

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HOSPICE OF THE PALM COAST,)
INC.,)
)
Petitioner,)
)
vs.) Case No. 06-1273CON
)
AGENCY FOR HEALTH CARE)
ADMINISTRATION,)
)
Respondent,)
)
and)
)
HOSPICE OF MARION COUNTY, INC.,)
)
Intervenor.)
_____)

RECOMMENDED ORDER

A final hearing was conducted in this case on December 4-7 and 11-14, 2006, and January 31, 2007, in Tallahassee, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Mark Emanuele, Esquire
Panza, Maurer, & Maynard, P.A.
Bank of America Building, Third Floor
3600 North Federal Highway
Fort Lauderdale, Florida 33308

For Respondent: Karin M. Byrne, Esquire
Agency for Health Care Administration
2727 Mahan Drive, Building 3
Mail Station 3
Tallahassee, Florida 32308

For Intervenor: John F. Gilroy, III, Esquire
John F. Gilroy, III, P.A.
1435 East Piedmont Drive, Suite 100
Tallahassee, Florida 32308

STATEMENT OF THE ISSUE

The issue is whether Respondent should approve Petitioner's Certificate of Need (CON) Application No. 9896 for the establishment of a hospice program in Marion County, Hospice Service Area 3B.

PRELIMINARY STATEMENT

On or about October 7, 2005, Respondent Agency for Health Care Administration (AHCA) established a fixed need pool (FNP) of one (1) for a new hospice program in AHCA's Service Area 3B (Marion County). AHCA published the established need in Volume 31, Number 40, of the Florida Administrative Weekly.

AHCA subsequently amended its finding of need for one additional hospice program in Marion County. On October 21, 2005, AHCA published a FNP of zero for Marion County in Volume 31, Number 42, of the Florida Administrative Weekly.

On or about October 24, 2005, Petitioner Hospice of the Palm Coast, Inc. (Palm Coast) filed a Letter of Intent (LOI) for the establishment of a new hospice program in Marion County. In the absence of a numeric need, Palm Coast's application attempted to demonstrate the existence of special circumstances to justify the approval of a new hospice program.

On February 24, 2006, AHCA preliminarily denied Palm Coast's CON Application No. 9896 for the establishment of a hospice program in Marion County.

On April 12, 2006, Palm Coast filed a Petition for Formal Administrative Hearing with AHCA. The petition challenged AHCA's preliminary denial of CON Application No. 9896. AHCA referred the petition to the Division of Administrative Hearings on April 12, 2006.

On April 14, 2006, Intervenor Hospice of Marion County, Inc. (HMC) filed a Petition to Intervene in the proceeding. On April 27, 2006, Administrative Law Judge David M. Maloney issued an Order Granting Intervention.

On May 18, 2006, Judge Maloney issued a Notice of Hearing. The notice scheduled the hearing for December 4-8 and 11-15, 2006.

Before the hearing commenced, the Division of Administrative Hearings transferred the case to the undersigned.

Palm Coast presented the testimony of seven witnesses, six of which were accepted as experts. Palm Coast offered Petitioner's Exhibit Nos. P1-P35. All of Petitioner's exhibits were accepted as evidence except for Petitioner's Exhibit Nos. P33 and P34. During the hearing, the undersigned reserved ruling on the admissibility of Petitioner's Exhibit Nos. P33 and

P34. Upon further consideration, Petitioner's Exhibit Nos. P33 and P34 are hereby admitted as evidence.

AHCA presented the testimony of one witness. AHCA's only exhibit, R1, was accepted as evidence.

HMC presented the testimony of seven witnesses, all of which were accepted as experts. HMC offered 19 exhibits that were accepted as evidence.

The record consists of 14 volumes of the transcript. The court reporter filed the fourteenth volume of the transcript on February 26, 2007.

On May 16, 2008, Palm Coast filed a Motion and Request for Judicial Notice. The motion seeks to have the undersigned take official recognition of AHCA's hospice need projection for one additional hospice program in Marion County planned for July 2009.

On May 29, 2008, the undersigned issued two orders. The first order denied Palm Coast's Motion to Reopen Proceedings or Alternatively Allow Amended Proposed Recommended Order. The second order granted an Agreed Motion for Extension of Time to File Response to Petitioner's Motion and Request for Judicial Notice.

After requesting and receiving several extensions of time, the parties filed their Proposed Recommended Orders in the

following order: (a) HMC on June 4, 2007; (b) AHCA on June 4, 2007; and (c) Palm Coast on June 5, 2007.

On June 11 and 12, 2008, respectively, AHCA and HMC filed their responses in opposition to Palm Coast's Motion and Request for Judicial Notice. On June 17, 2008, Palm Coast filed a Motion to Strike one paragraph of AHCA's response. After reviewing the motions and responses thereto, Palm Coast's Motion and Request for Judicial Notice is hereby denied and its Motion to Strike is hereby granted.

FINDINGS OF FACT

Hospice Generally

1. Hospice/palliative care services are provided to patients after their disease process has progressed to point that there is no longer a cure for it. Hospice and palliative care consists primarily of comfort measures to improve the quality of life during life's end stages, including pain control for patients and bereavement counseling for families.

2. The level of responsive care for each patient is individualized. Pursuant to a CON, hospices programs provide services in various settings, including a patient's home, a residential nursing facility, an assisted living facility (ALF), a hospital, or any other setting that the patient and his or her family desires.

