STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HERNANDO-PASCO HOSPICE, INC.,

Petitioner,

vs. Case No. 14-5121

AGENCY FOR HEALTH CARE
ADMINISTRATION,

Respondent,

and

COMPASSIONATE CARE HOSPICE OF
THE GULF COAST, INC., AND WEST
FLORIDA HEALTH, INC.,

Intervenors.
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RECOMMENDED ORDER

On January 20, 2015, a final administrative hearing was held in this case in Tallahassee, Florida, before Elizabeth W. McArthur, Administrative Law Judge, Division of Administrative Hearings (DOAH).

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this fixed need pool challenge is whether Respondent erred in determining that there is a numeric need for one additional hospice program in service area 5A.

PRELIMINARY STATEMENT

On October 3, 2014, the Agency for Health Care Administration (AHCA or Respondent) published the results of its fixed need pool calculations for the next certificate of need (CON) application batching cycle. The published fixed need pool for hospice programs showed a numeric need for one new program in service area 5A, Pasco County. Hernando-Pasco Hospice, Inc. (HPH or Petitioner), timely notified AHCA of an error allegedly made in the fixed need pool number for hospice service area 5A. According to HPH, proper application of AHCA’s rule setting forth the numeric need methodology for hospice programs should have resulted in a fixed need pool number of zero instead of one, to

indicate no need for any new programs in service area 5A. Thereafter, HPH timely filed a petition for a disputed-fact administrative hearing to contest AHCA's preliminary decision that the published numeric need for service area 5A was not erroneous and would not be corrected. AHCA forwarded the matter to DOAH for the assignment of an administrative law judge to conduct the proceeding and issue a recommended order.

Compassionate Care Hospice of the Gulf Coast, Inc. (CCH), and West Florida Health, Inc. (WFH) (collectively, Intervenors), timely filed motions to intervene to support AHCA's fixed need pool determination, which were granted without objection.

Prior to the scheduled final hearing, AHCA and Intervenors filed various motions to dismiss or relinquish jurisdiction, which were denied. AHCA and Intervenors also sought official recognition of an HPH motion to intervene in another fixed need pool challenge involving a different service area. They claimed HPH's allegations in the motion were inconsistent with HPH's positions in this case. Official recognition was denied because the issues in the two cases were demonstrably different, and HPH's statements in the motion to intervene, standing alone, were not inconsistent with HPH's positions in this case.

The parties filed a joint pre-hearing stipulation. To the extent relevant, the parties' stipulations are adopted herein.

At the hearing, the parties offered Joint Exhibits 1 through 5, which were admitted. HPH presented the testimony of: Marisol Fitch, the recently appointed supervisor of AHCA's CON unit; and Jay Cushman, accepted as an expert in health planning with an emphasis in hospice programs. HPH's Exhibits 1 through 8, 11 through 13, and 16 through 18 were admitted.

AHCA presented additional testimony of Marisol Fitch, and AHCA's Exhibits A and B were admitted. CCH did not present any additional witnesses; CCH's Exhibits 1, and 6 through 9 were admitted. WFH did not present any witnesses or exhibits, adopting the presentations by AHCA and CCH.

At the end of the hearing, the parties agreed to a ten-day deadline after the filing of the transcript in which to file proposed recommended orders (PROs). The one-volume Transcript was filed on January 26, 2015. Petitioner's unopposed motion for an extension of the PRO deadline was granted. The parties timely filed PROs by the extended deadline, which have been considered in preparing this Recommended Order.

FINDINGS OF FACT

A. The Parties

1. HPH is a licensed provider of hospice services in service area 5A, Pasco County.

2. AHCA is the state agency responsible for administering Florida's CON program, by which AHCA determines whether there is

a community need for regulated health care facilities and services as a prerequisite to licensure and operation.

3. Intervenors CCH and WFH alleged in their motions to intervene that they are filing CON applications by which they will be seeking to fill the allegedly erroneous numeric need for one new hospice program in service area 5A. Their allegations are accepted as true. They were not disputed; instead, the parties stipulated to the legal conclusion that follows from those alleged facts: that all parties, including Intervenors, have standing to participate in this proceeding.

B. Numeric Need and Evolution of the Fixed Need Pool Procedure

4. As part of its responsibilities under the CON laws, AHCA is required to establish, by rule, uniform need methodologies for CON-regulated health facilities and services. Those need methodologies must take into account "the demographic characteristics of the population, the health status of the population, service use patterns, standards and trends, geographic accessibility, and market economics." § 408.034(3), Fla. Stat. (2014).[1/]

5. Florida Administrative Code Rule 59C-1.0355 codifies the uniform need methodology that applies to hospice programs. The numeric need methodology reflected in the current rule was adopted in 1995, and has remained essentially the same since that time. The rule defines 27 service areas, and AHCA uses the need

methodology in rule 59C-1.0355(4)(a) to calculate numeric need for hospice programs for each of the 27 service areas.

6. AHCA accepts CON applications for new hospice programs in batching cycles twice each year. Overall, the CON program has four batching cycles annually; regulated facilities and services are split up and assigned to alternating semi-annual batching cycles. The timetable basis of the batching cycle was developed by the Department of Health and Rehabilitative Services (HRS), AHCA's predecessor, as a mechanism to allow for simultaneous filing and comparative review of competing CON applications.[2/]

7. The "fixed need pool" procedure was developed to address problems sorting out comparative review rights, which were described in the landmark decision, Gulf Court Nursing Center v. Department of Health and Rehabilitative Services, 483 So. 2d 700 (Fla. 1st DCA 1985) (Gulf Court).[3/] Gulf Court held that in order to stay true to the right to comparative review in the context of the CON laws, HRS had to require that CON applications filed in a batching cycle had to address a specific need projection, which would be the "fixed" need pool applicable to that batching cycle. Id. at 706-707.

8. The first step towards creating a "fixed" need pool for each batching cycle involved HRS's interpretation of its uniform need methodology rules to require that the data plugged into the calculation of numeric need had to be the data available at the

time the applications were filed and reviewed, rather than the most recent data available at the time of an administrative hearing. In Meridian v. Department of Health and Rehabilitative Services, 548 So. 2d 1169 (Fla. 1st DCA 1989), the court affirmed an HRS decision on nursing home CON applications that turned on HRS's interpretation of its bed need rule providing that "the three year projections of population shall be based upon the official estimates and projections adopted by the Office of the Governor." The court found "no error in HRS's decision that, for purposes of determining the number of beds in the planning horizon fixed pool, [the rule] is properly construed to mean that the population estimates adopted by the Governor's office at the time the initial applications were filed and reviewed must be used, rather than the most recent estimates adopted by that office at the time of the hearing[.]" Id. The court explained:

> The logic of HRS's position is unassailable. It gives effect to the notion that, pursuant to applicable principles of comparative review, the number of beds in the fixed pool . . . to which the applicants' applications were addressed (as shown by the formula) would become set . . . for purposes of comparative review, even though new data coming to light in later months or years might reflect a different bed need when factored into the formula.

Id. at 1170-1171.

9. Over time, the interpretation approved in Meridian was codified in the need methodology rules, by the addition of

language that set a specific cut-off time, at which point the available data would be utilized. Taking the concept one step further, AHCA adopted a "fixed need pool" rule whereby before each batching cycle, AHCA uses the data called for by its need methodologies, runs the calculations, and publishes the resulting "fixed need pool" numbers in what is now the Florida Administrative Register. Fla. Admin. Code R. 59C-1.008(2).

