

MAR 1 - 2011

DFS HEALTH PLANNING
RECEIVED

MAR 02 2011

Medical Facilities
PLANNING SECTION

Joy Heath, Esq.
Law Office of Joy Heath
514 Daniels Street #182
Raleigh, NC 27605
T 919.559.3904
F 919.803.6876
jht@jht-law.com

TO: State Health Coordinating Council Members
Elizabeth Brown & Carol Potter, DHHS Planning Section

FROM: Law Office of Joy Heath

RE: 2011 Home Health Need Determinations

DATE: February 21, 2011

I represent a client actively involved in preparing CON Applications in response to the home health agency need determinations in Mecklenburg, Cabarrus and Guilford Counties and we strongly object to the removal of these need determinations.

With respect to all three Counties in which the 2011 State Plan shows a need, we urge you to consider the following points. In addition, with respect to Mecklenburg County, we ask that you consider the specific data explained at the conclusion of this Memorandum.

We believe it is entirely appropriate to retain the home health need determinations in the 2011 Plan because the time for concerns and questions has passed. As you are very well aware, during the planning process, the Committee members, the Council and all interested parties had multiple opportunities to question the data, the calculations and any other aspect of the Tables and Methodology used in the three County need determinations, all of which were published as part of the Proposed 2011 Plan. The Plan was "disseminated broadly and examined in six public hearings held across the State." Any comments received during this year-long process "were duly considered."

At the Long Term and Behavioral Health Committee Meeting on February 11, 2011, it was noted that a provider had "found" the present use-rate calculation issue. What this tells us is that this issue is not a result of any change – it is a matter that could have been raised during the planning process but was not. The time to call for reexamination and revision has expired.

We believe you should focus on Policy GEN-2 which sets the exclusive terms for revisions to the State Plan. The only mechanism for change in need determinations is provided in Policy GEN-2 which speaks to revisions to need determinations to reflect changes in "inventories" of facilities and equipment. The present situation has nothing to do with a change in "inventories." Under the doctrine of *expressio unius est exclusio*

alterius, when a statute lists the situations to which it applies, it implies the exclusion of situations not contained in the list. See Evans v. Diaz, 333 N.C. 774, 430 S.E. 2d 244 (1993). In other words, because Policy GEN-2 only authorizes changes in need determinations based on inventory changes, it effectively precludes changes for any other purposes.

The present situation is unlike the situation in 2004 when an Operating Room need for Moore County was added to the Plan because: (a) that 2004 Plan change was based on an inventory change which is not the case now; and (b) that 2004 Plan change added a need determination which is unlike the proposed deletion of home health need determinations from the current Plan.

In determining how to proceed, we believe you should be mindful of fairness concerns. Relying on the announced need determinations, my client has already expended time and resources in the development of three CON Applications. As an interested party, my client has relied upon the Plan as a “key resource” for planning. Plan, p. 1. Specifically, my client has engaged the services of a consulting firm and has paid a significant non-refundable deposit to retain this firm’s services. Moreover, my client has entered into a contractual arrangement obligating it to pay for the work performed in the preparation of these Applications. My client has also expended funds for legal fees and services in connection with its plans to file CON Applications in the three Counties. My client has devoted its own staff time and effort in assembling information for use in the CON Applications for the three Counties and has incurred charges for various expenses associated with its CON Application preparation efforts. My client’s consultant has already participated in a Pre-Filing Conference last month, attended by Assistant CON Chief Martha Frisone and Project Analyst Carol Hutchinson. Removing the need determinations would be unfair and unreasonable inasmuch as my client has expended time and resources pursuing efforts to secure CON approvals for home health agencies in the three Counties in response to the announced needs.

We urge you to take into account my client’s commitment to bringing home health agencies into the identified Counties and ask that you consider the undue harm and loss my client would incur if it were unable to pursue the CON approvals necessary to allow it to do so. Our Supreme Court has stated, that “an estoppel may arise against a (governmental entity) out of a transaction in which it acted in a governmental capacity, if an estoppel is necessary to prevent loss to another, and if such estoppel will not impair the exercise of the governmental powers of the (entity).” See Washington v. McLawhorn, 237 N.C. 449, 454, 75 S.E.2d 402, 406 (1953).

