

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LIFEPATH HOSPICE, INC

Petitioner,

vs.

Case No. 15-2001CON

WEST FLORIDA HEALTH, INC.;
AND AGENCY FOR HEALTH CARE
ADMINISTRATION,

Respondents.

SEASONS HOSPICE & PALLIATIVE
CARE OF TAMPA, LLC,

Petitioner,

vs.

Case No. 15-2003CON

WEST FLORIDA HEALTH, INC.;
AND AGENCY FOR HEALTH CARE
ADMINISTRATION,

Respondents.

WEST FLORIDA HEALTH, INC.,

Petitioner,

vs.

Case No. 15-2007CON

GULFSIDE HOSPICE AND PASCO
PALLIATIVE CARE, INC.; SEASONS
HOSPICE & PALLIATIVE CARE OF
TAMPA, LLC; LIFE PATH HOSPICE,
INC.,

Respondents.

GULFSIDE HOSPICE AND PASCO
PALLIATIVE CARE, INC.,

Petitioner,

vs.

Case No. 15-2008CON

AGENCY FOR HEALTH CARE
ADMINISTRATION,

Respondent.

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RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its designated Administrative Law Judge, R. Bruce McKibben, held the final hearing in the above-styled cases on November 30 and December 1 through 4, 7 through 10, and 14 through 16, 2015, in Tallahassee, Florida.

APPEARANCES

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STATEMENT OF THE ISSUES

Whether the Certificate of Need ("CON") applications filed by Seasons Hospice and Palliative Care, Inc. ("Seasons"); Gulfside Hospice and Pasco Palliative Care, Inc. ("Gulfside"); and West Florida Health, Inc. ("West Florida"); for a new hospice program in Agency for Health Care Administration ("AHCA" or the "Agency") Service Area 6A/Hillsborough County, satisfy the applicable statutory and rule review criteria sufficiently

to warrant approval, and, if so, which of the three applications best meets the applicable criteria, on balance, for approval.

PRELIMINARY STATEMENT

On October 3, 2014, the Agency published a fixed need pool for one new hospice program to be established in Service Area 6A, which consists of Hillsborough County, Florida. See Fla. Admin. Reg., Vol. 40, No. 193, ID. No. 15126391. Nine applicants filed competing CON applications in response to the fixed need pool. On October 24, 2015, Lifepath Hospice, Inc. ("Lifepath"), submitted a letter to AHCA indicating its opposition to the applications filed by West Florida and another applicant not a party to this proceeding.

After a comparative review of the applications, on February 20, 2007, the Agency announced its intent to approve the application filed by West Florida (CON No. 10302), and to deny the other competing applications.

Seasons and Gulfside timely filed petitions to contest the denial of their own applications (Nos. 10298 and 10294, respectively) and the approval of West Florida's application. West Florida filed an approved applicant petition in support of its own application and in opposition to the Seasons and Gulfside applications.

The Agency forwarded the petitions to the Division of Administrative Hearings ("DOAH") for the assignment of an administrative law judge to conduct a final hearing.

LifePath, as the only existing hospice provider in Service Area 6A, filed a petition opposing the approval of the application filed by West Florida. LifePath did not contest the approval of the applications filed by Seasons or Gulfside.

On November 25, 2015, the parties filed a joint pre-hearing stipulation.

During the final hearing, West Florida presented the testimony of Dr. Jim Burkhart, president and CEO of Tampa General Hospital ("TGH" or "Tampa General"), accepted as an expert in hospital operations and administration; Mike Schultz, division president of Adventist Health Systems West Florida ("Florida Hospital"), accepted as an expert in hospital operation and administration; Dr. Howard Tuch, director of palliative medicine at TGH, accepted as an expert in hospice and palliative care medicine; Dr. Vincent Perron, vice-president of medical affairs and associate chief medical officer at TGH, accepted as an expert in hospice and palliative care medicine; Rev. William Baugh, retired director of pastoral care and clinical pastoral education ("CPE") at TGH, accepted as an expert in clinical chaplaincy and CPE; Rev. Wayne Maberry, director of pastoral care and CPE at TGH, accepted as an expert

in clinical chaplaincy and CPE; Ann Tellini, case manager and discharge planner at Florida Hospital, accepted as an expert in hospital case management and discharge planning; Rema Cole, director of Florida Hospital-Flagler hospice care, accepted as an expert in hospice operations; Armand Balsano, CON consultant, accepted as an expert in financial analysis and financial feasibility; and David Levitt, CON consultant, accepted as an expert in health planning. The testimony of Jennifer Cacioppo was also introduced into evidence by way of her deposition transcript. West Florida Exhibits 1 through 3, 5 through 8, 8A, 10, 12A through J, 14, and 15A through Z were admitted into evidence.

Lifepath presented the testimony of Jay Cushman, hospital consultant, accepted as an expert in health planning; Darryl Weiner, CON consultant, accepted as an expert health care finance; and Kathy Fernandez, president and CEO of Chapters Hospice Systems, accepted as an expert in hospice administration. LifePath Exhibits 18 through 19, 22 through 29, 32 through 37, 39, and 42 through 48 were admitted into evidence.

Seasons presented the testimony of Todd Stern, CEO, accepted as an expert in hospice development and administration; Joyce Simard, geriatric consultant, accepted as an expert in dementia; Dr. Balakrishana Natarjan, medical director, accepted

as an expert in internal care medicine and hospice and palliative care medicine; Dr. Russell Hilliard, senior vice president for patient experience and staff development, accepted as an expert in music therapy, social work, hospice compliance, and hospice programs; Pedro Del Campo, executive director of Seasons Hospice in Miami, Florida, accepted as an expert in hospice operations; Sharon Gordon-Girvin, CON consultant, accepted as an expert in CON review and health care planning; and Steven Jones, CPA, accepted as an expert in health care finance and financial feasibility. The testimonies of Rabbi Elchonon B. Freedman, Dr. Daniel Maison, and Mary Lynn McPherson were presented by way of deposition transcripts. Seasons Exhibits 1 through 30 and 32 through 36 were admitted into evidence.

Gulfside presented the testimony of Linda Ward, president and CEO, accepted as an expert in hospice administration and health care administration; Gene Nelson, CON consultant, accepted as an expert in health planning, CON review criteria, and CON procedures; Rick Knapp, CON consultant, accepted as an expert in financial feasibility and CON projects; and Kathy Postiglione, chief operating officer and senior vice-president of business development, accepted as an expert in hospice operations. Gulfside Exhibits 1 through 8, 9A through G, and 10A through K (including the deposition transcripts of Deborah

Gilles, Suzanne Johnson, Rabbi Aaron M. Lever, Tara Scalise, Shelley Schneider, Dr. Charles L. Suggs, and Anthony Trovato) were admitted into evidence.