3. Hospice care is delivered via an interdisciplinary team of care givers. The team includes nurse care managers, physicians, nurses, spiritual advisors, bereavement coordinators, social workers, home health aides, and family members.

4. The primary reimbursement mechanism for hospice services is through the federal Medicare reimbursement plan on a per diem basis. The four levels of care that are reimbursable under Medicare are as follows: (a) routine; (b) continuous; (c) inpatient; and (d) respite. Some commercial insurance programs, as well as Medicaid, will also reimburse for hospice services.

5. All beneficiaries of Medicare Part A are entitled to hospice services. To obtain the benefit, two physicians must certify that a patient has a terminal prognosis of six months or less if the disease runs its normal course.

6. Due to the fact that approximately 90 percent of reimbursement for hospice services is via Medicare, the price rates for hospice service are fixed, disallowing opportunity for individual hospice programs to compete for patients by adjusting prices. Instead, hospice programs compete on non-price competition factors such as quality of care, including responsive time to admissions, education, and the provision of non-covered services.

The Parties

7. HMC is a not-for-profit Florida corporation, originally licensed in 1983 as Ocala Hospice. HMC is the sole existing provider of hospice services in AHCA's Subdistrict 3B (Marion County). HMC's program includes the provision of residential care and inpatient care in four hospice houses with a total of 52 beds.

8. HMC is organized into the following ten major departments: (a) physician services; (b) quality improvement; (c) patient/family care; (d) professional and community education; (e) development (fundraising); (f) thrift stores (manned by volunteers); (g) pharmacy; (h) information technology; (i) human resources; and (j) financial services. HMC owns a number of affiliates, including Florida Palliative Home Care, LLC, Accent Medical, and Summerfield Suites, LLC.

9. Palm Coast is a not-for-profit Florida corporation and the subsidiary of Odyssey Healthcare, Inc. (Odyssey), a for-profit corporation whose shares are publicly traded. Odyssey, as one of the largest providers of hospice care in the United States, currently operates approximately 80 state-licensed and Medicare-certified hospice programs in 30 states. Odyssey developed approximately 75 of its hospice program since 1997.

10. Palm Coast is currently licensed and operates hospice programs in AHCA's Subdistrict 4B (Flagler County and Volusia

County) and District 11 (Dade County). Palm Coast operates under a management agreement with Odyssey.

11. Palm Coast currently does not provide inpatient services in a hospice facility and does not propose to do so through the instant application. Palm Coast's focus here is directed as follows: (a) identifying and treating non-traditional hospice patients (not diagnosed with cancer); (b) identifying and treating traditional cancer patients; (c) providing services within three hours of a physician order; (d) daily contact and pain evaluations with every visit from a team member; (e) and end-of-life planning, education, and bereavement programs. Palm Coast plans to contract with a skilled-nursing facility or acute care hospital to provide inpatient services.

12. AHCA is the state agency responsible for administering the CON program and licensing hospice programs. In this case, Palm Coast seeks to establish a new hospice program in AHCA's Subdistrict 3B (Marion County). AHCA denied Palm Coast's application and set forth its reasoning in the State Agency Action Report (SAAR).

Stipulated Facts

13. The parties have stipulated to the following facts:

a. Section 408.035, Florida Statutes (2005), and Florida Administrative Code Rules 59C-1.0355 and 59C-1.030 set forth the statutory review criteria and standards applicable here;

b. Sections 408.035(8) and 408.035(10), Florida Statutes (2005), are not applicable or at issue in this matter;

c. Florida Administrative Code Rule 59C-1.0355, subparagraphs (7), (8), (9), and (10), are either not applicable or not at issue in this matter;

d. Palm Coast timely filed its Letter of Intent (LOI);

e. Palm Coast's application and AHCA's review of that application complied with the application and review process requirements of the Florida Statutes and the Florida Administrative Code set forth above;

f. Initially, AHCA projected and published a FNP of one hospice for Subdistrict 3B for the 2005 second batching cycle in the Florida Administrative Weekly, October 7, 2005 edition;

g. The FNP was subsequently amended and a FNP of zero was published in the October 21, 2005, edition of the Florida Administrative Weekly. The zero FNP was not challenged and is not at issue here.

Unmet Need

14. As stated above, AHCA's published FNP was zero for the second batching cycle of 2005, applicable to this proceeding. Palm Coast bases its application in part on an alleged "unmet

need." Using a combined review of a volume-driven demand analysis and a "hybrid need methodology", the application purports to demonstrate the existence of an "incremental pool" of "potentially unserved hospice patients."

15. Palm Coast's theory of need begins with the number most recently published by AHCA as the "net need," or projected number of unserved patients under the need formula for the applicable batching cycle. In this case, that number is 322, less by 28 than the 350 specified by rule as the threshold for showing need.

16. Palm Coast bases its volume/demand analysis on a straight-line future projection of historic growth and an improper hybrid need methodology. Palm Coast's alternative need analysis, standing alone, cannot establish that there is an unmet numeric need. However, other than failing to show an unmet need or special circumstances that outweigh the lack of a numeric need, Palm Coast's application is approvable.

