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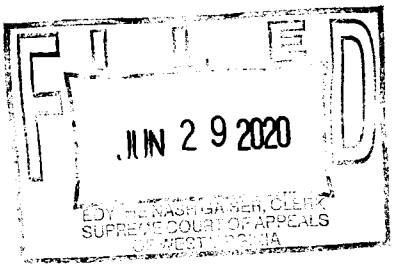

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

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AMEDISYS WEST VIRGINIA, L.L.C.
dba AMEDISYS HOME HEALTH OF WEST VIRGINIA,
ST. MARYS MEDICAL CENTER HOME HEALTH SERVICES, LLC,
AND LHC GROUP, INC., Petitioners Below

Petitioners,

v.

PERSONAL TOUCH HOME CARE OF W.VA. INC. AND
THE WEST VIRGINIA HEALTH CARE AUTHORITY, Respondents Below,

Respondents.

From the Circuit Court of Kanawha County, West Virginia
Civil Action No. 19-AA-145

PETITIONER BRIEF

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ASSIGNMENTS OF ERROR

1. The Circuit Court of Kanawha County erred when it affirmed two lower tribunal decisions, by Respondent the West Virginia Health Care Authority (the "WVHCA")[1] on April 4, 2019 and by the West Virginia Office of Judges (the "Office of Judges") on September 26, 2019, both of which failed to properly apply the Certificate of Need Standards for Home Health Services adopted by the Governor on November 13, 1996 (the "Home Health Standards") as written. The Home Health Standards conclusively require that an unmet need "threshold" of at least 229 projected home health patients be demonstrated in order for a new home health provider to be approved, regardless of whether a new provider has been approved in the prior twelve month period, and Respondent Personal Touch Home Care of W.Va., Inc. ("Personal Touch") only projected 29 patients in Cabell County and 55 patients in Wayne County in its Certificate of Need Application ("Application").

2. In affirming the two lower tribunals, the Circuit Court erred by ignoring the clear and conclusive language in the Home Health Standards and by accepting the WVHCA's incorrect and impermissible interpretation that the Home Health Standards do not impose any numerical home health patient "threshold" or minimum need calculation as the basis for the development of new home health services.

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[1] The Health Care Cost Review Authority ("HCCRA") was created by the Legislature in 1983 and HCCRA became known as the West Virginia Health Care Authority ("WVHCA") in 1997. The WVHCA is responsible for ensuring the containment of health care costs, gathering and disseminating health care information; analyzing and reporting on changes in the health care delivery system as a result of evolving market forces, and assuring that the state health plan, certificate of need program, and information systems serve to promote cost containment, access to care, quality of services and prevention. *See* W.Va. Code § 16-29B-1. The certificate of need program was adopted to provide for the orderly, economical and consistent offering or development of health services, to avoid unnecessary duplication of health services, and to contain or reduce increases in the cost of delivering health services. *See* W.Va. Code § 16-2D-1.

3. The Circuit Court erred by ignoring the conclusive language in the Home Health Standards and accepting the WVHCA's incorrect and impermissible interpretation that the "Conclusion" section of the Home Health Standards applies only to the fourth step of the unmet need calculation, or not at all.

4. The Circuit Court of Kanawha County erred by failing to adopt the persuasive decision on this subject from a prior appeal to the Circuit Court of Mason County, where it was determined that the Home Health Standards conclusively require that a threshold unmet need of at least 229 projected home health patients be demonstrated in order for a new home health provider to be approved, regardless of whether a new provider has been approved in the prior twelve month period. This created an inconsistency between two lower tribunals. *See In re: Family Home Health Plus, Inc., d/b/a Ohio Valley Home Health, Inc.*, Civil Action No. 06-AA-20, Decision issued March 27, 2007, Joint Appendix at 248-257[2]; *Order entered by West Virginia Supreme Court of Appeals,* No. O6-AA-20, April 3, 2008 (refusing a Petition for Appeal by Petitioner, West Virginia Health Care Authority), J.A. at 259.