AHCA presented the testimony of Marisol Fitch, Health Services and Facilities consultant supervisor, accepted as an expert in health care planning and CON. AHCA Exhibits 1 and 2 were admitted into evidence.

The parties' request for additional time to file proposed recommended orders (PROs) and for extension of the page limit for PROs to 50 pages was granted. The parties were given until February 12, 2016, to file PROs. Each party timely submitted its PRO. All post-hearing submissions have been considered in the preparation of this Recommended Order.

Unless specifically stated otherwise herein, all references to Florida Statutes shall be to the 2015 version.

FINDINGS OF FACT

I. Procedural History

A. The Fixed Need Pool

1. On October 3, 2014, the Agency published a need for one additional hospice program in Hospice Service Area 6A, Hillsborough County, for the January 2016 planning horizon.

2. Under the Agency's need methodology, numeric need for an additional 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.

3. The need methodology promotes competition and access because numeric need exists under the methodology when the hospice use rate in a service area falls below the statewide average use rate.

4. In a service area in which there is a sole hospice provider, as in the present case, the existing provider has an incentive to continually improve access to hospice services in the service area in order to avoid numeric need for an additional program under the formula.

5. For the January 2016 planning horizon, the Agency determined that the difference between projected hospice admissions and current admissions in Hospice Service Area 6A was 759, and therefore a numeric need for an additional hospice program exists in Hillsborough County.

6. AHCA is the state agency authorized to evaluate and render final determinations on CON applications pursuant to section 408.034(1), Florida Statutes.

A. The Proposals and Preliminary Decision

7. Nine applicants submitted CON applications seeking to establish a new hospice program in AHCA Service Area 6A,

Hillsborough County, in response to the fixed need pool. LifePath, the only existing provider of hospice care in the service area, opposed the hospice application which was sponsored by a hospital system, i.e., West Florida's.

8. After reviewing the applications, the Agency preliminarily approved West Florida's CON Application No. 10302 and preliminarily denied the remainder of the applications, including Seasons' CON Application No. 10298 and Gulfside's CON Application No. 10294.

9. At the final hearing, Marisol Fitch, supervisor of AHCA's CON unit, testified that the Agency approved West Florida's CON application because it determined that West Florida's application best promotes increased access to hospice services for residents of Hillsborough County. The Agency concluded that Tampa General and Florida Hospital, West Florida's parent organizations, already have large infrastructures in place in Hillsborough County. Accordingly, the Agency determined that West Florida's proposed hospice program, if approved, would benefit from built-in access points that would enable West Florida to improve hospice accessibility.

B. The Applicants, AHCA and Lifepath

West Florida

10. West Florida is a joint venture with 50-50 ownership and control by Tampa General and Florida Hospital, two acute

care hospitals in Hillsborough County. The entity was created for the purpose of seeking the CON at issue in this proceeding for a new hospice in Service Area 6A. West Florida recently became the owner/operator of three home health agencies which had been operated for several years by the Florida Hospital System. Tampa General has not operated hospices in the past, while Florida Hospital has, and the CON application submitted by West Florida relied heavily upon the Florida Hospital-affiliated hospice's programs and history.

West Florida is the only applicant in this proceeding that is hospital affiliated.

Seasons

11. Seasons, the applicant, is a single purpose entity created for the purpose of seeking a CON to operate a new hospice in Service Area 6A. It is affiliated with Seasons Hospice and Palliative Care, a for-profit company (hereinafter referred to as "Seasons HPC").

Seasons HPC is the largest family-owned hospice organization in the country.

12. The first Seasons HPC-affiliated hospice opened in Chicago, Illinois, in 1997. In 2003, Seasons HPC opened its second hospice in Milwaukee, Wisconsin, and in 2004, it acquired a third hospice in Baltimore, Maryland. Since 2004, Seasons HPC has continued to grow nationally by opening, or in some cases

acquiring, hospices in new markets. Today, Seasons HPC is the fourth largest hospice company in the United States with 25 separate hospices operating in 18 different states.

13. Each Seasons HPC-affiliated hospice is a separate entity, with its own license, executive director, and staff. However, each Seasons HPC hospice is connected via overlapping ownership and via contracts with Seasons Healthcare Management, its management company. Among the services that Seasons Healthcare Management provides to each Seasons HPC hospice are: education and training, quality management, financial planning support, management of payrolls, tax preparation, cost report preparation and coordination, IT services, corporate compliance policies and programs, marketing and development expertise, in-house legal services, and a wide variety of policies and consultations including, but not limited to, clinical support and physician oversight.

14. Todd Stern is the CEO of Seasons Healthcare Management and is also the CEO of the 25 separate hospices that Seasons HPC operates throughout the country. Mr. Stern joined Seasons HPC in 2001, and was appointed CEO in 2008.

Gulfside

15. Gulfside is a 501(c)3 community-based, not-for-profit organization and is licensed by AHCA. Gulfside has been providing hospice services in Pasco County (which is contiguous

to Hillsborough County) for more the 25 years. Gulfside provides service to all patients in need regardless of race, creed, color, gender, sexual orientation, national origin, age, qualified individual with a disability, military status, marital status, pregnancy, or other protected status.

LifePath

16. LifePath is the sole existing, licensed hospice provider in Hospice Service Area 6A, Hillsborough County. LifePath is a subsidiary of Chapters Health System.

17. LifePath has provided hospice services in Hillsborough County since 1983. It was the first hospice program in the state to be accredited by The Joint Commission and has continuously maintained that accreditation. LifePath is also accredited by the National Institute for Jewish Hospices.

18. In addition to providing routine, continuous, and respite care to residents of Hillsborough County, LifePath also provides inpatient hospice care in two, 24-bed hospice houses located in Temple Terrace and Sun City, Florida. Additionally, LifePath has scatter-bed contracts with all of the acute care hospitals in Hillsborough County to provide inpatient care.

19. LifePath is an important part of the healthcare continuum in Hillsborough County and works collaboratively with other healthcare providers in the community, including hospitals, nursing homes, and assisted-living facilities.

AHCA

20. AHCA is the state agency responsible for administering the Florida CON program.

I. Overview of Hospice Services

21. In Florida, a hospice program is required to provide a continuum of palliative and supportive care for terminally ill patients and their families. A terminally ill patient has a medical prognosis that his or her life expectancy is one year or less if the illness runs its normal course. Under the Medicare program administered by the federal government, a terminally ill patient is one who has a life expectancy of six months or less.

22. Hospice services must be available 24 hours a day, seven days a week, and must include certain core services, such as nursing services, social work services, pastoral or counseling services, dietary counseling, and bereavement counseling services. Physician services may be provided by the hospice directly or through contract.