Special Circumstances

17. Palm Coast attempts to demonstrate the existence of "special circumstances" to justify approval of its proposed hospice pursuant to Florida Administrative Code Rule 59C-1.0355(4)(d), which provides as follows:

(d) Approval Under Special Circumstances. In the absence of numeric need identified in paragraph (4)(a), the

applicant must demonstrate that circumstances exist to justify the approval of a new hospice. Evidence submitted by the applicant must document one or more of the following:

1. That a specific terminally ill population is not being served.
2. That a county or counties within the service area of a licensed hospice program are not being served.
3. That there are persons referred to hospice programs who are not being admitted within 48 hours * * * The applicant shall indicate the number of such persons.^[1/]

18. Palm Coast does not contend that Florida Administrative Code Rule 59C-1.0355(4)(d)2. is at issue here. Rather, Palm Coast focuses on Florida Administrative Code Rules 59C-1.035(4)(d)1. and 59C-1.035(4)(d)3., asserting first that specific terminally ill populations are not being served, and second that there are persons referred to hospice programs who are not being admitted within 48 hours.

Specifically Ill Populations

19. In its application, Palm Coast alleged that two groups of people are underserved: hospice patients age 65 and over with diagnoses other than cancer and residents of nursing homes and assisted living facilities. There is a substantial crossover between those two groups.

20. Palm Coast attempted at hearing to show special circumstances regarding these populations using its hybrid need methodology. The methodology segregates the component parts of

AHCA's rule methodology and recalculates need based on penetration rates within individual age and diagnosis cohorts: hospice cancer patients under age 65; hospice cancer patients aged 65 and over; hospice patients under age 65 admitted with all other diagnoses; and hospice patients aged 65 and over admitted with all other diagnoses.

21. As discussed above, this alternative need methodology may not be applied in determining need. However, an applicant is not foreclosed from looking at such specific local penetration rates in attempting to develop a showing of special circumstances.

Non-cancer Patients

22. The evidence here does not establish that hospice patients aged 65 and over with diagnoses other than cancer are underserved. There is no pattern of underperformance that would support such a finding.

23. At one point during the hearing, Palm Coast seemed to shift its focus to show that it actually may be cancer patients under age 65 who are underserved rather than patients with a non-cancer diagnoses aged 65 and over. In support of this argument, Palm Coast relied on a single six-month drop in the penetration rate for hospice cancer patients.

24. The drop in the penetration rate is readily explained by a number of significant changes in the Marion County oncology

medical community for the period in question. Such anomalous occurrences undoubtedly impacted the number of cancer patient referred for hospice services locally and were unrelated to the performance of HMC.

25. Historically, HMC has provided care for cancer and non-cancer patients, regardless of age. In 1996, non-cancer patients made up one-third of HMC's admissions and two-third of its patient days.

26. Palm Coast emphasized that as a national average, approximately 68 percent of its patients have a non-cancer diagnosis. HMC currently provides approximately 66 percent of its services to non-cancer patients, a level that is not materially different than that of Palm Coast. The most recent data shows that HMC is performing above the statewide average in non-cancer categories for all ages.

Nursing Home and ALF Patients

27. Palm Coast argues in general that many non-cancer patients tend to live in nursing homes and ALFs. Palm Coast asserts that many of these patients have chronic conditions that go unrecognized when their condition becomes terminal.

28. There are nine licensed skilled nursing facilities in Marion County. HMC provides services to patients in each facility. HMC also provides continuing professional education to nursing home staff members, particularly with regard to the

signs and symptoms of end-stage disease, including non-cancer end-stage conditions.

29. Ms. Alicia Brown is HMC's patient/family care coordinator for the nursing home team. Ms. Brown and her team maintain very close relationships with the directors of nursing homes, education nurses, unit managers, and staff nurses. Ms. Brown has developed educational programs, including an eight-part series based on nursing home survey criteria to help foster understanding and good relationships between hospice nurses and nursing home staff.

30. HMC's medical director is Dr. Segismundo Pares. Dr. Pares has been on staff at HMC for approximately four years. Currently, he concentrates on the provision and development of hospice services in eight of the nine nursing homes in Marion County.

31. Since January 2006, Dr. Pares has developed and expanded programming and direct initiatives in community outreach, initially focusing on the community of hospital physicians and staff who direct so many hospice referrals. Having started the hospitalist program at Munroe Regional Medical Center (Munroe Regional) in Ocala, Florida, as well as having been a leader of those operations, Dr. Pares has credibility and an extensive working relationship with the

medical community to effectuate awareness, acceptance, and utilization among potential hospice referrers and patients.

32. Ms. Leigh Hutson has been HMC's community liaison for over three years. Ms. Hutson makes personal visits on a regular basis to all nine nursing homes and 24 licensed ALFs in Marion County. Ms. Hutson provided persuasive testimony that HMC provides hospice services in Marion County ALFs, and regularly has patients in those facilities. HMC's ALF utilization has doubled in the last three years.

33. Through HMC's outreach and education processes, nursing homes in Marion County have had an opportunity to gain a clear sense of the various scenarios in which hospice is appropriate. Nursing homes and ALFs in Marion County regularly refer both cancer and non-cancer patients to HMC.

34. In 2005, HMC self-reported that it provided 13 percent of its patient days to nursing home patients and 25 percent of its combined patient days to patients in nursing homes and ALFs. On the other hand, Palm Coast alleges that 40 percent of Odyssey's patient days nationwide are nursing home patient days. These statistics are not persuasive enough to show that HMC is not providing adequate service to nursing home and ALF patients in Marion County.