5. The Circuit Court erred when it affirmed two lower tribunal decisions, both of which failed to require that Personal Touch use more recent and readily available data in its Application as required by the Home Health Standards, and despite the fact that the unmet need in Cabell County had decreased from 29 projected patients using 2016 data to negative 195 (-195) projected patients using 2017 data.

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[2] References herein to the Joint Appendix (in the format "J.A. at ___.") are to the contemporaneously filed Joint Appendix which was agreed to by the parties.

6. The Circuit Court erred by affirming and deferring to the WVHCA's interpretation of the Home Health Standards, which is clearly wrong, arbitrary, capricious and characterized by abuse of discretion.

STATEMENT OF THE CASE

1. Introduction.

This matter is an appeal of an administrative decision issued by Respondent the WVHCA, which is the agency responsible for health planning, the development of health services, and administering the certificate of need program in West Virginia pursuant to W.Va. Code § 16-2D-1, *et seq.* *See* W. Va. Code § 16-2D-1, *et seq.*; *see also* W.Va. Code § 16-29B-1, *et seq.*; *see also* J.A. at 193 – 207, 334. West Virginia's certificate of need law, found in West Virginia Code W.Va. Code § 16-2D-1, *et seq.*, provides that any proposed new health service as defined therein shall be subject to review by the WVHCA prior to the offering or development of the service. J.A. at 334; W.Va. Code § 16-2D-8. The WVHCA's purpose is explicitly stated in the "Legislative Findings" preamble to the certificate of need law, wherein it is declared to be the public policy of West Virginia "[t]hat the offering or development of all health services shall be accomplished in a manner which is orderly, economical and consistent with the effective development of necessary and adequate means of providing for the health services of the people of this state and to avoid unnecessary duplication of health services, and to contain or reduce increases in the cost of delivering health services." *See* W.Va. Code § 16-2D-1(1); *see also* W.Va. Code § 16-29B-1.

Home health services[3] are among the many health services that are subject to certificate of need review by the WVHCA. W.Va. Code § 16-2D-8. The process for applying, as well as the procedure for certificate of need review and the minimum criteria for review are also set forth in Article 2D. W.Va. Code §§ 16-2D-12 and 16-2D-13. Importantly, "[a] certificate of need may only be issued if the proposed health service is: (1) [f]ound to be needed; and (2) [c]onsistent with the state health plan, unless there are emergency circumstances that pose a threat to public health." *See* W.Va. Code §§ 16-2D-12; J.A. at 339. The state health plan and the certificate of need standards for the health services subject to review by the WVHCA pursuant to W.Va. Code § 16-2D-8, including the Home Health Standards applicable to the Application, are maintained by the WVHCA. *See* W.Va. Code § 16-2D-3; *see also Certificate of Need Standards*, West Virginia Health Care Authority, https://hca.wv.gov/certificateofneed/Pages/CONStandards.aspx (last visited June 25, 2020). The state health plan and the certificate of need standards are required to be reviewed by the WVHCA biennially, and the Home Health Standards require updating on a yearly basis (J.A. at 199), but the Home Health Standards have nonetheless remained unchanged for 24 years, since they were approved by then-Governor Gaston Caperton on November 13, 1996. *Id.*

2. Background and Procedural History

Respondent, Personal Touch, is an existing home health provider located in Hurricane, West Virginia. J.A. at 8. This matter commenced on July 31, 2018, when Personal Touch

[3] Home health care can vary among providers, but the home health services that Personal Touch proposed to provide were nursing, physical therapy, occupational therapy, social work and aides (J.A. at 8), which are typical of the services offered by Petitioners in Cabell County and Wayne County. *See e.g. Home Health Care Services in Huntington*, Amedisys Home Health Services, https://locations.amedisys.com/wv/huntington/amedisys-home-health-care.html (last visited June 25, 2020); *Care Specialties*, St. Mary's Home Health Service, https://lhcgroup.com/locations/st-marys-home-health-service-of-huntington/ (last visited June 25, 2020).

proposed the expansion of home health services into Cabell and Wayne Counties by filing a letter of intent to file the Application. J.A. at 336.[4] Personal Touch filed the Application on August 10, 2018 (J.A. at 4 – 106), and described its proposed project as the expansion of home health services into Cabell and Wayne Counties with a projected capital expenditure of $47,000. J.A. at 8. Personal Touch only projected an unmet need of 29 patients in Cabell County and 55 patients in Wayne County in its Application. J.A. at 36-40.