23. Hospice care and services provided in a private home shall be the primary form of care. Hospice care and services may also be provided by the hospice to a patient living in an assisted living facility, adult family-care home, nursing home, hospice residential unit or facility, or other non-domestic place of permanent or temporary residence.

24. The inpatient component of care is a short-term adjunct to hospice home care and hospice residential care and shall be used only for pain control, symptom management, or respite care. The hospice bereavement program must be a comprehensive program, under professional supervision, that provides a continuum of formal and informal support services to the family for a minimum of one year after the patient's death.

25. The goal of hospice is to provide physical, emotional, psychological, and spiritual comfort and support to a dying patient and their family. Hospice care provides palliative care as opposed to curative care, with the focus of treatment centering on palliative care and comfort measures.

26. Hospice care is provided pursuant to a plan of care that is developed by an interdisciplinary team consisting of, e.g., physicians, nurses, social workers, counselors, chaplains, and other disciplines.

27. There are four levels of service in hospice care: routine home care, continuous care, general inpatient care, and respite care. Generally, hospice routine home care comprises the vast majority of patient days and respite care is typically a very minor percentage of days.

28. Continuous care is basically emergency room-like or crisis care that can be provided in a home care setting or in any setting where the patient resides. Continuous care is

provided for short amounts of time usually when symptoms become severe and skilled and individual interventions are needed for pain and symptom management.

29. The inpatient level of care provides the intensive level of care within a hospital setting, a skilled nursing unit, or in a free-standing hospice inpatient unit. Respite care is generally designed for caregiver relief.

30. Medicare reimburses different levels of care at different rates. Approximately 85-to-90 percent of hospice care is paid for by Medicare.

31. There are certain services required or desired by some patients that are not necessarily covered by Medicare and/or private or commercial insurance. These services include music therapy, pet therapy, art therapy, massage therapy, and aromatherapy, among others. There are other, more complicated and expensive non-covered services, such as palliative chemotherapy and radiation, that may be indicated for severe pain control and symptom control. Hospices which provide these additional services are said to have "open access" and foot the bill for such services.

II. The Parties' Proposals

32. Each of the applicants- -as well as LifePath and the Agency- -agree that any one of the applicants could provide quality hospice services if approved. The following paragraphs

set out some of each applicant's attributes. Before each of the applicants' proposals is discussed more fully below, it is clear that all of the applicants would likely be successful if approved. As stated by the parties themselves: "All three applicants . . . have the ability to operate a high quality hospice." West Florida counsel, Tr., p. 12. "These are all excellent providers" and "There are no bad choices here." AHCA counsel, Tr., pp. 1802 and 2009. "All [applicants] would be qualified; they all do good." Lifepath counsel, Tr., p. 1980. "All applicants will undoubtedly provide the same level of quality care." West Florida PRO, ¶ 59. The ultimate concern of AHCA regarding a new hospice provider in Hillsborough County is not the quality of care that the applicants can provide. All applicants will undoubtedly provide the same level of quality care. The real concern is costs, access, and availability. The Agency believes that West Florida will be best suited to promote cost effectiveness, as well as increase access and availability.

A. West Florida

33. West Florida is a collaborative effort by two existing, licensed hospitals in the service area. West Florida justifiably touts its connection to educational institutions. West Florida conditioned its approval on the funding of an additional palliative care fellowship at the University Of South Florida

College of Medicine at an annual cost of roughly \$80,000 and an additional CPE resident in Tampa General's CPE program at an annual cost of \$30,000.

34. Having West Florida as part of the Tampa General "family" will expose not only the new palliative care fellow, but also medical students, medical interns and residents, other fellows, nurses, and a wide variety of allied health professionals, to hospice services and the benefits of hospice care.

35. The new CPE resident could help to expand knowledge about end-of-life care and ultimately improve access to hospice services. West Florida will benefit the Tampa General pastoral care and CPE program by extending pastoral palliative care and end-of-life care training and experiences for all CPE students.

36. Florida Hospital is a part of the Adventist Health System, which operates all types of healthcare facilities throughout the nation, including hospitals, rehab facilities, home health agencies, hospices, long term acute care hospitals, nursing homes, and more. In Florida, Adventist operates a range of facilities, including statutory teaching hospitals, quaternary-level service providers, critical-access hospitals, and safety net hospitals. In Hillsborough County, Florida Hospital operates Florida Hospital Tampa and Florida Hospital Carrollwood, both acute care facilities, in addition to a

variety of outpatient facilities, physician practices, and the like.

37. West Florida has proposed and is committed to opening a four-bed hospice inpatient unit at Florida Hospital Carrollwood, located in the northwestern portion of the county. Currently, there are two other inpatient hospice house units in Hillsborough County, one on the eastern side and one in the far south, both operated by LifePath. The unit would theoretically benefit hospice patients by increasing the number of inpatient beds and improving geographic distribution, thereby providing more access to hospice care.

38. An inpatient unit may operate better than contracted "scatter beds" because hospice staff trained in end-of-life care and symptom management would be the medical personnel providing care to the patient rather than other hospital staff.

39. Florida Hospital is an experienced provider of hospice services in the State of Florida, operating Florida Hospital Hospice Care in Volusia and Flagler Counties, as well as Hospice of the Comforter in Orange and Osceola Counties. Ms. Rema Cole is the administrator for Florida Hospital Hospice in Flagler and Volusia Counties. She has been responsible for opening two new hospice programs in the State of Florida.

40. West Florida will provide a wide variety of unfunded "open access" services to its patients, such as: radiation and

chemotherapy, caring for patients on ventilators, and training staff to provide these services.

41. Combined, Florida Hospital and Tampa General touch tens of thousands of lives in Hillsborough County, totaling approximately 52,000 patients each year. Tampa General or Florida Hospital could tell its patients and their families about the goals and benefits of hospice care. It is likely West Florida would tend to promote its own hospice more prominently than it would promote its competitor's (LifePath) services.

42. West Florida suggests the possibility of a fully integrated electronic medical record. It would entail a long process, but steps have already been taken to begin the integration. The ability of the medical records of both Tampa General Hospital and Florida Hospital to "talk" to each other and all related ancillary providers, including its clinically integrated network, home health agency, and West Florida could improve the ability to reduce costs, as well as emergency room visits and unplanned admissions of hospice patients to hospitals. Having a streamlined system that communicates between the hospice, hospitals, and their ancillary providers could reduce workload, unnecessary paperwork, and increase the efficiency at which the hospice staff is able to operate. There is no such system in operation yet, but West Florida has plans to implement it once it is available.

