. The Program granted the request and held a reconsideration hearing in May 2005 during which Odyssey submitted additional information. Following the hearing, Odyssey and the interested parties submitted rebuttal information. During this process, Odyssey had the opportunity to address the survey results. In October 2005, the Program issued its analysis and decision after reconsideration. The Program affirmed its denial of

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<sup>1</sup> As a result of a no need finding, the Program also concluded that Odyssey's applications did not meet the other CN criteria: financial feasibility, structure and process (quality of care) and cost containment as set forth in WAC 246-310-220 through WAC 246-310-240.

<sup>2</sup> It is unclear when all of the survey data was available but it will be assumed here that some of the results were not available until after the closure of the administrative record and after Odyssey submitted its rebuttal comments following the public hearing.

Odyssey's CN applications, finding no need for additional in-home hospice services pursuant to WAC 246-310-290(7).

Odyssey appealed Program's denial of its applications for in-home hospice agency CNs. Pursuant to the schedule set forth in Prehearing Order No. 1, Odyssey and Program each filed motions for summary judgment arguing there is no material facts at issue and that their interpretation of WAC 246-310-290(7) is correct as a matter of law.

### III. DISCUSSION

Summary judgment is appropriate where there is no genuine issue of material fact, and the moving party is entitled to summary judgment as a matter of law. CR 56(c), *Ins. Co. v. Emerson*, 102 Wn 2d 477 (1984). In determining whether a genuine issue of material fact exists, all reasonable inferences shall be viewed in light most favorable to the nonmoving party, and the motion only granted if reasonable persons could reach but one conclusion. *GO2NET, Inc. v. C I Host, Inc.*, 115 Wn App 73 (2003). There are no material facts at issue regarding the questions raised in the motions for summary judgment: what is the correct interpretation of WAC 246-310-290(7) and whether the Program may rely on information that was not available to the applicant at the time the application was filed? Since no material facts are at issue in the motions for summary judgment, Program is entitled to summary judgment as a matter of law.

#### ***A. Program correctly interpreted WAC 246-31-290(7).***

The Department promulgated WAC 246-310-290(7) to provide a methodology for projecting the need for additional in-home hospice services.<sup>3</sup> The language in WAC 246-310-290(7) outlines the six step methodology to determine the need for additional in-home hospice services. Hospice care may be provided in patients' homes or in health care facilities. Hospice care aids terminally ill patients and their families by helping provide the best quality of life one may have during this stage in life.<sup>4</sup>

The regulatory language in question is contained within Step 2 of the six step methodology to determine whether additional in-home hospice services are needed. The interpretation of words "total residents deaths" contained in Steps 2 requires a review of the methodology as a whole. WAC 246-310-290(7) outlines the following six step methodology:

(7) Need projection. The following steps will be used to project the need for hospice services.

(a) Step 1. Calculate the following four statewide predicted hospice use rates using CMS<sup>5</sup> and department of health data or other available data sources.

(i) The predicted percentage of cancer patients sixty-five and over who will use hospice services. This percentage is calculated by dividing the average number of hospice admissions over the last three years for patients the age of sixty-five and over with cancer by the average number of past three years statewide total deaths sixty-five and over from cancer.

(ii) The predicted percentage of cancer patients under sixty-five who will use hospice services. This percentage is calculated by dividing the average number of hospice admissions over the last three years for patients under the

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<sup>3</sup> On April 19, 2003, WAC 246-310-270 became effective. Odyssey filed one of the first CN applications to establish an in-home hospice agency under this rule.

<sup>4</sup> WAC 246-310-290(1)(e) defines hospice care as "symptom and pain management provided to a terminally ill individual, and emotional, spiritual and bereavement support for the individual and family in a place of temporary or permanent residency and may include the provision of home health and home care services for the terminally ill individual.

<sup>5</sup> Center for Medicare and Medicaid Services

age of sixty-five with cancer by the current statewide total of deaths under sixty-five with cancer.

(iii) The predicted percentage of noncancer patients sixty-five and over who will use hospice services. This percentage is calculated by dividing the average number of hospice admissions over the last three years for patients age sixty-five and over with diagnoses other than cancer by the current statewide total of deaths over sixty-five with diagnoses other than cancer.

(iv) The predicted percentage of noncancer patients under sixty-five who will use hospice services. This percentage is calculated by dividing the average number of hospice admissions over the last three years for patients under the age of sixty-five with diagnoses other than cancer by the current statewide total of deaths under sixty-five with diagnoses other than cancer.

(b) Step 2. Calculate the average number of total resident deaths over the last three years for each planning area.<sup>6</sup>

(c) Step 3. Multiply each hospice use rate determined in Step 1 by the planning areas average total resident deaths determined in Step 2.