10. AHCA's fixed need pool rule allows a ten-day window following publication for any person "who identifies an error in the fixed need pool numbers" to advise AHCA of the error. If AHCA agrees, it will make the correction and re-publish the fixed need pool number(s). If AHCA disagrees, the fixed need pool publication may be challenged in a proceeding such as this one, but only by a party that timely advised AHCA of an error.

C. HPH's fixed need pool challenge

11. HPH timely advised AHCA of an alleged error in the fixed need pool number published for service area 5A. HPH contended that AHCA did not use the correct death data specified in the rule methodology, and that had AHCA used the data required by the rule methodology, AHCA's calculation would have resulted in a fixed need pool of zero, meaning no numeric need for an additional hospice program, in service area 5A. When AHCA disagreed with HPH's contention, HPH timely filed its petition for a disputed-fact administrative hearing.

12. The fixed need pool for hospice service area 5A, as determined in this proceeding, will ultimately govern AHCA's decisions on CON applications filed in the October 2014 batching cycle. When there is a numeric need for an additional program, a CON application seeking to fill that need is generally approvable. However, in the absence of numeric need for an additional program, a CON application will not be approved unless the applicant can demonstrate "special circumstances."

D. Numeric Need Methodology for New Hospice Programs

13. AHCA's hospice need methodology is set forth in rule 59C-1.0355(4)(a). Though lengthy and complicated, the current rule methodology is set forth in its entirety below:

> Numeric need for an additional Hospice program is demonstrated if the projected number of unserved patients who would elect a Hospice program is 350 or greater. The net need for a new Hospice program in a service area is calculated as follows:
>
> (HPH) - (HP) ≥ 350
>
> where:
> (HPH) is the projected number of patients electing a Hospice program in the service area during the 12 month period beginning at the planning horizon. (HPH) is the sum of (U65C × P1) + (65C × P2) + (U65NC × P3) + (65NC × P4)
>
> where:
> U65C is the projected number of service area resident cancer deaths under age 65, and P1 is the projected proportion of U65C electing a Hospice program.

65C is the projected number of service area resident cancer deaths age 65 and over, and P2 is the projected proportion of 65C electing a Hospice program.

U65NC is the projected number of service area resident deaths under age 65 from all causes except cancer, and P3 is the projected proportion of U65NC electing a Hospice program.

65NC is the projected number of service area resident deaths age 65 and over from all causes except cancer, and P4 is the projected proportion of 65NC electing a Hospice program.

The projections of U65C, 65C, U65NC, and 65NC for a service area are calculated as follows:

U65C	=	(u65c/CT)	x	PT
65C	=	(65c/CT)	x	PT
U65NC	=	(u65nc/CT)	x	PT
65NC	=	(65nc/CT)	x	PT

where:
u65c, 65c, u65nc, and 65nc are the service area's current number of resident cancer deaths under age 65, cancer deaths age 65 and over, deaths under age 65 from all causes except cancer, and deaths age 65 and over from all causes except cancer.

CT is the service area's current total of resident deaths, excluding deaths with age unknown, and is the sum of u65c, 65c, u65nc, and 65nc.

PT is the service area's projected total of resident deaths for the 12-month period beginning at the planning horizon.

"Current" deaths means the number of deaths during the most recent calendar year for which data are available from the Department of Health, Office of Vital Statistics at least 3 months prior to publication of the Fixed Need Pool.

“Projected” deaths means the number derived by first calculating a 3-year average resident death rate, which is the sum of the service area resident deaths for the three most recent calendar years available from the Department of Health, Office of Vital Statistics at least 3 months prior to publication of the Fixed Need Pool, divided by the sum of the July 1 estimates of the service area population for the same 3 years. The resulting average death rate is then multiplied by the projected total population for the service area at the mid-point of the 12-month period which begins with the applicable planning horizon. Population estimates for each year will be the most recent population estimates from the Office of the Governor at least 3 months prior to publication of the Fixed Need Pool. The following materials are incorporated by reference within this rule; Department of Health, Office of Vital Statistics Florida Vital Statistics Annual Reports entitled “Deaths” for 2012, 2011 and 2010, and Florida Population Estimates and Projections by AHCA District 2010 To 2030, released September, 2013. These publications are available on the Agency website at http://ahca.myflorida.com/MCHQ/CON_FA/Publications/index.shtml and <u>http://www.flrules.org/Gateway/reference.asp?No=Ref-03907</u>.

The projected values of P1, P2, P3, and P4 are equal to current statewide proportions calculated as follows:

P1 = (Hu65c/Tu65c)
P2 = (H65c/T65c)
P3 = (Hu65nc/Tu65nc)
P4 = (H65nc/T65nc)

where:
Hu65c, H65c, Hu65nc, and H65nc are the current 12-month statewide total admissions of Hospice cancer patients under age 65, Hospice cancer patients age 65 and over, Hospice patients under age 65 admitted with all other diagnoses, and Hospice patients age 65 and

over admitted with all other diagnoses. The current totals are derived from reports submitted under subsection (8) of this rule. Tu65c, T65c, Tu65nc, and T65nc are the current 12-month statewide total resident deaths for the four categories used above.

(HP) is the number of patients admitted to Hospice programs serving an area during the most recent 12-month period ending on June 30 or December 31. The number is derived from reports submitted under subsection (8) of this rule.

350 is the targeted minimum 12-month total of patients admitted to a Hospice program.

14. The hospice need methodology establishes the standard that numeric need for a new hospice program exists when the difference between projected hospice admissions and the current admissions in a service area is equal to or greater than 350, but when this difference is less than 350, no numeric need exists.

15. The methodology codifies AHCA's policy choices for how to project hospice admissions and over what period of time. The rule selects two years as the appropriate planning horizon, so that the methodology projects the number of hospice admissions expected in the service area for the twelve-month period beginning two years after applications are filed.

16. AHCA's policy judgments are reflected in the formula's details regarding what evidentiary data should be considered, what values should be placed on the different categories of data, and what relationship the separate categories of data should bear

to each other in calculating numeric need. The formula codifies AHCA's judgments regarding how the following categories of data should be used to project admissions: historic death data, including numbers of deaths, causes of death, and age at time of death; population data, including current population numbers and population projections for the planning horizon; and historic admissions data, including numbers of hospice admissions, diagnoses at admission, and age of admitted patients. The formula also reflects AHCA's judgment regarding the significance of comparative service area data and statewide data.

17. The data ingredients used in the methodology include the state's official death statistics issued by the Department of Health Office of Vital Statistics in its Florida Vital Statistics Annual Reports, which provide aggregate numbers of deaths and breakdowns by cause of death and age categories; the state's official population estimates and projections issued by the Office of the Governor; and admissions data from semi-annual reports that licensed hospices are required to submit to AHCA.

18. Imbedded in the lengthy hospice need methodology rule is language that defines the specific cut-off time at which the data that is available will be used to calculate numeric need, as has been provided in all of AHCA's uniform numeric need methodology rules to codify the holding of Meridian, supra. Thus, where the methodology calls for use of "current" deaths,

rule 59C-1.0355(4)(a) has, at all times since the methodology was adopted in 1995, provided as follows:

> "Current" deaths means the number of deaths during the most recent calendar year for which data are available from the . . . Office of Vital Statistics[4/] at least 3 months prior to publication of the Fixed Need Pool.

19. Similarly, the rule defines "projected" deaths as used in the methodology, and identifies the population data to be used in connection with projecting deaths. The current language, which has remained materially unchanged since 1995, provides:

> "Projected" deaths means the number derived by first calculating a 3-year average resident death rate, which is the sum of the service area resident deaths for the three most recent calendar years available from the . . . Office of Vital Statistics at least 3 months prior to publication of the Fixed Need Pool, divided by the sum of the July 1 estimates of the service area population for the same 3 years. The resulting average death rate is then multiplied by the projected total population for the service area at the mid-point of the 12-month period which begins with the applicable planning horizon. Population estimates for each year will be the most recent population estimates from the Office of the Governor at least 3 months prior to publication of the Fixed Need Pool.