Here, we believe the prudent course is to allow the need determinations to remain in the Plan and allow the CON Section to exercise its governmental powers to evaluate each applicant under the Need Criterion, N.C. Gen. Stat. Section 131E-183(a)(3), to determine whether the applicant has demonstrated the need the identified population has for the services proposed. With respect to Mecklenburg County, we ask you to consider the information on the following pages.

Mecklenburg County

The Council is being asked to remove the Need Determination for two (2) new home health agencies in Mecklenburg County because the Planning Section now reports an error related to the use rate for one of the age cohorts that factor into the Need Methodology.

Opponents suggest, as noted above, that such a change is not authorized and it is too late and overly unfair to remove the Need Determinations at this point in the year.

The contrary suggestion appears to be this: despite the lack of authority and the fairness concerns, it is better to “get it right” than it would be to allow Need Determinations if, in reality, there is no true need for additional agencies in Mecklenburg County.

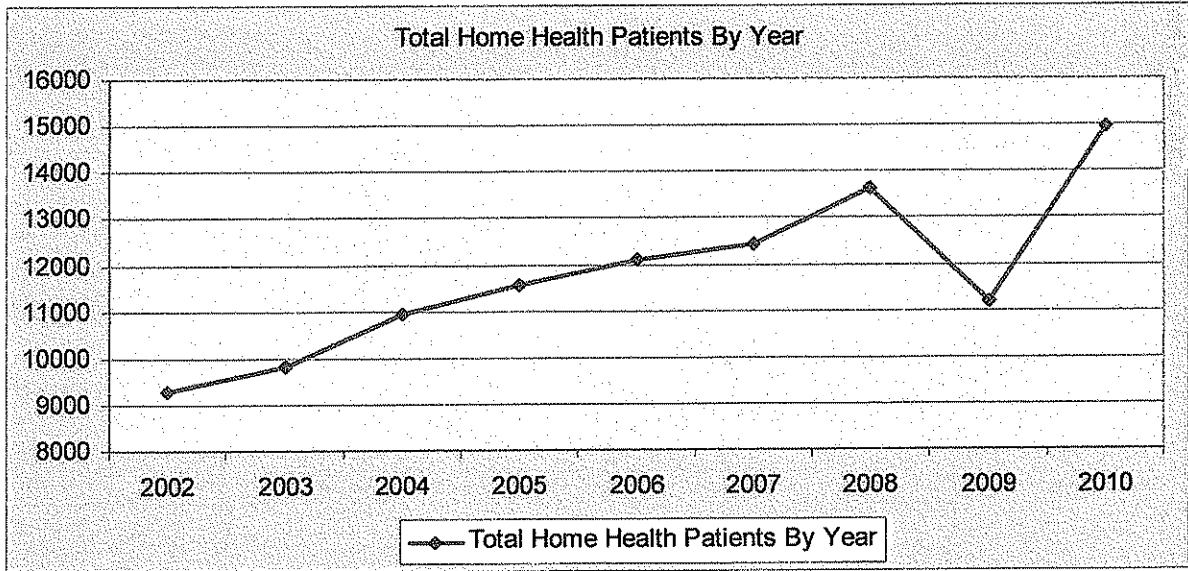
With the following data, we will show you that – in reality – there is a significant need for new agencies in Mecklenburg County. Despite all other considerations, it is clear that Mecklenburg County, its patients and its use rates are historically growing and there is a true and significant need in this County for additional home health agencies.

The Need Determination for two home health agencies for Mecklenburg County appears in the 2011 SMFP despite the calculations in the Plan that suggest declining utilization. The 2011 SMFP actually reports the following Average Annual Change Rates by age cohort as follows:

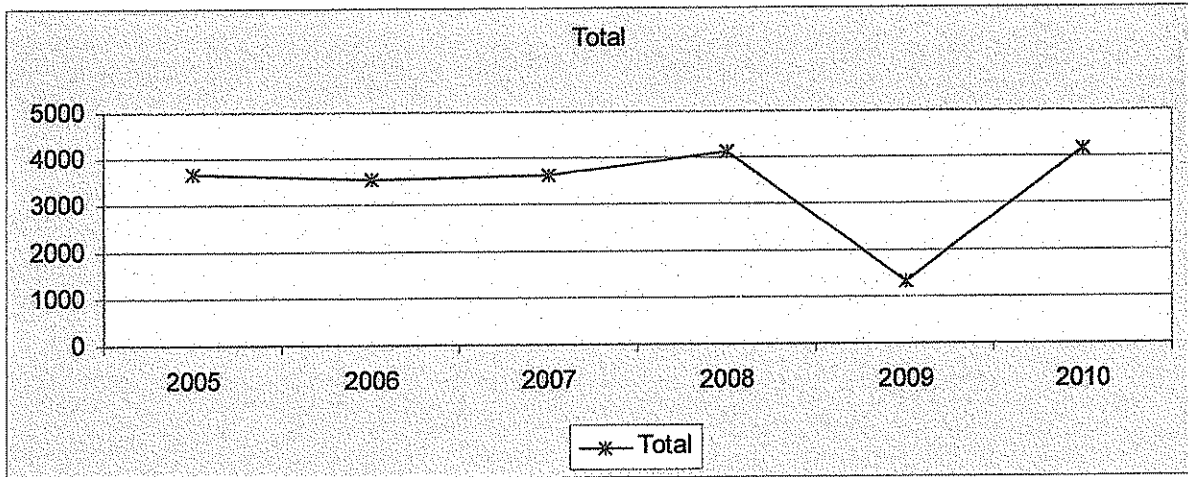
Mecklenburg County	Average Annual Rate of Change in Number of Patients	Average Annual Rate of Change in use Rates per 1000
<18	-21%	-22%
18 – 64	-2%	-4%
65 – 74	-2%	-3%
75 +	-4%	-6%

All of these change rates are negative numbers, or, project a declining patient population. It is not reasonable to conclude that the number of patients being served in Mecklenburg County is or will continue to decline as suggested by the above table. Such a projection is quite simply not consistent with historical utilization of home health agencies and services in Mecklenburg County.

With the overall historical utilization trend showing a year over year increase in home health patients, why the decline in 2009 as shown in the 2011 SMFP? The overarching reason why the 2011 SMFP only identifies a Need for only two (2) new home health agencies in Mecklenburg County is because it incorporates data from 2009 which suggests a sharp drop in the number of patients and the rate of use for home health services.