43. Florida Hospital Hospice Care provides a wide range of non-compensated programs, including a pet partner program called "HosPooch" that provides pet therapy to patients in inpatient units, nursing homes, ALFs, and even to non-hospice patients at their cancer centers. They also have a recording project called Project Storytellers that has a group of volunteers going into patients' homes or wherever they may be to talk to the patient about their life, record things that were important to them, and give that recording to the families as a keepsake. Florida Hospital Hospice Care is involved with their local Veterans Administration nursing home and clinic, where volunteers perform pinnings of veterans. There is also music therapy, a group of quilters, and vigil volunteers, who sit at the bedside of patients to keep watch if the caregiver needs to take a break or run errands.

44. West Florida can immediately tap into the existing connections that both Florida Hospital and Tampa General have in the community. These include relationships and connections with physicians, churches, civic groups, and other organizations, both healthcare and non-healthcare related. These existing relationships would serve not only as opportunities to market West Florida, but could also serve as educational opportunities to inform more individuals, groups, and organizations about the

benefits of hospice care and the availability of the West Florida.

45. West Florida agreed to condition approval of its CON application on the following eleven concepts:

- 1) Annual funding for an additional palliative care fellowship at the University of South Florida;
- 2) Annual funding for an additional CPE resident;
- 3) Annual sponsorship of up to \$5,000 for children's bereavement camps;
- 4) Up to \$10,000 annually for a special wish fund;
- 5) Operating a 4-bed inpatient unit at Florida Hospital Carrollwood;
- 6) Programs which are not paid by Medicare;
- 7) Offices on the campus of Tampa General and Florida Hospital;
- 8) Using a licensed clinical social worker with at least a Master's degree to lead the psychological department;
- 8) Establish an education program on hospice care accessible to medical staff;
- 10) Programs for the Hispanic population;
and
- 11) Creation of a community resource information website.

A. Seasons

46. Seasons described its proposal for services through various key players within its parent organization.

47. Dr. Balakrishana Natarjan is the chief medical officer for Seasons Healthcare Management. Dr. Natarjan plays an active role in recruiting the medical directors for each Seasons hospice, and the medical director of each hospice reports directly to him. Dr. Natarjan has developed a detailed list of the medical director's qualifications and responsibilities, and a list of what he deems to be "non-negotiable company values" to which each medical director must agree. It is difficult to imagine how some of those values can be monitored (e.g., "The Medical Director must love holding the patient's hand"; "The Medical Director must go to bed each night knowing they made a difference in the lives of specific dying patients," etc.), but the idea of non-negotiables is recognized as positive. Seasons has also recently hired Daniel Maison, M.D., as the associate chief medical officer for the company.

48. Dr. Russell Hilliard is Seasons' vice-president for Patient Experience and Staff Development. He has a Ph.D. in music education, with an emphasis in music therapy and social work from Florida State University. His work is well-recognized in the hospice community. He was instrumental in starting the music therapy programs at Big Bend Hospice in Tallahassee, Florida, and at Hospice of Palm Beach County (Florida). His concept of music therapy is innovative, inclusive, and well-proven to achieve positive results. Dr. Hilliard will assist

Seasons in doing a community-oriented needs assessment to ascertain what needs exist in Hillsborough County, examine how to meet those needs, and establish programs to be implemented upon approval as a hospice provider in the area. Seasons' music therapies would then be implemented as necessary to meet the identified needs.

49. Seasons has also assembled a team of national experts who are available to assist in various areas. One such expert is Mary Lynn McPherson, Pharm.D. Dr. McPherson has developed an online course entitled "Medication Management at the End of Life for Clinical, Supportive, Hospice and Palliative Care Practitioners," that is offered through Seasons.

Dr. McPherson is purportedly available 24 hours a day, seven days a week, to field numerous calls from Seasons physicians and other staff regarding complex medication management issues.

50. Joyce Simard, a national expert in caring for people with dementia, developed for Seasons HPC hospices a specialized program for patients in the advanced stages of dementia. The program uses person-centered approaches to improve the quality of life for people suffering from dementia through meaningful sensory activities that stimulate the senses and promote comfort and serenity.

51. Seasons Hospice Foundation (Foundation) is an independent 501(c)(3), non-profit foundation founded in 2011.

The Foundation was established because Seasons was receiving unsolicited donations from grateful families and friends of patients, and it wanted these funds to go to a charitable purpose. Today the mission of the Foundation is to serve the needs of patients outside the hospice benefit. For example, the Foundation will assist patients who are unable to cover basic non-hospice needs, such as restoring electricity to a patient's home or airfare so family members can travel to see a patient.

52. Seasons does not rely on charitable contributions or other philanthropy to support its operations, nor does it rely on any other types of non-hospice revenue sources such as thrift shops.

53. Unlike some new hospices which try to conserve resources and hire part-time staff when opening, Seasons invests 100 percent in new programs up front. All of the initial core staff is full-time, even when the hospice may be starting out with just a handful of patients. This allows the hospice team to develop trust among the group and to become familiar with Seasons' policies, procedures and culture.

54. Each Seasons HPC program and staff is reflective of the ethnic and cultural make-up of the area it serves. However, the mission statement, core values, service standards, operating practices, protocols, and policies are uniform in each Seasons HPC hospice.

55. Seasons provides a large depth and breadth of programs in its hospices. Included among those services are music therapy, pet therapy (using certified pet therapy animals, as well as a specialized robotic seal for certain patients), Namaste (a specialized program for patients in the advanced states of dementia), Kangaroo Kids summer camp, Volunteer Vigil program, Leaving a Legacy, and Careflash. Seasons also participates in the We Honor Veterans program.

56. Seasons would provide "open access" services in Hillsborough County. Seasons would provide these services for patients choosing to continue them so long as their prognosis remains six months or less, and the treatment is approved by the clinical leadership team for appropriateness. Such interventions may include IV antibiotics, blood transfusions, palliative cardiac drips, ventilator support, radiation therapy, heart therapy, dialysis and other palliative therapies.

57. As discussed earlier, Seasons offers a very robust and highly professional music therapy program. But Seasons also provides music companions when simple entertainment is what is called for and Seasons makes sure the entire interdisciplinary staff is trained in this subject.

58. Seasons actively works with hospitals in the markets it serves to educate physicians and allied health professionals in hospice and end-of-life care. Seasons hospices have

affiliation agreements with several medical schools around the country to offer internships, fellowships, and other educational opportunities to pre-med students, medical students, and residents.

59. Seasons hires experienced nurses who have previously worked in emergency rooms and intensive care units, and consequently is able to provide a much more clinically complex service than some other hospices. As a result, Seasons is able to serve patients that other organizations typically may not have served.