20. The hospice need methodology uses a comparable cut-off for hospice admissions data, which is the third data ingredient used to calculate numeric need. The methodology defines current hospice admissions (HP) as "the number of patients admitted to

Hospice programs serving an area during the most recent 12-month period ending on June 30 or December 31 [as] derived from reports submitted under subsection (8)[.]" While not expressed as a cut-off counting backwards from the fixed need pool publication, the same objective is achieved by the data submission deadlines, which serve to define the most recent 12-month period for which data reports are available. Paragraph (8) of the hospice rule requires semi-annual reports by hospice providers, with reports covering January through June each year due by July 20; and reports covering July through December due by January 20. Thus, for the October 3, 2014, published fixed need pool, the most recent twelve-month period for which AHCA had admissions data reports was July 1, 2013, through June 30, 2014. The data reports through June 30, 2014, were due by July 20, 2014, two and one-half months before the fixed need pool publication.

21. The rule methodology itself sets the standards for numeric need for hospice programs. The methodology ingredients are evidentiary facts--actual death data and population numbers from two different executive state offices, and actual admissions data from hospice providers. The facts used to calculate need are not themselves standards, specifications, or policies; they have no independent significance or effect. Their significance comes only from the methodology, which prescribes how the facts are to be used to calculate need.

22. The hospice rule remained the same from 1995, when the current methodology was adopted, until 2009. In 2009, AHCA amended the hospice need rule in reaction to the initiation of two types of challenges--one, a fixed need pool challenge; another, an unadopted rule challenge pursuant to section 120.56(4), Florida Statutes, neither of which were shown to culminate in a final order on the merits. The 2009 amendment added the following two sentences after the definitions of "current" deaths, "projected" deaths, and population estimates:

> The following materials are incorporated by reference within this rule; Department of Health Office of Vital Statistics Florida Vital Statistics Annual Report 2007, Deaths, and the Office of the Governor Florida Population Estimates and Projections by AHCA District 2000 To 2020, released September, 2008. These publications are available on the Agency website at http://ahca.myflorida.com/MCHQ/CON_FA/index.shtml.

Since 2009, this provision has been amended three times to change the dates of the referenced materials. At no time has the referenced materials included the hospice admission reports used as the third data ingredient to calculate need.

E. AHCA's calculation of numeric need for service area 5A

23. At issue in this fixed need pool challenge is whether AHCA failed to follow its rule methodology, by failing to use the correct data for "current" deaths specified in the rule. By extension, this dispute also implicates the correctness of data

used for "projected" deaths, which adds current deaths to the two prior years' deaths to calculate a three-year average death rate.

24. For "current" deaths, AHCA utilized death data from the 2012 Florida Vital Statistics Annual Report. For "projected" deaths, AHCA utilized death data from the Florida Vital Statistics Annual Reports for 2010, 2011, and 2012.

25. Death data for calendar year 2013 were available from the Department of Health Office of Vital Statistics by no later than May 29, 2014, when the 2013 Florida Vital Statistics Annual Report was published and made available on the Department of Health's website. Thus, 2013 was the most recent calendar year for which death data were "available from" the Department of Health Office of Vital Statistics at least three months--indeed, over four months--before the fixed need pool publication on October 3, 2014.

26. AHCA's rule defines "current" deaths as used in the numeric need methodology in clear terms, by specifying the data source and the cut-off time. The purpose of the three-month cut-off time specified in the rule is to allow AHCA sufficient time to obtain the data, plug the data into the numeric need methodology, run the calculations, and publish the results. AHCA had more than sufficient time to do so in this case. AHCA should have applied its rule as written, by using the 2013 death data.

27. Had AHCA used the current death data defined by its rule to calculate numeric need, the result for service area 5A would have been zero numeric need. Thus, the failure to use current death statistics, in the manner designed by the methodology, in relation to current hospice admissions data and population numbers, materially changed not only the resulting need number, but also, the methodology itself. Instead of considering 2013 death data in relation to hospice admissions for July 2013 through June 2014, AHCA used older death statistics, while still using the hospice admissions data for July 2013 through June 2014. The calculation does not reflect the values and relationship of the different data types called for by AHCA's policy, as set forth in the rule methodology. The fixed need pool number of one new hospice program needed was an error.

F. AHCA's proffered interpretation of its hospice rule

28. AHCA and Intervenors do not effectively refute the fact that death data for calendar year 2013 were "available from" the Department of Health Office of Vital Statistics more than three months before the publication of the fixed need pool, which is the language of the rule. Instead, they argue that the data were not "available to" AHCA to use to calculate the fixed need pool, because they contend that AHCA is required pursuant to section 120.54(1)(i)1., Florida Statutes, part of the Administrative Procedure Act (APA), to first incorporate the 2013 Vital

Statistics Annual Report in its rule before AHCA can use the facts in that report to calculate numeric need.

29. AHCA articulated its interpretation of its rule as follows in the Joint PRO filed by AHCA and Intervenors:

> The Agency interprets Rule 59C-1.0355(4)(a), F.A.C., to require use of the death reports specifically incorporated into the rule in determining the meaning of "current" deaths used in the hospice fixed need pool methodology. To the extent there is any conflict between the rule's requirement that the Agency use the most current death data available and the specific incorporation of the 2012 death report, the Agency, based on the statutory mandates of section 120.54(1)(i)1, F.S., interprets the rule to require the data expressly incorporated until there is a formal modification by properly enacted rule. The Agency reconciles the rule's definition of "current" deaths, or the number of deaths during the most recent calendar year for which data are available from the Department of Health, Office of Vital Statistics, at least three months prior to publication of the Fixed Need Pool, with the fact that the death data available to the Agency is the death data specifically incorporated by reference. (Jt. PRO at 11-12).

30. AHCA's proffered interpretation is contrary to the clear words that it chose to use in its rule. It is neither interpretation nor reconciliation to change the words "available from" the Office of Vital Statistics to "available to" AHCA. It is neither reconciliation nor interpretation to ignore the rule's requirement to use the most current death data available from the Office of Vital Statistics.

31. AHCA does not contend that it added the incorporating reference based on a belief that historic death data issued by the Office of Vital Statistics meets the APA's definition of a rule. Instead, AHCA explained that it added the references to specific data reports to identify the data used to calculate the fixed need pool and make it available to those interested in obtaining that data. Now, having added references to specific data reports in its rule, AHCA contends that it does not matter whether the data reports meet the definition of a rule; AHCA's position is that it must update the rule references before the current data can be used.

32. The position of AHCA and Intervenors assumes that the hospice rule requires that the referenced vital statistics reports must be used in lieu of the defined "current" death data. However, the hospice rule simply does not say what AHCA and Intervenors argue it says. The language chosen by AHCA in 2009 and left unchanged since then simply identifies specific data reports, without stating how or when those reports may or must be used. No operative "action" words accompany the data report references. Instead, the references are informational: here are some reports and here is a way to obtain them.

33. If in 2009, AHCA had rewritten its hospice rule to say that for purposes of the methodology, "current" deaths means death data in the most recent Vital Statistics Annual Report that

has been promulgated by AHCA as a rule and incorporated in this rule by reference, then the position of AHCA and Intervenors would be well-taken, even if it would make no sense to promulgate death statistics--historic, evidentiary facts--as rules. But AHCA clearly did not choose such a path.