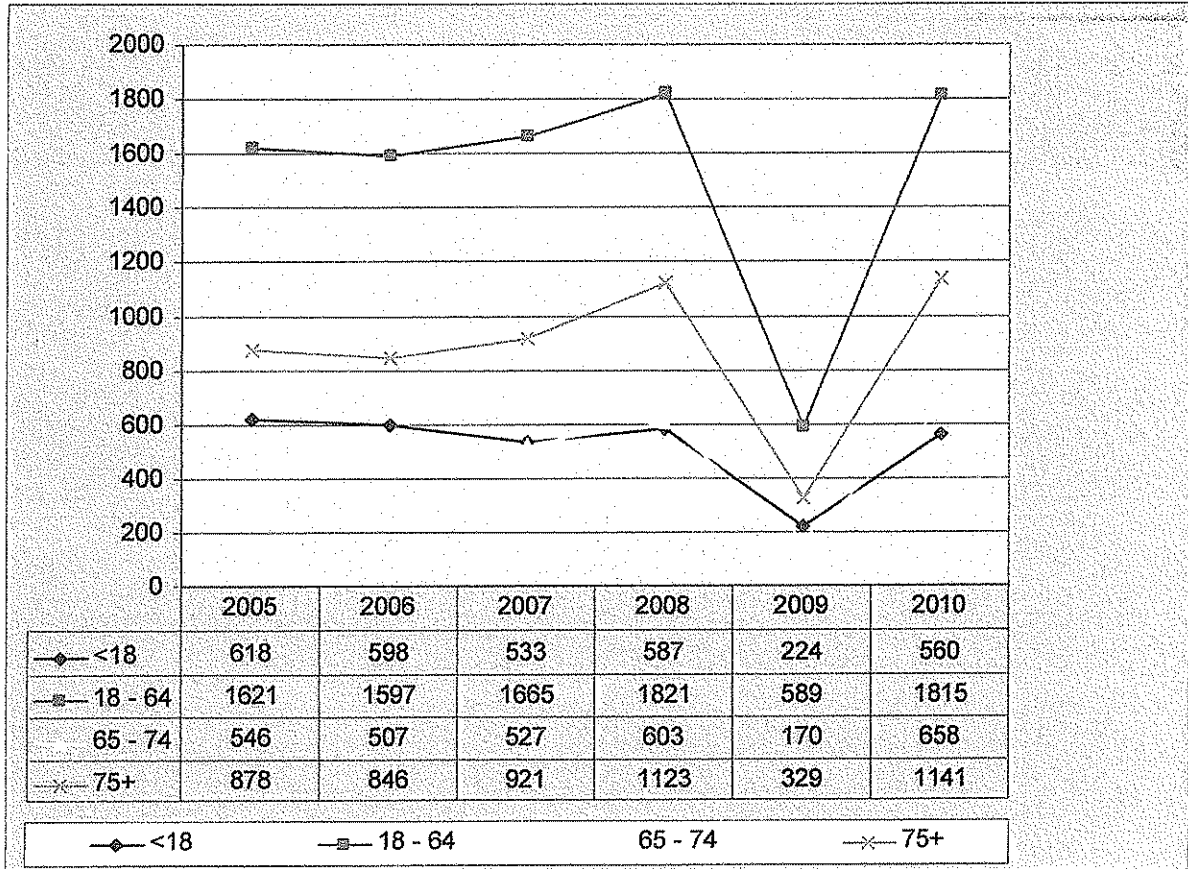


As explained below, that decline is a result of an abrupt plunge in the number of patients served as reported by one agency. The Healthy At Home Carolinas Medical Center home health agency has traditionally served significantly more patients than it reported for 2009. The following graph depicts the historical performance of Healthy at Home.



This reported precipitous dip in patient volumes for 2009 is highly unusual.

The next table reflects the historical performance of Healthy At Home, by age cohort, for the years 2005 through 2010. As the chart indicates, for 2009, curiously, Healthy At Home reported a similar plummet in all of the age cohorts.



Source: SMFPs and 2011 Supplemental Data Reports

From 2005 through 2010, Healthy at Home employed a consistent level of staff. In other words, although it reported a sharp drop-off in patient volumes, its reports show that its staffing levels remained consistent for all years from 2005 through 2010. Again, it is odd that Healthy At Home maintained its staffing levels despite reporting a steep descent in its home health patient volumes.

The Medicare Compare web site, <http://medicare.gov/HomeHealthCompare> reports that Healthy at Home serves more than 4,400 patients annually. Yet, the impact of the Healthy at Home reporting for 2009 was to suggest a tremendous decline in patient volume and use rates for Mecklenburg County.

The number of home health patients in Mecklenburg County has actually increased in each of the age cohorts as reported within the various State Plans since 2002!

Consider the following table:

Year	2002	2003	2004	2005	2006	2007	2008
Total	9284	9227	10951	11581	12106	12455	13626
< 18	701	712	768	852	858	876	909
18 - 64	3159	3304	3733	3948	3996	4115	4735
65 - 74	1668	1814	1960	2149	2221	2287	2502
75 +	3756	3997	4490	4632	5031	5177	5480

The total number of Mecklenburg County residents who received home health services in 2010 is significantly higher than that reported in the 2011 SMFP for 2009. Consider the next table which demonstrates that the continuing overall trend is an increasing patient population.

Year	2002	2003	2004	2005	2006	2007	2008	2009	2010
Total	9284	9227	10951	11581	12106	12455	13626	11201	14978
< 18	701	712	768	852	858	876	909	487	816
18 - 64	3159	3304	3733	3948	3996	4115	4735	3871	5316
65 - 74	1668	1814	1960	2149	2221	2287	2502	2162	2899
75 +	3756	3997	4490	4632	5031	5177	5480	4681	5947

If the Need Determinations for Mecklenburg County remain in the SMFP, my client is confident that it will be able to demonstrate a real need for the services it proposes.

Despite all other considerations, it is clear that Mecklenburg County, its patients and its use rates are historically growing and there is a true and significant need in this County for additional home health agencies to provide patient service.

Thank you for your attention and consideration. We look forward to learning of a decision which will continue the need determinations as announced in the 2011 Plan.