60. Seasons utilizes a hospice-specific electronic medical record and is the largest hospice client of Cerner, a medical records provider. When a patient is admitted to a Seasons hospice, Seasons gathers the medical history of the patient, including hospital records if the patient has recently been in the hospital, and all relevant non-hospital medical records, including rehab notes, labs and other diagnostic testing results. This integrated electronic medical record is accessible to all Seasons hospice team members.

61. Seasons has a centralized call center that takes calls from patients and their families 24 hours a day, seven days a week. At the call center, there are clinicians who are licensed in every state where Seasons operates who can respond to questions and provide consultation. The call center staff has

full access to the patient's electronic medical record in real time. Seasons also requires that all of its staff, including management at all levels, make calls to check on patients during the term of their treatment (i.e., not only when a patient calls or after the patient has died).

62. In September 2010, Seasons acquired a controlling interest in a hospice in Miami-Dade County that was formerly known as Douglas Gardens Hospice. The hospice was acquired from the Miami Jewish Health System, which retains a 20-percent ownership in the hospice. At the time Seasons took over Douglas Gardens Hospice, the census was approximately 63 patients and the hospice was largely dependent upon referrals from the relatively small Miami Jewish Health System. Seasons retooled the makeup of the staff to better reflect the county's Hispanic population and aggressively developed outreach efforts across the entire county. By the time of the final hearing, Douglas Gardens had grown to be the second largest hospice in Miami-Dade County with a census of 520 patients.

63. When Seasons acquired its interest in the Miami-Dade County hospice, it diligently pursued referrals from assisted living facilities and nursing homes. In September 2010, Seasons had 13 admissions from ALFs; in September 2015, that number had risen to 154 admissions.

64. Seasons' hospice in Miami-Dade County has contracts with over 60 percent of the nursing homes in the county. In September 2015, the hospice admitted 110 patients from skilled nursing facilities. It has also pursued marketing to more than 30 acute care hospitals in the county. Today, approximately 40 to 45 percent of Seasons' referrals in Miami-Dade County come from acute care hospitals.

65. The majority of Seasons' Miami-Dade County's staff, including its executive director, is bilingual, and the hospice serves a large number of Hispanic patients. It also employs five to six chaplains, including non-denominational chaplains, a rabbi, and a Catholic priest who is able to deliver the sacrament of last rites. Seasons HPC requires all of its chaplains to be either board-certified or become board-certified within a year of being hired.

66. Seasons HPC has developed a more formalized consulting arrangement with another national expert, Rabbi Elchonon Freedman from West Bloomfield, Michigan. Rabbi Freedman has been involved in the hospice field since the early 1990s and has four CPE units (equivalent to a master's degree) and is board-certified. He heads the Jewish Hospice & Chaplaincy Network in Michigan which is heavily involved in hospice education across all denominations.

67. Seasons participates in the "We Honor Veterans" program, and its Miami program has achieved Level 3 status.

68. Seasons opened a new hospice in Broward County in late 2014, and it became Medicare certified in August 2015. The Broward hospice has achieved an average daily census of more than 50 patients as of the date of the final hearing.

69. Seasons HPC has been successful in opening and growing new hospices in other large metropolitan markets throughout the country, most of which have no CON requirements and therefore present significantly higher hospice competition. Examples of large metropolitan markets where Seasons has successfully opened and grown the census of new hospices include: Phoenix, northern California, San Bernardino, and Houston.

70. Seasons also agreed to condition its CON application approval on certain agreed services, including:

- 1) Providing at least two continuing education units per year to registered nurses and licensed social workers at no charge;
- 2) Offering internship experiences for various disciplines involved in hospice care;
- 3) Donation of \$25,000 per year to fund a wish fulfillment program for its patients and families;
- 4) Provision of services outside the therapies paid for by Medicare; and

5) Voluntary reporting of the Family
Evaluation of Hospice Care survey to AHCA.

C. Gulfside

71. Gulfside is a 501(c)3 community-based, not-for-profit organization licensed by the AHCA as a hospice.

Gulfside has been providing hospice services in Pasco County for more the 25 years. Gulfside provides care to all individuals eligible for care who meet the criteria of terminal illness and reside within the service area. Gulfside is accredited by the Joint Commission with Gold Seal status.

72. Gulfside has grown in scope of services and in terms of census and coverage. In July 2004, it had 50 patients and roughly 30 staff members. It had a limited reach within Pasco County, primarily serving the community of New Port Richey. Hernando-Pasco Hospice, now known as HPH, was the dominant hospice provider in Pasco County. Gulfside grew, in part, through extensive community education to physicians and other healthcare and service providers, to its current average census of 360, which makes it the dominant hospice provider in Pasco County.

73. The leadership at Gulfside has extensive experience in hospice, senior living, and Alzheimer's care and management, including the management of senior living and SNF facilities, and developing new facilities and programs. Gulfside has a

depth of experience in oncology care, social work, nursing, hospice and palliative medicine, health care administration, technical development, as well as program and project development. For example, Gulfside's CEO and COO were both part of the team at LifePath's Service Area 6B program (Polk, Highland and Hardee Counties) as the program was developing, growing from a census of 200 to 350 in one year.

74. Each hospice patient at Gulfside meets with its interdisciplinary team ("IDT") at least bi-weekly to discuss patients and to review their plan of care and any adjustments to the care plan. These meetings also include an educational component for IDT members. IDT meetings also take place when a patient requests a change in their care plan or should a change in the patient's status trigger a new IDT review.

75. Additionally, the physician member of the IDT will confer on a regular basis with the hospice medical director to obtain guidance and advice. The spiritual and pastoral care staff are also part of the IDT.

76. Gulfside has extensive orientation and training for newly hired staff, requires that new staff must demonstrate core competencies before rendering services, and requires all staff to regularly demonstrate their competencies at Gulfside's recurring "skills days." Gulfside encourages all disciplines of its staff to maintain competencies, receive additional training,

and earn continuing education units in their respective fields.

77. Field staff use web-connected laptops and smartphones to assist with documentation and make live updates to the Electronic Medical Record (Allscripts) which Gulfside phased in over two years ago. Gulfside also has software programs which help to identify potential hospice referrals, allowing them to focus their outreach and education efforts to reach new patients.

78. Gulfside has inpatient and other hospice service agreements with every hospital and nursing home in Pasco County.

79. Gulfside has a very involved structure for internal improvement and regulatory compliance. There are a series of audits conducted by supervisors and others throughout its organization to ensure proper care, documentation and compliance. This type of review for performance improvement has been in place at Gulfside since 2005. Gulfside uses the services of DEYTA, a national organization, to assist it with the processing and data aggregation of its CHAPs results as part of its benchmarking for excellence. Gulfside's commitment to quality and compliance was recognized in their last CMS and State Survey results, both of which were deficiency-free.