34. No evidence was presented to document the 2009 rulemaking process, such as the rulemaking record or correspondence that AHCA may have submitted to the Joint Administrative Procedures Committee to explain how it reconciled the "current" deaths definition with the incorporation of an older Vital Statistics Annual Report. While CHC asked Ms. Fitch whether the subject of the seeming conflict between the two provisions was discussed in the public hearing, Ms. Fitch candidly responded that she did not know; she has only been at AHCA since 2011. No testimony was offered by any witness with knowledge. The reasonable inference, especially in the absence of any contradictory evidence, is that AHCA purposefully chose to leave intact the rule's requirement to use "current" death data, as that term has been defined since 1995, and to simply add a passive reference to specific data reports as one way to inform those interested in identifying the data reports used for the fixed need pool calculations.

35. AHCA's prior practice between 2009 and 2014 with regard to the Vital Statistics Annual Reports adds credence to the view

that AHCA simply intended to offer the data reports as part of its rule for informational purposes. Evidence of the rule amendment history offered at hearing established that in 2009, AHCA promulgated a rule amendment that incorporated by reference the 2007 Vital Statistics Annual Report. In 2010, AHCA promulgated a rule amendment that changed the reference from the 2007 report to the 2008 Vital Statistics Annual Report. In 2012, AHCA promulgated a rule amendment that changed the reference from the 2008 report to the 2010 Vital Statistics Annual Report. In the most recent rule amendment adopted in April 2014, at the suggestion of a public hearing participant AHCA left the reference to the 2010 report, and added references to the 2011 and 2012 Vital Statistics Annual Reports. The language of these references remained passive, in the same style used since 2009.

36. AHCA's prior practice demonstrates that before this case, AHCA never interpreted its rule to require use of only the specific vital statistics reports that were incorporated by reference. The hospice rule methodology requires AHCA to use historic death data for three consecutive calendar years to calculate "projected" deaths. Thus, twice each year in calculating the fixed need pools, AHCA used at least two Vital Statistics Annual Reports that were not incorporated by reference in its rule. And to this day, AHCA has never incorporated by reference the Vital Statistics Annual Report for 2009, yet the

death data in that report was used to calculate need for hospice programs for three consecutive years.

37. AHCA's prior practice of intermittently undergoing rule promulgation to update the references to specific Vital Statistics Annual Reports and only including some of the reports actually used to calculate numeric need, is consistent with the view that the past reports have been adopted by reference for informational purposes only.

38. No explanation was offered as to why AHCA promulgated references to only two of the three types of data reports used in the hospice need methodology calculations. The failure to adopt references to specific admissions reports would be inconsistent with the asserted position that the APA requires AHCA to promulgate as rules the data reports it uses to calculate need. But the failure to incorporate the hospice admissions reports as rules would square with the notion that the purpose of the passive references to the vital statistics and population reports is informational only. AHCA uses other means to make the hospice admissions reports available to interested persons.

39. Interpreting the hospice rule's references to specific data reports as being for informational purposes only gives effect to all of the rule language chosen by AHCA--not only to the part of the rule that identifies specific reports (but does not mandate their use), but also, to the unchanged parts of the

rule defining “current” deaths and “projected” deaths as used in the methodology. No other interpretation of these provisions was suggested to give effect to all parts of AHCA’s adopted rule.

G. HPH’s unadopted rule argument

40. AHCA’s position asserted in this proceeding gives rise to a problematic unadopted rule issue raised by HPH.

41. AHCA contends that it is obligated under the APA’s rulemaking statute to incorporate by reference the specific data reports it uses to calculate numeric need. AHCA contends that it must undergo rule promulgation to add references to each annual iteration of the official vital statistics report and the official population report before the data in those reports can be used. Leaving aside for now the fact that AHCA’s rule does not mandate use of the referenced reports and excludes references to the third type of data report used for the need calculation, AHCA’s position creates a tremendous rulemaking burden. Issuance of the death data and population data reports is not synchronized; indeed, over the years, either or both annual reports have not come out when expected.

42. The facts in this case illustrate that point. When the 2013 death data became available, HPH made AHCA aware of that fact. Yet AHCA did not immediately begin rule promulgation in May 2014, when it could have done so.

43. In October 2014, AHCA's response to HPH's error notice with regard to the service area 5A fixed need pool was twofold: first, AHCA disagreed that it should have used the 2013 death data available from the Office of Vital Statistics, because AHCA claimed it was required under the APA to amend its rule first before using the current death data; but second, AHCA had decided not to proceed with rulemaking right away, because it wanted to await the new population report from the Office of the Governor so that it could update both reports in one promulgation process.

44. At hearing, AHCA explained that it was not pronouncing a "policy" that it would always await the population report before beginning rule promulgation. Once again, AHCA's prior practice is illuminating, because AHCA has undertaken rule promulgation approximately every other year, to update the references to the two annual data reports in tandem.

45. AHCA characterized the decision to delay promulgation as a "case-by-case" decision based on a variety of factors. The facts identified were that the population report was not yet available, and that AHCA had just finished its last promulgation go-round in April 2014.

46. The very fact that AHCA has determined that it may choose to undergo rulemaking or to delay rulemaking, and that it will make its decision on the basis of administrative convenience factors, is either an agency statement of general applicability,

prescribing the agency's rulemaking practice or procedure in ways that are different from what any statute or rule provides, or it is AHCA's confirmation that updating the data report references in its rule is inconsequential.

47. AHCA's position that it must undergo rulemaking before using the most recent facts to calculate its fixed need pools is one that creates the urgency to undergo and complete rulemaking. AHCA's administrative convenience would not be a reason to not expeditiously promulgate rules, if indeed AHCA were correct that rulemaking is required. The APA would dictate that AHCA proceed as soon as practicable and feasible. If AHCA maintains that it must promulgate facts as rules and updated facts as amended rules, then AHCA's position dictates that AHCA necessarily must be in endless rulemaking for that purpose.

48. Anticipating this, AHCA asserted that its delay was justifiable because AHCA did not think it was "practicable or feasible" to complete the rulemaking process by the October 3, 2014, fixed need pool publication date. However, whether AHCA could have completed the process would not be the question asked by the APA if rulemaking was required; the issue would be why it was not practicable or feasible for AHCA to initiate rulemaking. Moreover, AHCA's reasoning in this regard was not persuasive; while AHCA's prior rulemaking timelines sometimes were longer than four months, those timelines included an internal routing

and review process, which would not be necessary if the sole rulemaking activity were to update a reference to a data report.

49. The picture got worse by the time of hearing: as of January 20, 2015, AHCA was still waiting for the new population report from the Office of the Governor, and AHCA still had not begun rulemaking. AHCA’s unadopted statement that it can choose not to proceed expeditiously to rule promulgation, while at the same time asserting that rule promulgation is required, would doom at least two batching cycles to stale 2012 death data; the next fixed need pool publication date is just around the corner.

50. It appears that AHCA has not thought through sufficiently the ramifications of its position. As HPH’s expert reasonably explained, important health planning objectives are served by considering the most current data possible. AHCA’s uniform need methodology rules require AHCA to use the most current data possible to calculate numeric need, compromised only by the dictates of Gulf Court, as recognized in Meridian. Gulf Court and Meridian acknowledge that it is necessary to make some sacrifice in the health planning objectives served by using the most current data possible, in order to achieve a process that ensures fairness to applicants entitled to comparative review. This balance has been achieved by cutting off the opportunity to use the most recent data as evidence in administrative hearings, and moving up the time for collecting the facts used to calculate

need. It is one thing to carry out the fixed need pool process by providing a cut-off point for collecting the data used to calculate need; it is another matter entirely to suggest that the fixed need pool process somehow transforms evidentiary facts into statements of policy that have to be promulgated as rules. But if that is AHCA's position, AHCA cannot choose for reasons of administrative convenience to not move forward immediately to promulgate the new facts as rules.

