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WSR 18-19-051

RULE-MAKING ORDER
PERMANENT RULE ONLY

CR-103P (December 2017)
(Implements RCW 34.05.360)

Agency: Department of Health

Effective date of rule:

Permanent Rules

☒ 31 days after filing.

☐ Other (specify) **(If less than 31 days after filing, a specific finding under RCW 34.05.380(3) is required and should be stated below)**

Any other findings required by other provisions of law as precondition to adoption or effectiveness of rule?

☐ Yes ☒ No If Yes, explain:

Purpose: WAC 246-310-290 Hospice services - Standards and need forecasting method. The adopted rule amends WAC 246-310-290 by updating and revising existing Certificate of Need (CN) criteria, standards and need methodology for hospice service agencies.

Citation of rules affected by this order:

New: None.
Repealed: None.
Amended: WAC 246-310-290
Suspended: None.

Statutory authority for adoption: RCW 70.38.135

Other authority: RCW 70.38.115

PERMANENT RULE (Including Expedited Rule Making)

Adopted under notice filed as WSR 18-12-073 on 06/01/2018 (date).

Describe any changes other than editing from proposed to adopted version: WAC 246-310-290(10)(b) was revised from "WAC 246-310-220 - Determination of financial feasibility under WAC 246-310-210;" to "Determination of financial feasibility under WAC 246-310-220" to align with the sentence structure of the remainder of the section and remove an incorrect WAC reference.

If a preliminary cost-benefit analysis was prepared under RCW 34.05.328, a final cost-benefit analysis is available by contacting:

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Other:

Note: If any category is left blank, it will be calculated as zero. No descriptive text.

Count by whole WAC sections only, from the WAC number through the history note. A section may be counted in more than one category.

The number of sections adopted in order to comply with:

Federal statute:	New	0	Amended	0	Repealed	0
Federal rules or standards:	New	0	Amended	0	Repealed	0
Recently enacted state statutes:	New	0	Amended	0	Repealed	0

The number of sections adopted at the request of a nongovernmental entity:

	New	0	Amended	1	Repealed	0

The number of sections adopted in the agency's own initiative:

	New	0	Amended	0	Repealed	0

The number of sections adopted in order to clarify, streamline, or reform agency procedures:

	New	0	Amended	0	Repealed	0

The number of sections adopted using:

Negotiated rule making:	New	0	Amended	0	Repealed	0
Pilot rule making:	New	0	Amended	0	Repealed	0
Other alternative rule making:	New	0	Amended	1	Repealed	0

Date Adopted: 09/14/18	**Signature:** 
Name: John Wiesman, DrPH, MPH	
Title: Secretary of Health	

AMENDATORY SECTION (Amending WSR 03-07-096, filed 3/19/03, effective 4/19/03)

WAC 246-310-290 Hospice services—Standards and need forecasting method. The following rules apply to any in-home services agency licensed or an applicant intending to become licensed to provide hospice services ((~~which has declared an intent~~)), and intending to become a medicare certified ((~~as a~~)) or medicaid contracted service provider ((~~of hospice services~~)) in a designated ((~~service~~)) planning area.

(1) The d~~D~~efinitions((~~.~~)) in this subsection apply throughout this section unless the context clearly indicates otherwise:

(a) "ADC" means average daily census and is calculated by:

(i) Multiplying projected annual hospice agency admissions by the most recent average length of stay in Washington ((~~(~~))~~,~~ based on the most recent data reported to the Centers for Medicare and Medicaid Services (CMS) ((~~data)~~)) to derive the total annual days of care; ((~~and~~))

(ii) Dividing ((~~this~~)) the total calculated in (a)(i) of this subsection by three hundred sixty-five (days per year) to determine the ADC.