80. Gulfside's volunteer services are well-developed, allowing trained and supervised volunteers to work

in administration, patient care, patient support, and even as part of the spiritual care team.

81. Gulfside was awarded the Florida Hospices and Palliative Care Association's Excellence Award in 2015 for its specialized Spiritual Care Volunteer Program. That program uses volunteers with spiritual or counseling training, including Stephen Ministers (lay-ministers) and retired clergy, to primarily serve patients with memory impairments, allowing the hospice chaplains to focus their efforts on patients with a more involved spiritual plan of care that might involve complicated unresolved relationships and life review.

82. Community outreach and education and marketing efforts by hospices are important for a hospice to be part of the community. Gulfside has an extensive history of outreach programs that include educational programs for physicians and facility staff, programs to honor local veterans, and to provide education and support to caregivers, patients, and to others caring for family and loved ones with life limiting illnesses.

83. Local fundraisers and events help keep Gulfside in touch with the community at large, in addition to raising funds which help support its mission. Gulfside's Thrift Shop operations are part and parcel of this community presence. The thrift shop operations are a significant source of Gulfside's operating revenues.

84. If approved, Gulfside would focus its attention to end-stage heart disease patients, as its research showed that fewer patients with this diagnosis were currently being served in Hillsborough County. Gulfside has developed special program to serve these patients and their unique needs. The end-stage heart disease incidence rate in Hillsborough County for the Hispanic population was 25 percent, much higher than the incidence rate for the population at large of seven percent. Gulfside sees this fact as evidence of need for more focused services.

85. Another unique trend Gulfside identified in Hillsborough County is a comparatively higher infant mortality rate when compared to the state average. In response to that identified trend, Gulfside proposed a program to meet the need for anticipatory grief and bereavement counseling for the parents and siblings of these infants and children.

86. Gulfside currently has well-established relationships with providers in Hillsborough County, physicians, hospitals, SNFs, and conducts outreach and education as part of its mission to educate about hospice, as well as to serve the increasing number of patients its serves who are Hillsborough County residents.

87. Gulfside agreed to a number of conditions for approval of its CON application:

- Condition 1 is for enhanced services to Veterans. Gulfside is a Level 4 We Honor Veterans provider.
- Condition 2 is for special bereavement programs and is consistent with Gulfside's programs and includes the traumatic loss program.
- Condition 3 is for special programs not covered by Medicare, and these programs all compliment the patient and family hospice experience and are incorporated into how Gulfside provides care. These programs include:
 - (a) Pet Peace of Mind program for ensuring patients and families are not burdened with additional stress worrying about the care of their pets.
 - (b) Treasured Memories, an interactive craft-based activity to express feelings and to create a tangible reminder of the patient.
 - (c) Heartstrings, a program using Reverie Harps to provide a soothing focus for patients and families, and include the patient playing the Harp. The Reverie Harp is a unique instrument which is auto-tuned and harmonizing; anyone can play it and make beautiful soothing music.
- Condition 4 provides for an Ethics Committee to assist with dilemmas and concerns for professionals and others when there is a question regarding cultural, religious, or clinical questions about the appropriateness or compatibility of a course of care or other decisions related to a patient.

- Condition 5 is for Gulfside's Crisis Stabilization program which has become a significant program as troubled family dynamics and other at-risk situations seem to arise with more frequency.
- Condition 6 is for the Patient and Family Resource Navigator, a program already being used in Pasco County which assists patients and families to identify community and governmental benefits and resources which may be available to them and assisting them with applying or accessing the benefits or resources.
- Condition 7 is to provide programs for patients whose primary language is not English. This will include providing for translations and to recruit bilingual staff and volunteers.
- Condition 8 reflects that Gulfside is an "open access" hospice, providing complex therapies such as infusion therapies, dobutamine, special wound care, palliative chemotherapy and palliative radiation to its patients.
- Condition 9 was for Gulfside to offer non-cancer patient outreach and education. This includes the previously discussed end-stage heart disease and Alzheimer's patients.
- Condition 10, Gift of Presence for the actively dying, will require the provision of specially trained volunteers to be present with patients and families during the last stages to assist and comfort them.
- Condition 11 is related to physician and clinician education, and networking programs to educate community practitioners and aligned professionals about hospice and palliative care and to provide peer-to-peer networks.

- Condition 12, provides for professional and physician internships and residencies, as well as the use of professional volunteers to educate about hospice and palliative care services.
- Condition 13 is for the development and implementation of the Patient and Family secure web-portal.
- Condition 14 provides that Gulfside will establish a separate foundation for Hillsborough County to help cover patient needs and expensive treatments. Gulfside will provide seed-money of \$25,000 and donations will remain in Hillsborough County as part of this Condition.
- Condition 15 is for the rapid licensure of the new Gulfside program in Hillsborough County. Gulfside will file its licensure application to add Hillsborough County to its existing license within 5 days of receipt of the CON.

88. Gulfside's corporate office in Land O'Lakes and its freestanding hospice inpatient facility in Zephyrhills would be used to support the Hillsborough County program. Both are located just north of the county line. Gulfside will not need to add administrative capabilities or staff at its corporate office to initially support staff and the incremental additional patients served in Hillsborough County. The existing supports for the new program would allow it to enjoy improved economies of scale and efficiencies.

89. Gulfside projects it will take approximately 45 days to receive a license from AHCA. During that time, existing

staff will be canvassed to see which of them would like to work in the new Hillsborough County program. Gulfside would only need to assemble one additional IDT initially to begin serving the new service area. Gulfside would provide services in Hillsborough County through existing experienced staff now working in Pasco County. Travel requirements for the Hillsborough County staff would not differ much from what is commonly seen in Pasco County, because Pasco has many remote areas that Gulfside serves. Gulfside already has 25 current staff who reside in Hillsborough County.

90. Because Gulfside is not creating a new Medicare provider or newly licensed entity in Florida, it could begin offering services as a fully-licensed and Medicare Certified provider as soon as it has a license from AHCA. All of Gulfside's current ancillary services and supply contractors already serve Hillsborough (as well as Pasco) County and all of these contracts necessary for delivering hospice care can readily be expanded to include Hillsborough County.

91. Gulfside will serve all of Hillsborough County through its extensive network of relationships throughout the county. Pasco and Hillsborough Counties are part of the same recognized healthcare market with patients flowing between the two counties. Gulfside expects its initial referrals will originate in the northern part of the county due to its strong referral

relationships with providers in that area, and Gulfside's assessments showed greater unmet need in that same area. It will later expand to cover the entire county.