51. When AHCA's representative was asked whether it was important to use the most current data possible when calculating numeric need under the hospice methodology, her response was that "we don't go with importance. We go with what's incorporated." (Tr. 31). However, the hospice need methodology serves as AHCA's expression of the importance of using "current" death data, tempered only by the need for a cut-off point that gives AHCA enough time to collect the data, calculate need, and publish the fixed need pool.

52. AHCA carries out its important health planning policies to use current data as the ingredients to calculate numeric need pursuant to its other uniform need methodologies. For example, the neonatal intensive care bed need rule methodology uses birth statistics like the hospice rule uses death statistics that are available from the Office of Vital Statistics as of a specified cut-off time before the fixed need pool publication. See Fla.

Admin. Code R. 59C-1.042(3). And that rule, as well as AHCA's other uniform need methodology rules, use population estimates issued by the Office of the Governor as of a specified cut-off time before the fixed need pool publication. Id.; see also Fla. Admin. Code R. 59C-1.036(3)(c) (nursing facility bed need rule); 59C-1.039(5)(c) (comprehensive medical rehabilitation inpatient bed need rule). None of AHCA's other need rules incorporate any data reports by reference. AHCA's representative testified that because the other rules do not incorporate data reports by reference, AHCA uses the most current data available as of the cut-off time specified in each rule to calculate numeric need for the fixed need pool publication.

53. AHCA's representative acknowledged that there is nothing in the CON laws requiring AHCA to promulgate death statistics or population data as rules, or to incorporate data reports by reference. Thus, AHCA's proffered interpretation of its hospice need rule (see Finding of Fact ¶ 29) is borne solely of AHCA's understanding of what the APA requires.

54. AHCA's representative testified that AHCA is considering overhauling all of its need rules and adopting another rule that will serve only as the repository to incorporate by reference all data reports (presumably including admissions reports) used in all need methodologies. But AHCA has not taken any formal steps in this direction yet. Interestingly,

AHCA's representative acknowledged that a "rule" cataloging and incorporating by reference the data reports used in AHCA's need methodologies would not have any policy implications.

CONCLUSIONS OF LAW

55. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

56. AHCA's preliminary fixed need pool determination for hospice service area 5A, timely challenged by HPH, is the proposed agency action at issue in this proceeding.

57. As an existing hospice provider in service area 5A, HPH is a candidate for party status to oppose a CON application to establish a new hospice program in service area 5A. See § 408.039(5)(c), Fla. Stat. HPH's substantial interests are adversely affected by AHCA's fixed need pool publication showing a numeric need for one new hospice program in service area 5A. As the parties stipulated, HPH has standing.

58. Intervenors are potential applicants seeking to establish a new hospice program in service area 5A. The prospect for approval of one of the applications would be greatly enhanced if HPH's challenge to the fixed need pool does not succeed. As the parties stipulated, Intervenors have standing.

59. HPH has the burden of proving by a preponderance of the evidence that AHCA made an error in the published fixed need pool

of one new hospice program needed in service area 5A for the second batching cycle of 2014. See generally Balino v. Dep't of Health & Rehab. Servs., 348 So. 2d 349, 350 (Fla. 1st DCA 1977); § 120.57(1)(j), Fla. Stat.

60. The premise of HPH's challenge to the fixed need pool number is that AHCA's need calculation failed to apply the terms of the hospice numeric need methodology rule, because AHCA did not use 2013 death data where the methodology calls for "current" deaths. According to the clear dictate of the rule, the term "current" deaths as used in the methodology "means the number of deaths during the most recent calendar year for which data are available from the Department of Health, Office of Vital Statistics at least 3 months prior to publication of the Fixed Need Pool." Fla. Admin. Code R. 59C-1.0355(4)(a).

61. HPH proved that 2013 is the most recent calendar year for which death data were "available from the Department of Health, Office of Vital Statistics at least 3 months prior to publication of the Fixed Need Pool." Death data for calendar year 2013 were available from that Office by May 29, 2014, more than four months prior to the fixed need pool publication.

62. As a threshold matter, AHCA and Intervenors argue that either HPH's challenge is not cognizable in a fixed need pool challenge, or that there are no disputed issues of material fact

and that DOAH should have relinquished jurisdiction to AHCA to resolve pure legal issues.

63. A fixed need pool challenge may properly be predicated on an argument that AHCA did not properly apply its need methodology rule in calculating numeric need. See, e.g., Hospice of Lake & Sumter, Inc. v. Ag. for Health Care Admin. and Hope Hospice and Community Servs. v. Ag. for Health Care Admin., Consolidated Case Nos. 08-6215 and 08-6218 (DOAH Order Relinquishing Jurisdiction, Feb. 2, 2009) (Lake and Hope), at 9 (fixed need pool challenge is proper when based on an alleged misapplication of the hospice need methodology or an alleged failure to update population data from a previous batching cycle); accord Big Bend Hospice v. Ag. for Health Care Admin., Case No. 01-4415 (Fla. DOAH Nov. 7, 2002; AHCA April 8, 2003), aff'd, 904 So. 2d 610 (Fla. 1st DCA 1995). HPH's challenge falls within these parameters, and is proper.

64. The argument that DOAH should have relinquished jurisdiction because of a lack of disputed material facts was advanced repeatedly before, during, and after hearing. AHCA and Intervenors attempted to characterize HPH's challenge as one that only raises legal issues that are, in effect, attacks on AHCA's hospice need rule. However, AHCA disputed HPH's allegation that 2013 death data were available from the Office of Vital Statistics. As is evident from the Findings of Fact above, HPH's

challenge is directed not to the rule itself, but to the convoluted interpretation proffered by AHCA and Intervenors in an attempt to reconcile seemingly conflicting parts of the rule. See Finding of Fact ¶ 29.

65. As a general proposition, AHCA's interpretation of its rules is entitled to great weight and deference, particularly where the interpretation is borne of the agency's construction of the statutes administered by the agency. See, e.g., Lakeland Reg'l Med. Ctr. v. Ag. for Health Care Admin., 917 So. 2d 1024, 1029 (Fla. 1st DCA 2006).

66. To the extent AHCA's proffered interpretation is not evident from the language of its rule or discoverable precedents, AHCA's interpretation is subject to proof by expert testimony, documentary opinions, or other evidence appropriate to the nature of the issue involved, and AHCA must expose and elucidate the reasons for its actions with competent, substantial evidence on record. See, e.g., Courts v. Ag. for Health Care Admin., 965 So. 2d 154, 157 (Fla. 1st DCA 2007); Brookwood-Walton Cnty. Conv. Ctr. v. Ag. for Health Care Admin., 845 So. 2d 223, 229 (Fla. 1st DCA 2003). Thus, the reasonableness of AHCA's proffered interpretation of its hospice rule (see Finding of Fact ¶ 29), not evident from the rule language or precedent, is a factual matter for determination. Further, to the extent AHCA's proffered interpretation is inconsistent with its prior practice,

the reasonableness of AHCA’s explanation for the inconsistencies is also a factual matter for determination based on the evidence. § 120.68(7)(e)3., Fla. Stat.