(d) Step 4. Add the four subtotals derived in Step 3 to project the potential volume of hospice services in each planning area.

(e) Step 5. Inflate the potential volume of hospice service by the one-year estimated population growth (using OFM data).

(f) Step 6. Subtract the current hospice capacity in each planning area from the above projected volume of hospice services to determine unmet need.

(g) Determine the number of hospice agencies in the proposed planning area which could support the unmet need with an ADC<sup>7</sup> of thirty-five.

WAC 246-310-290(7) (Emphasis added).

WAC 246-310-290 is designed to help predict the need for additional hospice care services in the state of Washington. Step 1 of this rule calculates statewide predicted hospice use rate by breaking down the patient use rate into four categories of terminally ill patients:

1. Cancer patients 65 or over.

<sup>6</sup> WAC 246-310-290(1)(f) defines planning area as: "each individual county designated by the department as the smallest geographic area for which hospice services are projected."

<sup>7</sup> ADC means average daily census. WAC 246-310-290(1)(a).

2. Cancer patients under 65.
3. Non-cancer patients 65 or over.
4. Non-cancer patients under 65.

In each of these categories, the predicted percentage of patients who will use hospice care statewide is calculated by dividing the average number of hospice admission by the average number of deaths during the past three years. The premise behind the calculations in Step 1 is that patients in these four categories are likely to use hospice care at different rates depending on their age and diagnosis.

Steps 2 through 5 project the future number of hospice patients in a particular county. Because terminal ill patients do not use hospice care at a uniform rate, as the four categories in Step 1 statistically demonstrate,<sup>8</sup> it is logical to evaluate/calculate the future number of hospice patients upon the historical data of each of these four groups identified by age and diagnosis.

Step 2 of the methodology directs one to "calculate the average number of total resident deaths over the last three years for each planning area"<sup>9</sup> without providing detailed directions as in Step 1. This language is plain on its face, but the calculation to be completed under this step is not self evident. It 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.<sup>10</sup> This interpretation harmonizes the language of the various steps contained in WAC 246-310-

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<sup>8</sup> AR 526.

<sup>9</sup> "Planning area means each individual county designated by the department as the smallest geographic area for which hospice services are projected. For the purposes of certificate of need, a planning or combination of planning areas may serve as the service area". WAC 246-310-290(1)(f).

<sup>10</sup> AR 526.

290(7) in the context of the regulation. The steps are building blocks, one building upon the other. It is therefore reasonable to calculate the “total resident deaths” in step 2 under the same four categories using the same underlying premise in Step 1.

Therefore the Program’s interpretation of WAC 246-310-290(7) is consistent with the rules of statutory construction, avoiding “unlikely, absurd, or strained consequences”.

Plain language of a statute or a rule does not need to be interpreted if the meaning is plain and unambiguous. *Regence Blueshield v. Ins. Comm’r*, 131 Wn App 693, 646 (2006). Ambiguous language is language “susceptible to more than one meaning or reasonable interpretation.” *Citoli v. City of Seattle*, 115 Wn App 459, 484 (2002). Word or phrases cannot be added to a regulation if no ambiguity exists. *Rabanco v. King County*, 125 Wn App 794, 108 (2005). The regulation must be applied as it is written. *State v. Delgado*, 148, Wn 2d 723, 727 (2003). But plain language should not be considered in isolation of its regulatory context. *Regence* at 648. To insure proper construction, the language in question should be interpreted as a whole, giving effect to all of the language by harmonizing the regulatory provisions in relation to each other.” *Regence* at 648 citing *King County v. Cent. Puget Sound Growth Mant. Hearings Bd.*, 142 Wn 2d 543, 560 (2000). Interpretations of regulations “that result in unlikely, absurd, or strained consequences” should be avoided. *Glaubach v. Regence Blueshield*, 149 Wn 2d 827, 833 (2003). Regulations should be interpreted in a manner that is “consistent with the spirit or purpose” of the rule “rather than a literal reading that renders the statute ineffective”. *Id.*



In its motion for summary judgment, Odyssey argues that Program erred by failing to literally interpret the plain language of WAC 246-310-290(7). Odyssey's interpretation of Step 2 as presented through its motion for summary judgment renders illogical results; the projected future hospice patients would exceed the total number of resident deaths from all causes. This is not a reasonable result; it is a strained, illogical result that does not harmonize with all of the provisions in the rule. *Id.*

The language of Step 2: "Calculate the average number of total resident deaths over the last three years for each planning area" should be interpreted as a step in a series of analytical mathematical steps, building blocks that need to be logically connected. Therefore to clarify the ambiguity, Step 2 should be read in the context of the prior step. Even Odyssey in its applications refers to the four subgroups outlined in Step 1 when addressing death rate calculations in Step 2.<sup>11</sup>

Program adopted an interpretation of Step 2 that is logical and harmonious with the other provisions of the rule and avoids strained illogical results.<sup>12</sup> This interpretation is consistent with Odyssey's first proposed interpretation of WAC 246-310-290(7) as stated in its CN applications.