92. Gulfside's operations in Hillsborough County would be more profitable on average than its current operations in Pasco County despite the allocation of administration and corporate overhead costs to the Hillsborough County program, and despite the assessment of a seven percent fee for corporate services and management from the Pasco home office. The cause of this difference is that the new program in Hillsborough County will benefit from economies of scale. Adding service volume does not require the duplication of costs and services for administrative and other support in place in Pasco County.

93. Gulfside had a loss in fiscal year 2015 due to several significant non-recurring expenses. Gulfside's projected budget for the 2016 fiscal year included a profit of \$337,000, and Gulfside for the first four months of the new fiscal year was ahead of budget. The 2016 fiscal year budget did not include those items which Gulfside had identified as non-recurring, and yet they out-performed that conservative budget, corroborating that these were non-recurring expenses, and that Gulfside will be more profitable than projected in the 2016 fiscal year budget.

94. Gulfside had a one-year loss for the 2015 fiscal year, but in that year, it also acquired a significant asset with the purchase of its corporate center office. Gulfside also maintained a good cash position and had significant additional credit available should it have needed to draw on those resources.

D. LifePath's Position vis-à-vis Competition

95. Due to LifePath's growth and its penetration rate within Service Area 6A, there has not been a need established by AHCA for another hospice in Hillsborough County until recently.

96. The events leading to the newly established need are partially of LifePath's own making, to wit: In May 2013, the Centers for Medicare and Medicaid Services ("CMS") announced a decision to eliminate two categories of diagnosis often used for hospice care—"debility, undefined" and "failure to thrive." The initial pronouncement from CMS indicated the change would take effect in approximately October 2013. LifePath decided to immediately stop accepting patients with those diagnoses so as to be in compliance with the new federal regulations when they took effect. LifePath also informed all its referring partners, physicians, hospitals, discharge planners, etc., that it would not be taking those types of patients any longer. Then CMS decided to delay implementation of the new policies for a year. By then, LifePath had already taken actions resulting in the

loss of some 700 potential admissions. When AHCA did its hospice need calculations shortly thereafter, lo and behold, there was a "shortage" of some 700 cases in the use rate portion of the need calculation formula. As a result, AHCA determined there was a need for one additional hospice provider in Service Area 6A. LifePath had been hoisted on its own petard.

97. LifePath does not challenge the Agency's fixed need calculation or that another hospice should be approved for Hillsborough County Service Area 6A. Rather, LifePath is desirous that only the hospice with least potential for negative impact on LifePath should be approved.

98. Based on the preponderance of evidence, West Florida would have the most negative impact on LifePath. Gulfside, due to its lower census development, would have the least impact. However, as Seasons would be more likely to completely meet the need projected by AHCA and would impact LifePath less than would West Florida, its proposal is the most acceptable.

IV. Statutory and Rule Review Criteria

99. The parties stipulate that: (1) All three applicants' letters of intent and CON applications were timely and properly filed with required fees; (2) AHCA duly noticed its preliminary intent to approve West Florida's CON application and to deny Seasons and Gulfside; (3) Seasons, Gulfside and LifePath timely filed Petitions for Formal Administrative Hearings challenging

AHCA's preliminary decision; and (4) Each application contains the minimum application content prescribed by sections 408.037 and 408.039, Florida Statutes. Also, Schedules A, D-1, and 10 in each CON application are acceptable and reasonable.

Section 408.035(1) Criteria Stipulations

100. (1) (a) "The need for the health care facilities and health services being proposed."- -There is a need for one additional hospice program in Service Area 6A.

101. (1) (b) "The availability, quality of care, accessibility, and extent of utilization of existing health care facilities and health services in the service district of the applicant."- -A consideration of this criterion supports the need for one new hospice program in the service area.

102. (1) (d) "The availability of resources, including health personnel, management personnel, and funds for capital and operating expenditures, for project accomplishment and operation."- -Each applicant has adequately projected the availability of personnel. Each party's Schedule 6 and staffing projections are reasonable. Each party's audited financial statements present an adequate financial condition.

103. (1) (f) "The immediate and long-term financial feasibility of the proposal."- -Schedules 1, 2, and 3 in each application are reasonable and indicate that each applicant's proposal is financially feasible in the short term and long term.

104. (1) (h) -"The costs and methods of the proposed construction, including the costs and methods of energy provision and availability of alternative, less costly, or more efficient methods of construction." - This criterion is not applicable.

Florida Administrative Code Rule 59C-1.030 Stipulations:

105. (2) (d) - "In determining the extent to which a proposed service will be accessible, the following will be considered: . . . The performance of the applicant in meeting any applicable Federal regulations."- -This criterion would support approval of any of the three applicants.

Florida Administrative Code Rule 59C-1.0355 Stipulations

106. (6) "An applicant for a new hospice program shall provide a detailed program description in its certificate of need application"- -Each application contained adequate evidence regarding the applicants' proposals.

III. Factors Mitigating Against Approval of West Florida

107. West Florida's proposal to establish a hospital-based hospice program in Service Area 6A materially differs from

Seasons' and Gulfside's proposals seeking to establish community-based hospice programs in the service area. There are key differences between a freestanding or community-based hospice, on the one hand, and a hospital-based hospice, on the other.

108. Most significantly, in contrast to a community-based hospice, a hospital-based hospice has ready access to a patient population (i.e., acute care patients at its sponsoring hospital) from which it may receive referrals.

109. Further, a hospital-based hospice primarily serves patients discharged from its sponsoring hospital and not the community at large, thereby creating a silo of care in which patients are funneled from the sponsoring hospital to the affiliated hospice. Nationally, for the period 2010 through 2014, hospital-based hospice programs obtained approximately 71 percent of their admissions from hospitals within their own health system and only six percent of admissions from out-of-system hospitals.

110. Further, it is possible for a hospital-based hospice program to quickly obtain a large volume of admissions by virtue of its relationship with its sponsoring hospital. The census development for a community-based hospice program is more gradual. Hospital-based hospices do not tend to serve the broader community; once they have captured all of the admissions coming out of their own hospital or health system,

they cease to continue to achieve significant market share growth.

111. Moreover, hospital-based hospices tend to have shorter average lengths of stay and provide higher levels of inpatient care than community-based hospices because they tend to treat patients with a higher acuity and have easy access to inpatient beds where they can provide inpatient hospice care. Medicare reimbursement for general inpatient care is significantly higher than for some other types of hospice care. To the extent that a hospice provider provides more inpatient care, they will experience higher revenues. This would result in a concomitant reduction in revenues for a competing hospice in the same service area.

112. Approximately 36 percent of patients discharged from an acute care hospital in Hillsborough County and admitted to a hospice program are discharged from one of West Florida's sponsoring hospitals. In 2014, approximately 46 percent of LifePath's admissions were referred from acute care hospitals. Accordingly, even if West Florida made no effort to obtain referrals to its program from sources other than its affiliate organizations, approximately 16.6 percent of LifePath's admissions could be at risk if West Florida's proposed project is approved.