67. The general deference afforded to an agency’s interpretation of its rules is not without limit, even when the interpretation is based on statutes over which the agency has substantive jurisdiction. Thus, when an agency’s interpretation of its rule is contrary to the words used in the rule, the agency properly is held to the “rule as written, and not as [the agency] has seen fit to modify it.” Boca Raton Artificial Kidney Ctr. v. Dep’t of Health & Rehab. Servs., 493 So. 2d 1055, 1057 (Fla. 1st DCA 1986) (where a CON need rule adopted a planning horizon of one year from when the CON application was completed, HRS could not change the rule by re-interpreting it to mean one year from the final hearing); Vantage Healthcare Corp. v. Ag. for Health Care Admin., 687 So. 2d 306 (Fla. 1st DCA 1997) (AHCA is required to follow its rules; agency action that conflicts with the agency’s own rules is erroneous).

68. Where, as here, an agency has adopted clear rule language that has been interpreted and applied by the agency in accordance with the clear words in the rule, the agency may not simply change its interpretation of the rule language. Instead, the words must be applied as written and as interpreted unless and until the words in the rule are changed. Id.; Cleveland

Clinic Fla. Hosp. v. Ag. for Health Care Admin., 679 So. 2d 1237, 1242 (Fla. 1st DCA 1996).

69. AHCA's hospice need rule defines "current" deaths in language that is clear and that has remained unchanged since first codified in 1995. The plain language of the current deaths definition in the hospice rule requires AHCA to use the 2013 death data to calculate numeric need. Lake and Hope, supra, at 9; Big Bend Hospice, supra.

70. AHCA and Intervenors contend that AHCA's use of old (2012) death data was consistent with the hospice rule's definition of "current" deaths, because 2013 death data were not "available to" AHCA to use. But that is not what the rule says. AHCA's rule requires the use of the 2013 death data because the 2013 data were available from the Office of Vital Statistics before the specified cut-off. The language chosen by AHCA for its rule is "available from" the Office of Vital Statistics, not "available to" AHCA. AHCA's interpretation requires a re-writing of the rule that is not permissible.

71. AHCA and Intervenors argue that the 2009 amendment to the hospice rule to add references to specific data reports requires AHCA to promulgate rule amendments incorporating each new data report before the data can be used to calculate numeric need. This argument fails on multiple levels.

72. First, the rule, as amended in 2009 and three times thereafter to its current form, simply does not say that AHCA must use the referenced data reports to calculate numeric need. Instead, the rule continues to provide that where the methodology calls for "current" deaths, that means the death statistics for the most recent calendar year for which data are available from the Office of Vital Statistics at least three months prior to the fixed need pool publication.

73. In this regard, it does not matter whether AHCA and Intervenors offer a reasonable or correct interpretation of the APA's requirements for incorporation by reference. If the APA requires that an agency adopt a rule providing "X," but the agency's rule provides "C" instead, the agency cannot through interpretation simply construe "C" to mean "X." Thus, even if the APA required AHCA to rewrite its rule to say that "current" deaths means death statistics in the most recent vital statistics report that is incorporated by reference in this rule, AHCA would have to actually rewrite the rule to say that. The rule does not say that now, and cannot be made to say that through "interpretation."

74. The argument by AHCA and Intervenors also fails with regard to its essential predicate that the APA requires AHCA to incorporate by reference as part of its hospice need rule historic death data disseminated pursuant to statutory mandate by

the Office of Vital Statistics. The APA does not require agencies to promulgate facts as rules. The APA does not require agencies to promulgate historic data as rules. Instead, the rule promulgation requirement is framed in the following manner in section 120.54(1)(a), Florida Statutes: "Each agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable."

75. Section 120.52(16) defines "rule" to mean

> each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule.

76. Incorporation by reference is a mechanism by which material that meets the definition of a rule can be promulgated as a rule by reference, so as to not have to set forth the material itself within the text of the rule. Thus, the "rulemaking procedures" referred to in section 120.54(1)(a), by which agency statements must be adopted as rules, include section 120.54(1)(i)1., which provides: "A rule may incorporate material by reference but only as the material exists on the date the rule is adopted. For purposes of the rule, changes in the material are not effective unless the rule is amended to incorporate the

changes."[5/] This statutory language is not new, nor was it new when the hospice rule was amended in 2009; at that point it had been on the books, without change, for well over a decade.

77. The limitation on incorporating material by reference as the material exists when the rule is adopted is consistent with the notion that when standards outside of a law or rule are incorporated by reference, it is as if the legislative or administrative body were adopting those standards as its law or rule. When the incorporated standards are later changed outside of the legislative or rulemaking process, those changed standards are not the ones that the legislative or administrative body adopted. If the legislative or administrative body wants to adopt the changed standards as part of its law or rule, it must specifically incorporate the changed standards through the formal promulgation process. Otherwise, the legislative or administrative body would be unconstitutionally or unlawfully adopting standards as a law or rule without going through the required procedures.

78. It was difficult to find any administrative or appellate cases involving anything remotely like the issue presented here. Virtually all of the cases that consider material incorporated by reference as a rule involve incorporative references of substantive standards,

specifications, or policies that are required to be used as the governing standards by the incorporating law or rule.

79. For example, AHCA and Intervenors cite to the recent Final Order in Peek v. State Board of Education, Case No. 12-1111RP (Fla. DOAH Aug. 22, 2012), in which Judge John G. Van Laningham invalidated a proposed rule establishing procedures and standards governing submission and review for approval of each school district's evaluation systems for instructional personnel and school administrators. Judge Van Laningham's thorough analysis determined that the proposed rule failed to comply with the APA's requirements for incorporative references. The proposed rule required submission of the evaluation systems on a checklist form that was incorporated by reference, and the proposed rule specified that the submissions would be judged for compliance with the elements in the checklist. The checklist had "considerable prescriptive content" with "dozens of mandatory elements." In five instances, the checklist mandated that submissions meet standards or requirements that were set forth in external documents. As such, the checklist that would be incorporated by reference in the proposed rule did not itself set forth all of the requirements, but rather, referred to another level of external material that imposed additional standards.

80. In Peek, Judge Van Laningham discussed the incorporation by reference method of rulemaking, quoting with

approval the following excerpt from an article written by now-Administrative Law Judge F. Scott Boyd, Looking Glass Law: Legislation by Reference in the States, 68 La. L. Rev. 1201, 1210 (2008)("Legislation By Reference"):

> A reference is incorporative if its effect is to adopt the standards, requirements, or prohibitions of the referenced material as its own standards, requirements, or prohibition. An incorporative reference occurs whenever legislation references material outside of itself and indicates expressly or by implication that this material should be treated as if it were fully set forth at that point in the legislation. The requirements of the referenced material are then said to be "incorporated into" or "adopted into" the legislation that adopted them, without the necessity of printing the text verbatim.

81. In contrast to an "incorporative reference" that imposes standards, requirements, or prohibitions in material that is adopted as if fully set forth, Judge Boyd's Legislation By Reference described a different kind of reference to external material in legislation (defined broadly for purposes of his article to include administrative rules):

> A legislative reference is termed "informational" if its only effect is to alert the reader to the existence of additional information or other material that might be of interest. An informational reference therefore neither affects the material to which it refers nor is in any way affected by it.[ ] In one sense, then, informational references have no real legal effect at all.

Id. at 1205 (footnote omitted).