35. During the hearing, Palm Coast presented the testimonies of Jon Marc Creighton, its community education

representative, and Rema Cole, its general manger in Volusia County. The testimonies were based on 18 informal, preliminary interviews of persons in the Marion County health care community in the fall of 2005.

36. According to Mr. Creighton, his interviews in Marion County revealed frustration with HMC's removal of nursing home patients to its hospice house when services could just as easily be provided in the nursing home. Mr. Creighton testified that he talked to administrators who had not been educated about the full array of hospice services that can be provided in nursing homes. Mr. Creighton stated that the nursing home administrators he talked to did not like the way HMC staff failed to properly communicate with nursing home staff when they entered the facilities.

37. Apparently, Mr. Creighton and Ms. Cole made five contacts with persons associated with nursing homes. One of the five nursing homes was Life Care of Ocala, a facility that strongly supports HMC in this proceeding. Interview notes for the other four nursing homes reveal no substantial support for the proposition that nursing home patients are underserved. The testimony of Mr. Creighton and Ms. Cole that HMS is not adequately and appropriately serving patients in nursing homes is not persuasive.

38. Palm Coast also presented the testimony of Robert Mundrone, the administrator at Marion House Healthcare Center, a nursing facility in Marion County. Mr. Mundrone testified that HMC was not fulfilling their contractual responsibilities to provide hospice service to his facility. According to Mr. Mundrone, nine of his residents were "taken" from his facility in 2005 despite a contractual agreement for HMC to provide inpatient services at the nursing home. Mr. Mundrone believed that HMC failed to adequately evaluate the former living arrangements of nursing home patients before the patients were discharged from the hospital to HMC's hospice house.

39. Mr. Mundrone's testimony actually establishes his awareness of available hospice services. He also confirmed the prevalence throughout his hospice career of hospice services being provided in his facility by HMC. He expressly endorsed the clinical quality and accessibility of HMC services.

40. A large percentage of nursing home residents who receive HMC hospice services are put in contact with hospice during the course of a hospitalization. Ms. Ladonna Kellum, social work case manager at Munroe Regional, testified about these initial contacts.

41. According to Ms. Kellum, her department works with patients and families to establish discharge plans and to arrange care for patients, including patients that are admitted

to the hospital from nursing homes. Before discharge, Ms. Kellum's department makes sure that patients are aware of their choices such as home health, rehabilitation, or hospice. When patients are ready to leave the hospital, and their physician recommends hospice, Munroe Regional works together with HMC to present hospice placement alternatives to patients and family members, including the option of returning to their former nursing homes. HMC does not make any decision about the placement of Munroe Regional's patients nor "take" patients from nursing homes.

42. Palm Coast provided five letters, collected in 2005, generally supportive of an additional hospice provider in Marion County. Two basic form letters came from staff at The Bridge, an ALF affiliated with Life Care Center of Ocala, which supports HMC. Two other letters of general support came from home health agencies that compete with HMC's affiliated home health entity.

43. Interviews conducted and letters collected in 2005 have limited probative value in 2007. The greater weight of the evidence indicates that nursing homes and ALFs in Marion County know what hospice services are available and do not lack awareness of the availability of hospice services in their facilities.

Hospice Houses

44. Under Section 400.606(6), Florida Statutes (2005), "A freestanding hospice facility that is primarily engaged in providing inpatient and related services and that is not otherwise licensed as a health care facility shall be required to obtain a certificate of need." (Emphasis added). On the other hand, a hospice facility that performs 49 percent inpatient care and 51 percent non-inpatient services does not require a CON. HMC's hospice houses are not subject to a CON because they do not provide a majority of their services at the inpatient level of care.

45. Nursing homes often refer patients for hospice house services upon determination that the patients are not economically attractive to the nursing home. On the other hand, patients returning to a nursing home from a hospitalization as a "skilled" patient under the Medicare reimbursement structure, qualify the facility to be reimbursed at a much higher rate for up to 100 days.

46. While HMC's hospice utilization in nursing homes has been somewhat below the statewide average, several factors serve to explain the variance. Marion County has significantly fewer nursing home beds per/1000 population than the state on average. Further, over the last few years, hospice utilization among ALF residents has increased significantly. In the most recent

reported annualized period, over one in three patients who received care from HMC is in a nursing home, ALF, or hospice house.

47. The percentage of patient days provided in nursing homes by HMC also is likely to have been affected by the availability of hospice houses in Marion County. HMC operates more hospice house beds than any hospice of comparable size. The relative availability and general attractiveness of a home-like environment in a hospice house has likely affected patient and family choice as to hospice placement.

48. There are a relatively small number of physicians who provide services to nursing home residents in Marion County. Out of approximately 80 primary care doctors, only 10 to 12 provide such care, creating an obstacle to developing hospice referrals of nursing home residents. Those doctors have a high patient load and relatively less time available for learning and understanding the benefits of hospice.

Admission Within "48 Hours" of Referral

49. Florida Administrative Code Rule 59C-1.0355(4)(d) allows an applicant that is confronted with a zero FNP to show another special circumstance justifying approval of a new hospice. The circumstance requires a showing "[t]hat there are persons referred to hospice programs who are not being admitted within 48 hours." See Fla. Admin. Code R. 59C-1.0355(4)(d)3.