(b) ((~~"Current supply of hospice providers" means:~~

~~(i) Services of all providers that are licensed and medicare certified as a provider of hospice services or that have a valid (unexpired) certificate of need but have not yet obtained a license; and~~

~~(ii) Hospice services provided directly by health maintenance organizations who are exempt from the certificate of need program. Health maintenance organization services provided by an existing provider will be counted under (b)(i) of this subsection.~~

~~(c) "Current hospice capacity" means:~~

~~(i) For hospice agencies that have operated (or been approved to operate) in the planning area for three years or more, the average number of admissions for the last three years of operation; and~~

~~(ii) For hospice agencies that have operated (or been approved to operate) in the planning area for less than three years, an ADC of thirty-five and the most recent Washington average length of stay data will be used to calculate assumed annual admissions for the agency as a whole for the first three years.~~

~~(d) "Hospice agency" or "in-home services agency licensed to provide hospice services" means a person administering or providing hospice services directly or through a contract arrangement to individuals in places of temporary or permanent residence under the direction of an interdisciplinary team composed of at least a nurse, social worker, physician, spiritual counselor, and a volunteer and, for the purposes of certificate of need, is or has declared an intent to become medicaid eligible or certified as a provider of services in the medicare program.~~

~~(e)~~)) "Average length of stay" means the average covered days of care per person for Washington state as reported by CMS.

(c) "Base year" means the most recent calendar year for which hospice survey data is available as of September 30th of each year.

(d) "CMS" means the Centers for Medicare and Medicaid Services.

(e) "Current supply of hospice providers" means all providers of hospice services that have received certificate of need approval to provide services within a planning area. State licensed only and vol-

unteer hospices are excluded from the current supply of hospice providers.

(f) "Hospice services" means symptom and pain management provided to a terminally ill ((~~individual~~)) person, and emotional, spiritual and bereavement support for the ((~~individual~~)) terminally ill person and family in a place of temporary or permanent residence ((~~and may include the provision of home health and home care services for the terminally ill individual.~~

~~(f)~~)) provided under the direction of an interdisciplinary team composed of at least a registered nurse, social worker, physician, spiritual counselor, and a volunteer.

(g) "OFM" means the Washington state office of financial management.

(h) "Planning area" or "service area" means ((~~each~~)) an individual ((~~county~~)) geographic area designated by the department ((~~as the smallest geographic area for which hospice services are projected~~)) for which hospice need projections are calculated. For the purposes of ((~~certificate of need, a planning or combination of~~)) hospice services, planning area((~~s may serve as the service area.~~

~~(g) "Service area" means, for the purposes of certificate of need, the geographic area for which a hospice agency is approved to provide medicare certified or medicaid eligible services and which consist of one or more planning areas~~)) and service area have the same meaning.

(i) "Projection year" means the third calendar year after the base year. For example, reviews using 2016 survey data as the base year will use 2019 as the projection year.

(2) The department ((~~shall~~)) will review a hospice application((~~s~~)) using the concurrent review cycle described in ((~~this~~)) subsection (3) of this section, except when the sole hospice provider in the service area ceases operation. Applications to meet this need may be accepted and reviewed in accordance with the regular review process described in WAC 246-310-110 (2)(c).

(3) Applications must be submitted and reviewed according to ((~~the following schedule and procedures~~)) Table A:

((~~(a) Letters of intent must be submitted between the first working day and last working day of September of each year.~~

~~(b) Initial applications must be submitted between the first working day and last working day of October of each year.~~

~~(c) The department shall screen initial applications for completeness by the last working day of November of each year.~~

~~(d) Responses to screening questions must be submitted by the last working day of December of each year.~~

~~(e) The public review and comment for applications shall begin on January 16 of each year. If January 16 is not a working day in any year, then the public review and comment period must begin on the first working day after January 16.~~

~~(f) The public comment period is limited to ninety days, unless extended according to the provisions of WAC 246-310-120 (2)(d). The first sixty days of the public comment period must be reserved for receiving public comments and conducting a public hearing, if requested. The remaining thirty days must be for the applicant or applicants to provide rebuttal statements to written or oral statements submitted during the first sixty-day period. Also, any interested person that:~~

~~(i) Is located or resides within the applicant's health service area;~~

~~(ii) Testified or submitted evidence at a public hearing; and~~

~~(iii) Requested in writing to be informed of the department's decision, shall also be provided the opportunity to provide rebuttal statements to written or oral statements submitted during the first sixty-day period.~~

~~(g) The final review period shall be limited to sixty days, unless extended according to the provisions of WAC 246-310-120 (2)(d).~~