During the application process, Odyssey agreed that the literal application of WAC 246-310-290(7) renders unreasonable results; the projected future hospice

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<sup>11</sup> Odyssey states in its application; "2. Develop average death rates for 4 sub-groups of population (cancer patient 65+, cancer patients under 65, non-cancer patients 65+, non-cancer patients under 65.) (a) Assemble 3-year average statewide deaths for the 4 sub-groups, (b) Assemble 200 state population, (c) Apply 3 year average death to WA 2000 population, (d) Generate 3-year average number WA death rates for 4 sub groups" AR 18

<sup>12</sup> Program's interpretation is consistent with the interpretation of Anne Keopsell, Executive Director of Washington State Hospice & Palliative Care Organization. Ms. Keopsell was a member of the committee that drafted the language of WAC 246-310-290. AR 555 (King County Application).

patients would exceed the total number of resident deaths from all causes.<sup>13</sup> In recognition of the problem with the literal interpretation of Step 2, Odyssey proposed two different interpretations of WAC 246-310-290(7) in its CN applications. Odyssey's first proposed interpretation of WAC 246-310-290(7) is the same as the Program's interpretation that Odyssey is now challenging. Under this first interpretation, Odyssey in its CN applications failed to include the Group Health's hospice program in its inventory of existing providers. Therefore, Odyssey erroneously concluded in its applications that there is a need for additional in-home hospice agency in King, Pierce and Snohomish counties. Under Odyssey's first interpretation of WAC 246-310-290(7), Program correctly included Group Health's hospice agencies, and concluded there is no need for additional hospice providers in the three counties. Program correctly denied Odyssey's applications.

In its CN applications and in its motion for summary judgment, Odyssey proposes its second interpretation of WAC 246-310-290(7) relying on a number of growth factors that are not included in the rule and requiring a change in the use of statewide rates as the benchmark for determining need in individual counties. WAC 246-310-290(7) utilizes a statewide benchmark to calculate the need for new hospice agencies in counties that provide hospice services below the statewide average. Odyssey recommends a less "conservative approach" that it claims is more consistent

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<sup>13</sup> Even Odyssey stated in its request for reconsideration that it "acknowledged" with "other hospice providers and their consultants" that the methodology set forth as written would result in excessive need projections. AR 1251. (In this statement, Odyssey appears to accidentally cite WAC 246-310-295(6) which refers to hospice care centers rather WAC 246-310-290(7) regarding hospice services under which Odyssey applied for in-home hospice agencies in Pierce, Snohomish and King Counties. AR 1-34 (Pierce) AR 1-35 (King) and AR 1-34 (Snohomish))

with data Odyssey cites from the 2002 *Last Acts Report; Means to a better End: A Report on Dying in America*.<sup>14</sup> Program did not adopt this second interpretation because the addition of the growth factors and/or the modification of the benchmark require an amendment to the rule.

Program concluded that the standards in WAC 246-310-290 are sufficient to determine need of additional hospice care services. The application of the statewide benchmark in determining need is clear from the reading of the rule as a whole. In light of the rules of statutory construction, Program's interpretation of WAC 246-310-290(7) is reasonable and does not require an amendment to the rule.

***B. Program did not err when it relied on the survey data collected and analyzed after Odyssey submitted its CN applications.***

Odyssey argues in its motion for summary judgment that Program's reliance on the survey data renders its analysis under step 1 "flawed" because the survey results were not available at the time Odyssey prepared and filed its applications. This argument is not supported by the law. Step 1 states that Program must use "CMS and department of health data or other available data sources." WAC 246-310-310(1)(a) (Emphasis added). The rule does not state that the data must be available at the time the application is filed.

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<sup>14</sup> The Last Act Report concludes there is much room for improving hospice care in the state of Washington as well as in other states. The report concludes that there are problems in provision of hospice care to terminally ill patients such as inadequate pain management, inadequate advance care planning, inadequate number of health care professionals specially trained in the provision of hospice care and inadequate access to high-quality end-of-life care. The report's recommended "Action for Public Policymakers" includes many suggestions to improve the hospice and related services, such as setting education targets for health professionals, promulgating policies on out-of hospital "do not resuscitate" programs, establishing good pain management policies to tackle the problem of under treatment of pain, and supporting the provision of hospice services in government run institutions. Absent from this list of recommendations for improving care for the terminally-ill is increasing the number of hospice providers. See page 48 of the Last Act Report that is Exhibit A of Odyssey's motion for summary judgment.