113. Mr. Michael Schultz, the CEO of Florida Hospital's West Florida Region, testified that the goal of Tampa General and Florida Hospital is to manage a patient's entire episode of care and that if West Florida's application were approved, both hospital organizations would "absolutely" prefer to have West Florida provide hospice care to patients discharged from its hospitals. LifePath's projection that it would lose 20 percent of its admissions if West Florida's application was approved is reasonable.

114. Mr. Burkhart discussed West Florida's desire to develop a "covered lives" strategy or network, where the hospital system can control how the dollars are spent and how the care is delivered. West Florida applied for a hospice CON for two reasons: 1) AHCA had published need; and 2) because "we wish to have more control over a piece of the hospice continuum so that when we're doing things like narrow networks, we have that in our portfolio under our control." Tr., p. 99. In a covered lives network, a hospice patient would pay less if they went to a West Florida affiliated hospice, and more if they went to Lifepath or another out-of-network hospice.

115. West Florida plans to open satellite hospice offices in Tampa General and in the two Florida Hospitals located in Hillsborough County. There was no mention of the desire or possibility of opening satellite hospice offices in any of the

non-West Florida affiliated hospitals located in Hillsborough County. From a practical perspective, it seems unlikely that competing hospital systems would welcome such involvement by a competitor.

Seasons

116. Seasons is the only applicant without a current connection to the healthcare community in Hillsborough County. It has, however, some experience in other Florida markets.

117. Fewer of Seasons' programmatic proposals are directly tied to a Condition of CON approval, but the programs are nonetheless generally universal in Seasons HPC operations.

Gulfside

118. Service Area 6A has a sizeable Hispanic population, but Gulfside has very limited experience in treating Hispanics. In fact, only 3.3 percent of its recent admissions are Hispanic. Gulfside's COO did not know how many, if any, of Gulfside's existing staff was bilingual. Today, Gulfside relies on interpreters who are accessed through a language line to communicate with Hispanic patients and family members. Since Gulfside plans to utilize existing staff to serve Hillsborough County, it will need to continue to rely upon interpreters to communicate with Hispanics in that county. To the extent the Hispanic population in Hillsborough County is underserved, or there is a need to ensure that these patients have a choice of

hospice providers that are committed to meeting their needs, Seasons demonstrated far more experience and ability than Gulfside.

119. Seasons projected 516 admissions in year two while Gulfside projected 276 admissions. Seasons has reasonably projected to achieve 240 more admissions in year 2 than Gulfside and thus will do a better job in meeting the unmet need. West Florida also projects more admissions than Gulfside.

IV. Ultimate Findings of Fact

120. Each of the applicants, as advertised, could provide quality hospice services to the residents of AHCA Service Area 6A/Hillsborough County.

121. The proposal by West Florida would be more likely to serve its own hospital patients than the community at large. This would have the effect of less penetration by West Florida in the service area as a whole. It would also likely result in West Florida retaining more of the most critically ill hospice patients (i.e., those with shorter lengths of stay), thereby benefitting from the new reimbursement rules to the exclusion of the competing hospice.

122. Gulfside would be able to commence operations in Hillsborough County more quickly than Seasons or West Florida. It has connections with other healthcare providers in Hillsborough County and could easily transition to that

geographic area. However, it proposes less growth and coverage than either Seasons or West Florida, thus will less likely meet the need which currently exists.

123. Seasons has the financial and operational wherewithal to be successful in Hillsborough County. It has more experience (and success) in starting a new hospice than the other applicants. Its programs are well-established and conducted by experts in their fields. Seasons would meet the need for a new hospice provider in Service Area 6A better than the other applicants.

124. Upon consideration of all the facts in this case, Seasons' application, on balance, is the most appropriate for approval.

CONCLUSIONS OF LAW

Jurisdiction

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

Burden of Proof

126. As applicants, West Florida, Seasons, and Gulfside each has the burden of proving, by the preponderance of the evidence, entitlement to a CON. Boca Raton Artificial Kidney Ctr., Inc. v. Dep't of Health & Rehab. Servs., 475 So. 2d 260 (Fla. 1st DCA 1985); § 120.57(1)(j), Fla. Stat. Each of the

applicants proved that they met all the necessary criteria for approval. However, there is a need for only one of the three to be approved.

127. The award of a CON must be based on a balanced consideration of all applicable and statutory rule criteria in section 408.035, Florida Statutes. Balsam v. Dep't of Health & Rehab. Servs., 486 So. 2d 1341 (Fla. 1st DCA 1986). "[T]he appropriate weight to be given to each individual criterion is not fixed, but rather must vary on a case-by-case basis, depending upon the facts of each case." Collier Med. Ctr., Inc. v. Dep't of Health & Rehab. Servs., 462 So. 2d 83, 84 (Fla. 1st DCA 1985). In the present case, the weighing of criteria must be done comparatively.

128. An administrative hearing involving disputed issues of material fact is a de novo proceeding in which the administrative law judge independently evaluates the evidence presented. Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778, 787 (Fla. 1st DCA 1981); § 120.57(1), Fla. Stat. The Agency's preliminary decisions on CON applications, including its findings in the State Agency Action Report, are not entitled to a presumption of correctness. Id.

129. Pursuant to the its hospice rule need methodology, the Agency determined that there is a projected need for only one new hospice program in Service Area 6A for the applicable planning horizon.

130. The existence of a numeric need pursuant to the rule creates a rebuttable presumption of need for an additional hospice program in the service area. Vitas Healthcare Corp. of Cent. Fla. v. Ag. for Health Care Admin., Case No. 04-3858CON, 2005 Fla. Div. Admin. Hear. LEXIS 881, *61-62 (DOAH June 14, 2005; AHCA July 7, 2005) (citation omitted).

131. There is no persuasive evidence to rebut the presumption of need.

132. All of the applicants are well qualified to meet the projected need for an additional hospice program in the service area. One of them, Seasons, will meet the need more appropriately than the other applicants.

133. Based upon the totality of the circumstances and for all of the reasons stated in the Findings of Fact, on balance, the advantage goes to Seasons over Gulfside or West Florida.

RECOMMENDATION

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

RECOMMENDED that a final order be entered approving Seasons Hospice and Palliative Care of Tampa, LLC's, CON No. 10298 and

denying West Florida Health, Inc.'s, CON No. 10302 and Gulfside Hospice & Palliative Care of Tampa, LLC's, CON No. 10294.

DONE AND ENTERED this 21st day of March, 2016, in Tallahassee, Leon County, Florida.



R. BRUCE MCKIBBEN
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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.