~~(4) Any letter of intent or certificate of need application submitted for review in advance of this schedule, or certificate of need application under review as of the effective date of this section, shall be held by the department for review according to the schedule in this section.~~

~~(5) When an application initially submitted under the concurrent review cycle is deemed not to be competing, the department may convert the review to a regular review process.~~

~~(6) Hospice agencies applying for a certificate of need must demonstrate that they can meet a minimum average daily census (ADC) of thirty-five patients by the third year of operation. An application projecting an ADC of under thirty-five patients may be approved if the applicant:~~

~~(a) Commits to maintain medicare certification;~~

~~(b) Commits to serve one or more counties that do not have any medicare certified providers; and~~

~~(c) Can document overall financial feasibility.~~

~~(7)~~))

Table A

		Application Submission Period			**Department Action**	**Application Review Period**		
Concurrent Review Cycle	Letters of Intent Due	Receipt of Initial Application	End of Screening Period	Applicant Response	Beginning of Review	Public Comment	Rebuttal	Ex Parte Period
Cycle 1 (Chelan, Douglas, Clallam, Clark, Skamania, Cowlitz, Grant, Grays Harbor, Island, Jefferson, King, Kittitas, Klickitat, Okanogan, Pacific, San Juan, Skagit, Spokane, and Yakima).	Last working day of **November** of each year.	Last working day of **December** of each year.	Last working day of **January** of each year.	Last working day of **February** of each year.	**March 16** of each year or the first working day thereafter.	**45-Day** public comment period (including public hearing). Begins **March 17** or the first working day thereafter.	**30-Day** rebuttal period. Applicant and affected person response to public comment.	**75-Day** ex parte period. Department evaluation and decision.
Cycle 2 (Adams, Asotin, Benton, Columbia, Ferry, Franklin, Garfield, Kitsap, Lewis, Lincoln, Mason, Pend Oreille, Pierce, Snohomish, Stevens, Thurston, Wahkiakum, Walla Walla, Whatcom, and Whitman).	Last working day of **December** of each year.	Last working day of **January** of each year.	Last working day of **February** of each year.	Last working day of **March** of each year.	**April 16** of each year or the first working day thereafter.	**45-Day** public comment period (including public hearing). Begins **April 17** or the first working day thereafter.	**30-Day** rebuttal period. Applicant and affected person response to public comment.	**75-Day** ex parte period. Department evaluation and decision.

(4) Pending certificate of need applications. A hospice service application submitted prior to the effective date of these rules will be reviewed and action taken based on the rules that were in effect on the date the application was received.

(5) The department will notify applicants fifteen calendar days prior to the scheduled decision date if it is unable to meet the deci-

sion deadline on the application(s). In that event, the department will establish and commit to a new decision date.

(6) When an application initially submitted under the concurrent review cycle is deemed not to be competing, the department may convert the review to a regular review process.

(7) Current hospice capacity will be determined as follows:

(a) For hospice agencies that have operated in a planning area for three years or more, current hospice capacity is calculated by determining the average number of unduplicated admissions for the last three years of operation;

(b) For hospice agencies that have operated (or been approved to operate) in a planning area for less than three years, an ADC of thirty-five and the most recent Washington average length of stay data will be used to calculate assumed annual admissions for the hospice agency as a whole for the first three years to determine current hospice capacity. If a hospice agency's reported admissions exceed an ADC of thirty-five, the department will use the actual reported admissions to determine current hospice capacity;

(c) For a hospice agency that is no longer in operation, the department will use the historical three-year admissions to calculate the statewide use rates, but will not use the admissions to calculate planning area capacity;

(d) For a hospice agency that has changed ownership, the department will use the historical three-year admissions to calculate the statewide use rates, and will use the admissions to calculate planning area capacity.

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

(a) Step 1. Calculate the following ((~~four~~)) two statewide predicted hospice use rates using ((~~CMS and~~)) department of health ((~~data or other available data sources.~~)) survey and vital statistics death data:

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

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

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

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

(b) Step 2. Calculate the average number of total resident deaths over the last three years for each planning area by age cohort.