The rule requires an applicant to indicate the number of such persons. Id.

50. There is no requirement for hospice programs to maintain a record of the time it takes to admit a patient or to track the number of admissions that occur 48 or more hours after referral. Such information, if it exists for a particular hospice program, is not public information.

51. Prior to litigation involving an existing hospice, the only way an applicant can establish the special circumstance is by showing a pattern of delays as related by physicians, hospital discharge planners, nursing home social workers, family members, and others in a position to know whether admission delays are occurring. Even then, such anecdotal evidence may not provide the specificity required by the rule. In this case, Palm Coast had little or no evidence prior to filing its application that anyone in Marion County had complained about untimely admissions.

52. Palm Coast's application refers to the special circumstance set forth in Florida Administrative Code Rule 59C-1.0355(4)(d)3., only generally, stating in its Summary of the Need for the Proposed Project as follows, in relevant part:

Hospice of the Palm Coast believes that the entrance of a new provider that has the management affiliation of a national provider, as well as the establishment of a new hospice model will enhance services to

those terminally ill patients that are not currently being served and will place a greater focus on the need to provide responsive and efficient hospice care within 48 hours of a referral. (Emphasis added).

53. Palm Coast's application contains five letters of support from Marion County, including two letters from the same ALF and two letters from home health agencies. The fifth letter is from a nursing facility that specifically supports Palm Coast's service standards, including its turnaround admission time of three hours after referral. However, the record is not so clear as to the point in the admissions process that Palm Coast intends to start the clock running.

54. HMC's goal is to admit appropriate patients within 24 hours of an initial contact, if at all possible. To HMC, an initial contact could be just an inquiry for information. It also could be a request for services from a prospective patient or his or her family members, friends, and neighbors. An initial contact could originate from a physician or the staff of a nursing home or ALF.

55. On its admission log, HMC labels the date and time of an initial contact as a "referral." HMC records the date and time of the initial contact not for purposes of achieving an admission within 48 hours as contemplated by the rule, but to measure the time from initial contact to admission for internal monitoring purposes.

56. HMC uses the information from the admission logs to create lag-time reports. The lag-time reports are presented to and reviewed by HMC's quality improvement committee to look for trends and identify circumstances where the process can be improved.

57. HMC also documents the status of any admission and the reason for any delay after the initial contact. This process begins when a call is received by an intake facilitator. The status of an admission is tracked on a dry erase board. It is also documented in the comment section of an electronic record.

58. If the reason for a delay is not documented in HMC's records, it could mean that the intake facilitator's efforts were producing no change. It could also mean that it was a particularly busy day and the status of an admission changed faster than could be recorded.

59. HMC does not consider an initial contact to have developed into a referral that allows it to pursue an admission until it receives an authorized request for service and a written or verbal physician certification of terminal illness. An authorized request is important because many hospice patients have health-care surrogates or other authorized representatives that have to consent to admission. Patients, authorized representatives, families, and physicians often require time to meet, discuss, and deliberate about such a profound decision as

requesting and/or recommending hospice services. The process of obtaining an authorized request and a doctor's certification may take more or less time, depending on any number of circumstances beyond the control of the hospice.

60. During discovery, HMC produced documents reflecting that in 2004 there were 352 patients, and in 2005 there were 406 patients with a lag time from initial contact to actual admission greater than 72 hours. There is no evidence to show how many of the delays in admission were beyond the control of HMC.

61. From January 1, 2006, through November 23, 2006, there were 460 identified patients who were admitted to HMC for hospice services after 48 hours from their first contact with HMC. Of those 460 patients, only four delays were the result of HMC's staffing problems. Other delays in admission are justified as follows: (a) 93 due to patient/family requests; (b) 58 due to wait for discharge from hospital; (c) 62 due to need for family conference; (d) 44 due to patient's choice to wait for a bed in a particular hospice house; (e) 36 due to unavailability of power of attorney; (f) 35 due to no response to request for physician order; (g) 32 due to patient not being in county; (h) 23 due to lack of documented information; (i) 19 due to indecision by patient; (j) 17 due to wait for discharge from skilled nursing facility; (k) 14 due to patient's desire to

continue seeking aggressive treatment; (l) 12 due to inability to contact patient/family or unavailability of patient/family; and (m) 11 others due to miscellaneous reasons, including skilled nursing facility having no weekend staff to sign a contract.

62. From January to November 2006, HMC admitted 411 patients on the same day it received the initial patient contact. It had a total of 2190 admissions, averaging 6 admissions a day.

63. The evidence does not establish a special circumstance under the terms of the 48-hour delayed admission rule. To the contrary, HMC admits patients and provides services in timely manner. HMC's admission process is well staffed and capable of performing timely admissions within 24 hours of a complete referral, 24-hours a day, seven days a week, 365 days a year.

Other Special Circumstances

64. Apart from the special circumstances set forth in Florida Administrative Code Rule 59C-1.0355(4)(d), Palm Coast has not established the existence of any other special circumstances. First, the total population of Marion County is projected to grow by larger percentages than either the district or the state through 2010. However, the amount by which the service area's growth is projected to exceed growth of the district and state is not unusual. Such slight differences in

growth percentages of the state, district, and service area are not so exceptional as to support an approval outside of published need.