82. The description of "informational references" in Legislation By Reference is fitting here; the description of "incorporative references" does not fit. Death data in official Vital Statistics Annual Reports do not constitute standards, requirements, or prohibitions. The data reports are not referenced because they have "legal" effect in the sense of establishing standards, requirements, or prohibitions. One need only imagine a hospice need methodology rule containing actual death statistics for past calendar years for 27 different service areas--the number of deaths in total, the causes of death, and the age categories--to realize the absurdity of the suggestion that death statistics are the sort of material that the APA requires to be adopted as rules. Instead, the annual reports with death statistics contain historic, evidentiary data. Indeed, AHCA's explanation for referencing the reports in the rule in 2009 fits the purpose of an informational reference: to alert the reader to material that might be of interest.

83. AHCA and Intervenors offer several administrative orders providing that material incorporated by reference was binding as a rule. Each of these administrative orders involves a true incorporative reference as described by Judge Boyd in Legislation By Reference. In each of the cited proceedings, the material incorporated by reference and deemed binding as a rule

set forth standards or requirements. None of them involve informational references to factual data. Moreover, the incorporative reference in the rule made clear that the issue at hand would be addressed by reference to requirements in the incorporated material. Thus, for example, in Parkinson v. Reily Enterprises, LLC and Department of Environmental Protection, Case No. 06-2842 (Fla. DOAH Feb. 12, 2007), the Department of Environmental Protection (DEP) adopted a rule that provided for delegation of authority under a particular permitting program to water management districts "as set forth in" DEP's interagency operating agreements with the water management districts, which were incorporated by reference in DEP's rule. Accordingly, DEP was bound by the terms of an operating agreement with a water management district, incorporated by reference in the rule, which set forth the details of DEP's delegation of authority. Similarly, in Outlook Media v. Department of Transportation, Case No. 09-3444 (Fla. DOAH Aug. 11, 2010), a statute required that applications for outdoor advertising permits must be made on a form prescribed by the Department of Transportation (DOT). DOT promulgated a rule requiring submittal of applications on a form that was incorporated by reference. The form set forth requirements that must be met by the applicant. In that context, an applicant's failure to comply with a requirement imposed by the application form was deemed a failure to comply with DOT's

rule. Finally, in McCarty v. Department of Corrections, Case No. 90-5311BID (Fla. DOAH Jan. 3, 1991), the Department's rule required that bid proposals be submitted on a form setting forth bid specifications, which was incorporated by reference in the rule. When a bidder failed to comply with specifications in the form, the bid was deemed non-responsive, because the Department was bound by the specifications incorporated by reference.

84. The only case found in which the APA's requirements for incorporation by reference were squarely addressed in the context of references in rules to data was Lane v. Department of Environmental Protection, Case Nos. 01-1332RP et al. (Fla. DOAH May 13, 2002), aff'd, per curiam, Case No. 1D02-2043 (Fla. 1st DCA, May 20, 2003). In Lane, Judge Stuart M. Lerner issued a 468-page Final Order comprehensively addressing eight consolidated challenges to DEP's proposed rules that described how DEP would exercise its authority to identify and list surface waters in the state that are impaired for purposes of the state's total maximum daily load. At pages 388 to 392, Judge Lerner addressed a challenge to a proposed provision that federal STORET data "will be the 'primary source of data used for determining water quality criteria exceedances[.]'" Petitioners contended that the reference to STORET data violated the APA's requirements for incorporating material by reference. Judge Lerner disagreed:

> To the extent Joint Petitioners allege . . . that the proposed rule chapter's reference to STORET is in violation of the requirement of [section 120.54(1)(i)1.], that "[a] rule may incorporate material by reference . . . only as the material exists on the date the rule is adopted," the argument is unpersuasive. Through its reference to STORET, the Department is not incorporating in the proposed rule chapter any standard-setting "material" as that term is used in [section 120.54(1)(i)1.]. The Department is simply explaining where the data it will consider in determining "water quality criteria exceedances" will come from. Even though some of the data may not now exist, there is nothing in [section 120.54(1)(i)1.] prohibiting the Department from giving such an explanation in the proposed rule chapter.

Id. at 389. Judge Lerner proceeded to summarize decisional law explaining when legislation is incorporating substantive standards in referenced materials, so as to require that the materials be in existence at the time of the legislation and to require that changes to the incorporated materials not be given legal effect without a corresponding amendment to the law incorporating the materials by reference. In contrast, when legislation references data instead of substantive standards, the same restrictions do not apply.

85. One of the key cases relied on by Judge Lerner is Eastern Air Lines, Inc. v. Department of Revenue, 455 So. 2d 311 (Fla. 1984). Judge Lerner quoted the following passage in Eastern Air Lines, which is equally instructive here:

In Welch this Court looked to the rule of law announced in Freimuth v. State, 272 So. 2d 473 (Fla. 1972). There, the Court said that the legislature may adopt provisions of federal statutes and administrative rules made by a federal administrative body that are in existence and in effect at the time the legislature acts, but it would be an unconstitutional delegation of legislative power for the legislature to adopt in advance any federal act or the ruling of any federal administrative body that Congress or an administrative body might see fit to adopt in the future. 272 So. 2d at 476. Accordingly, this Court held the statute unconstitutional for attempting to incorporate by reference future legislative and/or administrative actions of jurisdictions outside Florida. Id.

We believe that Eastern's reliance on the aforementioned language is misplaced. The statute under attack merely provides that an adjustment be made to the fuel price which is based on the percentage change in the average monthly gasoline price component of the Consumer Price Index. Here, the legislature is merely setting forth the manner in which the department is to determine the appropriate total motor fuel and special fuel retail price. The department is directed with precision how to make such a determination. We think the language of Welch and Freimuth should be interpreted to apply to statutes which incorporate federal statutes or administrative rules which substantively change the law, and not to a statute which incorporates a federal index to provide aid in making a ministerial determination.

Furthermore, we do not agree with Eastern's contention that the statute is also constitutionally infirm because the Department of Revenue will utilize a consumer price index which is to be determined after the effective date of the act. In Gindl we upheld a statutory provision which required a computation based on the most recent

> publication of the Florida Price Level Index prepared by the Department of Administration. The statute was to take effect July 1, 1976. The Department of Education intended to base the distribution on a survey which would be started in October or November of 1976 and completed during the early part of 1977. In other words, the effect of the statute was to reach forward and allow distribution to be calculated on the most recent publication of the Florida Price Level Index, an index which was not in existence when the law became effective. We agree with the circuit court's determination that the method of appropriation in chapter 83-3 is equivalent to the method approved in Gindl.

Id. at 315-316.

86. The analyses in Lane and Eastern Air Lines apply here. They confirm that AHCA is not required to undergo rule promulgation every time new data reports are issued by the Office of Vital Statistics in order to apply that data to the standard-setting need methodology. The death data in those reports are facts, and are not themselves standards having the force and effect of law. As such, the references in the hospice need rule must be considered informational references. As Judge Lerner determined, such references are not prohibited by the APA, but they are not subject to the stricter requirements for incorporative references of standard-setting material.

87. AHCA acknowledges that nothing in the CON laws would require rule promulgation to adopt vital statistics reports as rules. AHCA’s interpretation of the APA, over which AHCA has no

substantive jurisdiction, is not entitled to deference and is unpersuasive. The CON laws require AHCA to promulgate uniform need methodology rules, and AHCA has done so. The provisions of the hospice need methodology rule would be distorted and undermined by AHCA's interpretation of the APA to preclude use of the most recent available death statistics to calculate numeric need, and to instead require AHCA to engage in endless meaningless rulemaking to change the date references of data reports before the facts in those reports can be used.