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

(d) Step 4. ((~~Add the four subtotals derived~~)) Using the projected patients calculated in Step 3 ((~~to project~~)), calculate a use rate by dividing projected patients by the three-year historical average population by county. Use this use rate to determine the potential volume of hospice ((~~services in each planning area~~)) use by the projected population by the two age cohorts identified in Step 1, (a)(i) and (ii) of this subsection using OFM data.

(e) Step 5. ((~~Inflate the potential volume of hospice service by the one-year estimated population growth (using OFM data).~~)) Combine the two age cohorts. Subtract the most recent three-year average hospice capacity in each planning area from the projected volumes calculated in Step 4 to determine the number of projected admissions beyond the planning area capacity.

(f) Step 6. ((~~Subtract the current hospice capacity in each planning area from the above projected volume of hospice services to determine unmet need.~~)) Multiply the unmet need from Step 5 by the statewide average length of stay as determined by CMS to determine unmet need patient days in the projection years.

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

~~(8)~~)) Step 7. Divide the unmet patient days from Step 6 by 365 to determine the unmet need ADC.

(h) Step 8. Determine the number of hospice agencies in the planning areas that could support the unmet need with an ADC of thirty-five.

(9) If the department becomes aware of a facility closure fifteen calendar days or more prior to the letter of intent submission period, the department will update the methodology for the application cycle. If a closure occurs fewer than fifteen calendar days prior to the letter of intent submission period, the department will not update the methodology until the next year.

(10) In addition to demonstrating numeric need under subsection (7) of this section, ((~~hospice agencies~~)) applicants must meet the ((~~other~~)) following certificate of need requirements ((~~including WAC 246-310-210 -~~)):

(a) Determination of need((~~, WAC 246-310-220 -~~)) under WAC 246-310-210;

(b) Determination of financial feasibility((~~, WAC 246-310-230 -~~)) under WAC 246-310-220;

(c) Criteria for structure and process of care((~~, and WAC 246-310-240 -~~)) under WAC 246-310-230; and

(d) Determination of cost containment under WAC 246-310-240.

((~~(9) If two or more hospice agencies are competing to meet the same forecasted net need, the department shall consider at least the following factors when determining which proposal best meets forecasted need:~~

~~(a) Improved service in geographic areas and to special populations;~~

~~(b) Most cost efficient and financially feasible service;~~

~~(c) Minimum impact on existing programs;~~

~~(d) Greatest breadth and depth of hospice services;~~

~~(e) Historical provision of services; and~~

~~(f) Plans to employ an experienced and credentialed clinical staff with expertise in pain and symptom management.~~

~~(10)~~)) (11) To conduct the superiority evaluation to determine which competing applications to approve, the department will use only the criteria and measures in this section to compare two or more applications to each other.

(a) The following measures must be used when comparing two or more applications to each other:

(i) Improved service to the planning area;

(ii) Specific populations including, but not limited to, pediatrics;

(iii) Minimum impact on existing programs;

(iv) Greatest breadth and depth of hospice services; and

(v) Published and publicly available quality data.

(b) An application will be denied if it fails to meet any criteria under WAC 246-310-210, 246-310-220, 246-310-230, or 246-310-240 (2) or (3).

(12) The department may grant a certificate of need for a new hospice agency in a planning area where there is not numeric need.

(a) The department will consider if the applicant meets the following criteria:

(i) All applicable review criteria and standards with the exception of numeric need have been met;

(ii) The applicant commits to serving medicare and medicaid patients; and

(iii) A specific population is underserved; or

(iv) The population of the county is low enough that the methodology has not projected need in five years, and the population of the county is not sufficient to meet an ADC of thirty-five.

(b) If more than one applicant applies in a planning area, the department will give preference to a hospice agency that proposes to be physically located within the planning area.

(c) The department has sole discretion to grant or deny application(s) submitted under this subsection.

(13) Any hospice agency granted a certificate of need for hospice services must provide services to the entire county for which the certificate of need was granted.

(14) Failure to operate the hospice agency ((~~in accordance with~~)) as approved in the certificate of need ((~~standards~~)) may be ((~~grounds~~)) a basis for revocation or suspension of ((~~an~~)) a hospice agency's certificate of need, or other appropriate action.