65. Second, the 65 and over population of Marion County is projected to grow by larger percentages than either the district or the state through 2010. Even so, as with the total population increases, the amount by which the service area's 65 and over population growth is projected to exceed growth of the district and state, the differences in growth percentages are not so exceptional as to support an approval outside of published need. This is especially true where there is no evidence that the over-65 population is unserved or underserved as discussed above.

66. Third, there is no persuasive evidence of an underserved non-cancer population in Marion County. Just because a 2.37 percent discrepancy exists between the percentage of hospice non-cancer patients admitted by HMC and the average statewide, it does not mean there is an underserved non-cancer population.

67. Fourth, there is no persuasive support for Palm Coast's contention that the service area's penetration rate would increase with the introduction of second provider. There is no observable problem with penetration rates that needs to be remedied.

68. Additionally, there is no evidence to suggest that approval of Palm Coast's application would lead to improved quality, greater access, or cost-effectiveness of any types of services not already being provided by HMC. To the contrary, another hospice in Marion County will result in unnecessary duplication of overhead, administration, marketing, advertising, training, travel, outreach, recruitment, and "branding" costs.

69. It is clear that another hospice will strain HMC's ability to maintain an adequate corps of volunteers. HMC's ability to recruit and maintain professional staff also will suffer as Palm Coast hires staff at salaries higher than those currently paid by HMC.

70. Palm Coast projects that it will take as much as 25 percent of the Marion County market share of admissions within four years by virtue of its entry into the market. HMC will suffer an adverse financial impact as Palm Coast seeks to maximize revenue per admission while not exceeding applicable Medicare "caps" by managing patient mix for the most profitable balance. In that event, HMC will not only lose admissions, but will lose a disproportionate number of the more profitable admissions.

Statutory and Agency Rule Criteria

71. The parties stipulate that Section 408.035, Florida Statutes, and Florida Administrative Code Rules 59C-1.0355 and

59C-1.030 are applicable here. They also stipulate that certain provisions of those statutes and rules do not apply or are not at issue.

72. During the hearing, Jeffery N. Gregg, AHCA's Chief of the Bureau of Health Facility Regulation, testified on behalf of the agency. According to Mr. Gregg, other than failing to show the existence of special circumstances in the face of zero numeric need, the application is "approvable." Mr. Gregg went on to clarify that there was nothing in the application that AHCA would consider a fatal error.

73. Regarding Section 408.035, Florida Statutes, Palm Coast established the following: (a) the availability of resources for project accomplishment and operation; (b) immediate and long-term financial feasibility; and (c) its past and proposed provision of health care services to the medically indigent.

74. Palm Coast has not established the following criteria under Section 408.035, Florida Statutes: (a) that a numeric need exists; (b) that HMC's services are unavailable or inaccessible to any segment of the population or that its quality of care is unacceptable; (c) that Palm Coast's quality of care is superior to that of HMC; (d) that the proposed services will enhance access to hospice services; and (e) that

the proposal will foster competition that promotes quality and cost-effectiveness.

75. As to the preferences set forth in Florida Administrative Code Rule 59c-1.0355(4)(e), Palm Coast has shown the following: (a) that it has a commitment to serve populations with unmet needs; (b) that it will provide the inpatient care component of the hospice program through contractual arrangements with existing health care facilities; (c) that it is committed to serve patients who do not have primary caregivers at home or the homeless and patients with AIDS; and (d) that it will provide services that are not specifically covered by private insurance, Medicaid, or Medicare.

76. For the most part, Palm Coast meets the requirement of Florida Administrative Code Rule 59C-1.0355(5) by showing that its proposal is consistent with the needs of the community and other criteria contained in the local health council plan. Palm Coast intends to provide community education and to provide support groups and bereavement programs for all community residents. However, Palm Coast presented little or no evidence regarding its ability to provide culturally competent care or its specific strategy for volunteer recruitment in Marion County.

77. To comply with Florida Administrative Code Rule 59C-1.0355(6), Palm Coast provided a detailed program description. The description includes proposed staffing levels and use of volunteers.

78. Palm Coast states that it will seek patient referrals from physicians, long-term care facilities (including nursing homes and ALFs), hospitals, managed care companies, and insurance companies.

79. The description of Palm Coast's proposed program included 405 projected admissions in year two of operation. The projected admissions were described by payer type, by type of illness, and by age group.

80. The application states that most hospice services will be provided directly by hospice staff and volunteers. Palm Coast intends to contract with physicians, nutritionists, physical therapists, speech therapists, and occupational therapists.

81. Palm Coast proposes to provide inpatient care through contracts with existing health care providers. However, there is limited evidence regarding the following: (a) the number of inpatient beds that will be located in hospitals and nursing homes; (b) circumstances under which a patient would be admitted to an inpatient bed; and (c) specific provisions for serving persons without primary caregivers at home.

82. Regarding fundraising activities, Palm Coast states that Odyssey has a contribution program that gives back to the communities being served. Palm Coast individually does not have active local fundraising projects and activities. Therefore, any funds donated will be used to support other local not-for-profit community programs.

CONCLUSIONS OF LAW

83. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to Sections 120.569, 120.57(1), and 408.039(5), Florida Statutes (2005).