Program did not have access to the needed CMS data to determine the current patient hospice admissions required to perform Step 1 of the need methodology under WAC 246-310-290(7).<sup>15</sup> Because Program did not have sufficient data regarding the existing hospice care; it sent a survey to existing hospice providers in Washington State.<sup>16</sup> The Program gathered and analyzed the survey data after Odyssey filed its CN applications. The Program relied on these survey results regarding 2000-2002 patient utilization data from licensed hospice providers in the state<sup>17</sup>. Program compared the survey data with data provided by the Department of Health's Center for Health Statistics and Cancer Registry (SCR) to determine the percentages of deaths for the four different patient groups outlined in Step 1 of WAC 246-310-290(7). Because CMS data was not available, Program reasonably relied on the survey results.

Odyssey also challenges the reliability of the survey results. Odyssey did not raise this issue in its motion for summary judgment, but it is a significant issue if the data is unreliable. Odyssey relies on a chart regarding the survey data in support of its argument that the survey data is unreliable due to inaccuracies.<sup>18</sup> This chart indicates errors in Odyssey's argument. For example Clark County's current capacity is not 1 as stated by Odyssey in its reply brief but 1,064.<sup>19</sup> Odyssey also argues without adequate supporting evidence that the survey data is unreliable because the data lists too many counties as 0 for current capacity. Program does admit that that there is one provider in

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<sup>15</sup> Odyssey's motion for summary judgment, page 2.

<sup>16</sup> Program later sent a second survey with additional questions.

<sup>17</sup> Not all of the hospice providers in the state responded to the program's survey; but all of the providers in the counties in question did provide responses. (King, Pierce and Snohomish) AR 511, 1939-2027.

<sup>18</sup> AR 531 (Pierce) AR 549 (Snohomish) and AR 542 (King).

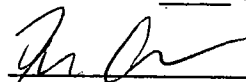
<sup>19</sup> Odyssey also question the capacity figure of 45 for Douglas County as being too high when the chart indicates that it is actually below the projected 2003 potential capacity volume of 60. AR 512 and 531.

Whatcom County; Whatcom County is listed as 0 for current capacity. But this gap in the survey results has little impact on lowering the overall statewide use rates. Given the size of the oversupply of hospice care in Pierce, King and Snohomish counties, this gap in the survey data does not materially change the need analysis for new in-home hospices services for Pierce, King and Snohomish counties.<sup>20</sup> Therefore there are no material facts at issue, and summary judgment should be granted.

### ORDER

Program's Motion for Summary Judgment is GRANTED, and Odyssey's Motion for Summary Judgment is DENIED.

Dated this 8<sup>th</sup> day of June, 2006.

  
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Zimmie Caner, Health Law Judge  
Presiding Officer

### NOTICE TO PARTIES

This order is subject to the reporting requirements of RCW 18.130.110, Section 1128E of the Social Security Act, and any other applicable interstate/national reporting requirements. If adverse action is taken, it must be reported to the Healthcare Integrity Protection Data Bank.

Either Party may file a **petition for reconsideration**. RCW 34.05.461(3); 34.05.470. The petition must be filed within 10 days of service of this Order with:

Adjudicative Service Unit  
PO Box 47879  
Olympia, WA 98504-7879

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<sup>20</sup> AR 532.

and a copy must be sent to:

Certificate of Need Program  
P.O. Box 47852  
Olympia, Washington 98504-7852

The request must state the specific grounds upon which reconsideration is requested and the relief requested. The petition for reconsideration is considered denied 20 days after the petition is filed if the Adjudicative Service Unit has not responded to the petition or served written notice of the date by which action will be taken on the petition.

A petition for judicial review must be filed and served within 30 days after service of this order. RCW 34.05.542. The procedures are identified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. A petition for reconsideration is not required before seeking judicial review. If a petition for reconsideration is filed, however, the 30-day period will begin to run upon the resolution of that petition. RCW 34.05.470(3).

The order remains in effect even if a petition for reconsideration or petition for review is filed. "Filing" means actual receipt of the document by the Adjudicative Service Unit. RCW 34.05.010(6). This Order was "served" upon you on the day it was deposited in the United States mail. RCW 34.05.010(19).

DECLARATION OF SERVICE BY MAIL

declare that today I served a copy of this document upon the following parties of record:

STEPHEN PENTZ AND KATHLEEN BENEDICT, AND DONALD BLACK, ATTORNEYS AT LAW AND RICHARD MCCARTAN, AAG  
by mailing a copy properly addressed with postage prepaid.

DATED AT OLYMPIA, WASHINGTON THIS 5<sup>th</sup> DAY OF JUNE, 2006.



Adjudicative Service Unit

cc: JANIS SIGMAN

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