88. AHCA and Intervenors identify a single administrative order, Balsam v. Department of Health and Rehabilitative Services, Case No. 84-0173RX (Fla. DOAH March 29, 1984), which they characterize as "precedent" requiring AHCA to incorporate data by reference before the data can be used in fixed need calculations. The Balsam order, predating Gulf Court, Meridian, and fixed need pools, is inapposite. Balsam did not address historic data like the death statistics at issue here. Instead, Balsam expressed a limited concern directed to HRS adopting the results of a University's methodology for projecting population without promulgating the methodology or the results as rules. HRS acknowledged the legitimacy of the concern by arguing that its rules should be interpreted to say that HRS would first consider "the methodologies and techniques used by [the

University's Bureau of Economic and Business Research] to make its projections." But the rules did not say that.

89. After Balsam, AHCA's uniform need methodology rules were changed to provide for use of the official population estimates issued by the Office of the Governor. AHCA's use of those population reports is not an issue presented here for determination, but presumably AHCA's change to an official government source for population data was made with Balsam in mind. Regardless, the limited concern expressed in Balsam has no application to AHCA's use of death data.

90. Chapter 382, Florida Statutes, mandates the establishment of the Department of Health Office of Vital Statistics, which is required to develop a vital statistics system of registration, collection, and preservation of vital records, including records of deaths and births, and to tabulate and disseminate annual reports of those vital statistics.

91. Death statistics are historic facts. The annual reports issued by the Office of Vital Statistics pursuant to its statutory duty would be admissible evidence to prove the truth of the death statistics compiled therein, under the hearsay exceptions provided in section 90.803(8), Florida Statutes (public records and reports), and section 90.803(9) (records of vital statistics). By reason of Gulf Court and Meridian, the time for considering this admissible evidence is set before the

fixed need pool publication so AHCA can plug the evidence into its methodology to calculate need.

92. AHCA and Intervenors argue that, even if AHCA was not required to incorporate the death statistics annual reports by reference through the rule promulgation process, AHCA in fact did so, and having done so, is thereby precluded from using updated death statistics annual reports until the rule is amended to incorporate the new report by reference as part of the rule.

93. Coming full circle, AHCA and Intervenors couch their argument in terms of AHCA being bound by its rule, which they contend requires AHCA to use the death statistics in the reports incorporated by reference. However, the hospice rule says no such thing. The only part of the rule that specifies the death data to be used in the numeric need methodology is the language defining "current" deaths and "projected" deaths.

94. Applying the plain language of the hospice need rule, without reading words into the rule and without deleting existing language, requires AHCA to use 2013 death data to calculate numeric need. The "current" deaths definition, as the operative provision that specifies which data is to be used, controls. The passive language incorporating by reference older vital statistics annual reports does not direct the use of the referenced reports in calculating new fixed need pools. Instead, the passive reference language is a helpful provision identifying

some of the data reports that have been used and provides links for how the data reports can be obtained. While the APA does not require AHCA to promulgate death statistics reports as rules, it does not prohibit AHCA from identifying data reports and providing convenient access for informational purposes.

95. Since AHCA's existing rule does not state that the referenced data reports must be used to calculate numeric need, it follows that AHCA is not required to update the informational references through rule promulgation before AHCA is permitted (and required) to follow the operative language in its rule directing the use of death data for the most current year for which data are available from the Office of Vital Statistics.

96. AHCA's convoluted interpretation, quoted in Finding of Fact ¶ 29, cannot be accepted. It is contrary to the rule as written. It rewrites or eliminates the "current" deaths provision and adds "action" words to the passive references to specific data reports. Instead of interpreting its rule in a way that rewrites the words codified in the rule, AHCA must harmonize (without changing) all of the rule language. Giving full effect to the operational part that defines "current" deaths, while properly treating the passive references as informational only, harmonizes all of the rule language without changing any of it. It also avoids the quandary from AHCA's interpretation that AHCA

would have violated the APA's rulemaking requirements by choosing not to proceed expeditiously to rulemaking.

97. AHCA's explanation of what it believes the APA requires, to justify its proffered interpretation of the hospice rule, cannot be squared with AHCA's prior practice in which AHCA has never limited itself to using only those data reports incorporated by reference in the hospice rule. AHCA's explanation cannot be squared with AHCA's current practice of undergoing rule promulgation to reference only some of the data reports used by the hospice need methodology, while excluding the hospice admissions data reports. And AHCA's explanation cannot be squared with AHCA's practice in connection with other CON need methodology rules, where AHCA does not take the position that it cannot use data to calculate numeric need until the data reports are promulgated and incorporated by reference as rules. AHCA did not reasonably explain these inconsistencies.

98. HPH met its burden of proving that AHCA failed to apply its hospice need methodology rule as written. AHCA's rule requires use of the 2013 death data where the methodology calls for "current" deaths. Instead, AHCA erroneously used 2012 death data for "current" deaths. The resulting numeric need determination of one new hospice program needed was erroneous. The corrected fixed need pool number for hospice service area 5A, using the death data required by AHCA's rule, is zero.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Agency for Health Care Administration enter a final order determining that the published fixed need pool number of one for hospice service 5A was erroneous, and that the correct fixed need pool number for hospice service 5A is zero.

DONE AND ENTERED this 11th day of March, 2015, in Tallahassee, Leon County, Florida.

ELIZABETH W. MCARTHUR
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of March, 2015.

ENDNOTES

1/ References to Florida Statutes are to the 2014 codification, unless otherwise provided.

2/ The batching cycle mechanism was developed in response to Biomedical Applications of Clearwater v. Department of Health and Rehabilitative Services, 370 So. 2d 19 (Fla. 2d DCA 1979) (Biomedical). In Biomedical, the court applied the Ashbacker doctrine, established in Ashbacker Radio Corp. v. Federal Communications Commission, 326 U.S. 327, 66 S. Ct. 148, 90 L.Ed.

108 (1945), to the CON program, holding that CON applicants have an inherent right to comparative review with other mutually exclusive CON applications. In explaining mutual exclusivity in the CON context, the Biomedical court described the "fixed need pool" concept: "We are not the first to observe that where need is determined in accordance with a quantitative standard; that is, by number of units, a fixed pool of needed investments is thereby created. Opposing applicants necessarily become competitors for that fixed pool." Id. at 23. The court suggested that a "self-starting mechanism within HRS" was needed and invited HRS "to devise means of achieving comparative consideration[.]" Id. at 25. The result was the batching cycle mechanism.

3/ Prior to fixed need pools, HRS calculated numeric need under the applicable rule methodology at the time of its initial review of CON applications, plugging into the calculations data available at that time. But if HRS's initial decisions were challenged, as they often were, numeric need would be recalculated in subsequent administrative hearings based on new data admitted as evidence. Hearings were frequently delayed at the request of parties hoping for new favorable data, which could be used as evidence. The problem tackled by Gulf Court was how to sort out comparative review rights when numeric need is the product of new data issued after HRS's initial decisions, when several batching cycles might be pending at DOAH, with later batches sometimes going to hearing before earlier batches.

4/ The 1995 version of the hospice rule identified the Office of Vital Statistics as being within HRS, as it was at the time. Following a reorganization, the Office of Vital Statistics was reassigned to the Department of Health, and the reference in the rule was later changed to reflect that reassignment. Otherwise, the language has not been changed from 1995 to its present form.

5/ AHCA and Intervenors also refer to Florida Administrative Code Rule 1-1.013, adopted by the Department of State to address requirements for incorporation by reference, pursuant to the rulemaking authority in section 120.54(1)(i)6. As AHCA and Intervenors acknowledge, the Department of State's rule permits agencies to incorporate material by reference "provided it meets the definition of 'rule' provided in section 120.52(16) . . . and is generally available to affected persons." (Jt. PRO at 24). Despite this recognition, AHCA and Intervenors fail to explain how historic death data meets the definition of a rule.

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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.