84. As the applicant, Palm Coast has the burden of demonstrating its entitlement to a CON. See Boca Raton Artificial Kidney Center, Inc. v. Department of Health and Rehabilitative Services, 475 So. 2d 260 (Fla. 1st DCA 1985). A balanced consideration of applicable statutory and rule criteria must be made. See Humana, Inc. v. Department of Health and Rehabilitative Services, 469 So. 2d 889 (Fla. 1st DCA 1985). Such consideration requires that varying weight be accorded each criterion depending on the facts of the case. See Collier Medical Center, Inc. v. Department of Health and Rehabilitative Services, 462 So. 2d 83 (Fla. 1st DCA 1985).

85. Statutory review criteria are set forth in Section 408.035(1)-(10), Florida Statutes (2006). As stated in the

Findings of Fact, there is nothing in Palm Coast's application that would be fatal to an award of a CON except its failure to show special circumstances that outweigh the lack of numeric need.

86. Section 408.043(2), Florida Statutes, discusses the need for hospice services as follows:

(2) HOSPICES. When an application is made for a certificate of need to establish or to expand a hospice, the need for such hospice shall be determined on the basis of the need for and availability of hospice services in the community. The formula on which the certificate of need is based shall discourage regional monopolies and promote competition. The inpatient hospice care component of a hospice, which is a freestanding facility, or a part of a facility, which is primarily engaged in providing inpatient care and related services and is not licensed as a health care facility shall also be required to obtain a certificate of need. Provision of hospice care by any current provider of health care is a significant change in service and therefore requires a certificate of need for such services.

Palm Coast presented no evidence that HMC, as the only existing hospice provider in Marion County, was a regional monopoly. Additionally, the greater weight of the evidence indicates that approval of the CON will not promote competition.

87. Regarding the statutory and rule criteria, Florida Administrative Code Rule 59C-1.0355(3)(b) provides as follows:

(b) Conformance with Statutory Review Criteria. A certificate of need for the

establishment of a new hospice program, construction of a freestanding inpatient hospice facility, or change in licensed bed capacity of a freestanding inpatient hospice facility, shall not be approved unless the applicant meets the applicable review criteria in Sections 408.035 and 408.043(2), F. S., and the standards and need determination criteria set forth in this rule. Application to establish a new hospice program shall not be approved in the absence of a numeric need indicated by the formula in paragraph (4)(a) of this rule, unless other criteria in this rule and in Sections 408.035 and 408.043(2), F.S., outweigh the lack of a numeric need.

88. Because there is a zero numeric need here, Palm Coast must establish the existence of special circumstances, which are addressed in Florida Administrative Code Rule 59C-1.0355(4)(d) as follows in relevant part:

(d) Approval Under Special Circumstances. In the absence of numeric need identified in paragraph (4)(a), the applicant must demonstrate that circumstances exist to justify the approval of a new hospice. Evidence submitted by the applicant must document one or more of the following:

1. That a specific terminally ill population is not being served.

* * *

3. That there are persons referred to hospice programs who are not being admitted within 48 hours * * * The applicant shall indicate the number of such persons.

89. The most persuasive evidence shows that Marion County does not have a specific terminally ill population that is not

being served or that is underserved. HMC is providing adequate services to all persons regardless of their ages or types of terminal illnesses.

90. The next question is whether Palm Coast has met the requirement to show a specific number of persons who are not being admitted to hospice services within 48 hours of referral. In order to address that issue, it first must be determined whether presentation of such evidence at hearing is a permissible amendment to its application.

91. Palm Coast's application makes no specific claim that any patients in Marion County are not being admitted within 48 hours of referral. Under Florida Administrative Code Rule 59C-1.010(3)(b), once an application is deemed complete, no amendment is permitted.

92. When a CON becomes the subject of a formal administrative hearing, administrative law judges are frequently faced with the balance between Florida Administrative Code Rule 59C-1.010(3)(b) and the attributes of a de novo hearing. For example, it is well-settled that a CON applicant may not make material changes to its application at hearing on matters within the applicant's control that could have been included when the application was filed. See Manor Care Inc. v. Department of Health and Rehabilitative Services, 558 So. 2d 26, 28 (Fla. 1st DCA 1989).

93. Amendments to applications are permissible when the change in circumstances is beyond the applicant's control and the applicant had no knowledge of the information at the time of filing the original application. See Vitas Healthcare Corp. of Fla. v. Agency for Health Care Administration, Case Nos. 04-3856CON and 04-3886CON, 2006 Fla. Div. Adm. Hear. LEXIS 498, *91-93 (DOAH Oct. 18, 2006; AHCA Dec. 13, 2006).

94. The concept of control was defined in Charter Medical-Orange County, Inc. v. DHRS, Case No. 87-4748 (DOAH Nov. 28, 2988; AHCA Feb. 2, 1989), indicating that new information can only be considered if the applicant could not have reasonably known about the information at the time of the application.

95. In Big Bend Hospice, Inc. v. Agency for Health Care Administration, Case Nos. 02-0455CON and 02-0880CON, 2002 Fla. Div. Adm. Hear. LEXIS 1314, *76-78 (DOAH Nov. 7, 2002; AHCA Mar. 18, 2003), aff'd, 904 So. 2d 610 (Fla. 1st DCA 2005), an applicant made a special circumstances argument at final hearing even though there was a fixed-need pool. In that case, a motion to exclude evidence supporting the argument was denied. According to Big Bend, the special circumstances rule requires the applicant to demonstrate at least one of the three criteria; however, it does not prohibit applicants from showing that other "not normal circumstances" exist. In Big Bend at *77-78, the following four-part test was set forth:

Rule 59C-1.010(3)(b), Florida Administrative Code, does not prevent an applicant from presenting evidence not specifically set forth in the application when the evidence:

(a) is relevant to rule and statutory requirements;

(b) is revealed for the first time during discovery;

(c) is not a significant or material change to an application or is not a change to the proposed program; and

(d) is the type of evidence routinely presented to compare an applicant to an existing provider.

96. The evidence in question is a permissible amendment and is, therefore, admissible for the following reasons:

(a) it is relevant to statutory and rule criteria apart from showing a special circumstance, i.e. Sections 408.035(2), 409.035(3), and 408.035(7), Florida Statutes; (b) the evidence was revealed for the first time during discovery; (c) the evidence was not a change to the proposed program; and (d) the evidence is the type that, once discovered, would be routinely presented to compare an applicant to an existing provider.

97. Because of the lack of specific numbers of delayed admissions that are available from anecdotal evidence, Palm Coast could not have known that hundreds of HMC's patients each year were not being admitted within 48 hours of an initial contact. Health care facilities were not, and still are not, required by statute or rule to admit patients within 48 hours of

an initial contact or a complete referral or to tract or report such data.

98. The final question is whether HMC was failing to admit patients within 48 hours of referral. An admission consists of several components: (a) a physician's diagnosis and prognosis of a terminal illness; (b) a patient's or his or her authorized representative's expressed request for hospice care; (c) the informed consent of the patient or his or her authorized representative; (d) the provision of information regarding advance directives to the patient or his or her authorized representative; and (e) performance of an initial professional assessment of the patient. See Big Bend Hospice, Inc. v. Agency for Health Care Administration, Case No. 01-4415CON, 2002 Fla. Div. Adm. Hear. LEXIS 1584, *26-28 (DOAH Nov. 7, 2002; AHCA Apr. 8, 2003), aff'd, 904 So. 2d 610 (Fla. 1st DCA 2005).

99. At the time of the final hearing, there was no definition of a referral as used in Florida Administrative Code Rule 59C-1.0355(4)(d)3. Since that time, a referral has been defined as follows: (a) a request for hospice services by a terminally ill patient and/or his or her legal guardian or other person acting in a representative capacity; and (b) a written or verbal determination by a physician that the person is terminally ill. See The Hospice of the Florida Suncoast, Inc., et al v. Agency for Health Care Administration and Hospice of

the Palm Coast, Inc., Case No. 07-2906RX, at 44-46 (DOAH May 14, 2008)(See Endnote).

100. Applying the above-referenced definitions of a referral and an admission to the evidence here, it is clear that HMC provides services in a timely manner. HMC's self-imposed standard is to admit a patient within 24 hours of an initial contact. An initial contact is not the same as referral which requires a request from a patient, family members, or anyone else with authority to speak on behalf of the patient and a written or verbal doctor's order.

101. Out of 460 delayed admissions from January to November 2006, HMC was at fault for only four due to staffing problems. As to the other delayed admissions, HMC had no control over the time between an initial contact and a completed referral. There is no evidence that HMC failed to admit the remaining 456 patients on the same day that it received the completed referrals.

102. In this case, Palm Coast has not met its burden of proving that it is entitled to an award of the CON. There are no special circumstances that justify approving the application in the absence of numeric need.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED:

That a final order be entered denying CON Application
No. 9896.

DONE AND ENTERED this 21st day of August, 2008, in
Tallahassee, Leon County, Florida.



SUZANNE F. HOOD
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of August, 2008.

ENDNOTE

^{1/} In The Hospice of the Florida Suncoast, Inc., et al v. Agency for Health Care Administration and Hospice of the Palm Coast, Inc., Case Nos. 07-2906RX and 073021RX (DOAH May 14, 2008), it was determined that Florida Administrative Code Rule 59C-1.0355(4)(d)3. was invalid as to the parenthetical language, i.e., "(excluding cases where a later admission date has been requested)" and valid as to the remaining portions of the 48-hour rule, i.e., "[t]hat there are persons referred to hospice programs who are not being admitted within 48 hours. The applicant shall indicate the number of such persons."

COPIES FURNISHED:

Karin M. Byrne, Esquire
Agency for Health Care Administration
2727 Mahan Drive, Building 3
Mail Station 3
Tallahassee, Florida 32308

Mark A. Emanuele, Esquire
Panza, Maurer, & Maynard, P.A.
Bank of America Building, Third Floor
3600 North Federal Highway
Fort Lauderdale, Florida 33308

John F. Gilroy, III, Esquire
John F. Gilroy, III, P.A.
1435 East Piedmont Drive, Suite 215
Tallahassee, Florida 32308

Richard J. Shoop, Agency Clerk
Agency for Health Care Administration
2727 Mahan Drive, Mail Station 3
Tallahassee, Florida 32308

Holly Benson, Secretary
Agency for Health Care Administration
Fort Knox Building, Suite 3116
2727 Mahan Drive
Tallahassee, Florida 32308

Craig H. Smith, General Counsel
Agency for Health Care Administration
Fort Knox Building, Suite 3431
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.