On September 14, 2018, the Petitioners, Amedisys West Virginia, L.L.C. d/b/a Amedisys Home Health of West Virginia ("Amedisys"), St. Mary's Medical Center Home Health Services, LLC ("St. Mary's") and LHC Group, Inc. ("LHC"), requested to be recognized as affected persons and requested that the WVHCA hold a public administrative hearing regarding Personal Touch's Application as permitted by the statutory review process. J.A. at 336-337; W.Va. Code § 16-2D-13. On September 26, 2010, the WVHCA issued a Hearing Order and the Notice of Prehearing Conference and Administrative Hearing. J.A. at 337. Personal Touch submitted replacement pages to its Application on October 3, 2018 (J.A. at 109, 113) and October 5, 2018 (J.A. at 129). The parties engaged in discovery and the WVHCA conducted a Prehearing Conference on December 5, 2018. J.A. at 338. At the Prehearing Conference, the parties exchanged witness and exhibit lists. J.A. at 131, 134.

The public administrative hearing was held on December 12, 2018, at which time the parties presented their respective cases, introduced evidence through hearing exhibits, heard Petitioner's expert witness testimony, and the WVHCA was allowed an opportunity to ask questions regarding the Application. *See* Hearing Transcript dated December 12, 2010, J.A. at

[4] The Joint Appendix includes the WVHCA's pleadings index and exhibit reference, which is the WVHCA's docket sheet and demonstrates the documents and information submitted as a part of the certificate of need review process and official agency record. See J.A. 1 – 3.

260 – 333; *see also* Petitioner's Witness and Exhibit List, including Hearing Exhibits 3, 5, 7, 8, 9, 10, 11, 12, and 13, J.A. at 134 – 259. On January 4, 2019, the WVHCA received the Administrative Hearing Transcript. *Id.* The parties filed post-hearing briefs and proposed certificate of need decisions with the WVHCA on January 30, 2019, and the WVHCA issued the decision on April 4, 2019. J.A. at 334-376.

On May 3, 2019, Petitioners filed an administrative appeal of the WVHCA's decision granting Personal Touch a certificate of need to expand home health services in Cabell and Wayne County by requesting certificate of need review by the Office of Judges, which is the agency required by statute to conduct such appeal proceedings. J.A. at 412, W.Va. Code § 16-2D-16. The Office of Judges established a briefing schedule and heard arguments on August 15, 2019, then issued its decision on September 26, 2019 affirming the decision of the WVHCA. J.A. at 412-421.

On October 23, 2019, Petitioners filed an administrative appeal before the Circuit Court of Kanawha County and requested that the Office of Judges decision be reviewed. J.A. at 422, W.Va. Code § 16-2D-16. The appeal was assigned to the Honorable Tod J. Kaufman in the Circuit Court of Kanawha County and assigned Civil Action No. 19-AA-145. J.A. at 436. The Circuit Court established a briefing schedule and then issued its decision affirming the WVHCA and the Office of Judges on February 28, 2020. J.A. at 422-435.

3. Inconsistency Among Lower Circuit Court Tribunals

In addition to the decision by the Circuit Court of Kanawha County (J.A. at 422-435) that is the subject of this appeal, the Court should be aware that an earlier appeal of the exact question of law, interpreting the need methodology under the Home Health Standards, presented

by this matter to the Circuit Court of Mason County[5] resulted in the reversal of the WVHCA and the Office of Judges for many of the same reasons argued by Petitioners *infra*. J.A. at 248-257. In that matter, an applicant proposed to offer home health services in Mason County and projected an unmet need of 198 home health patients, below the 229-patient threshold.[6] J.A. at 250. Like here, the WVHCA nevertheless approved the application, and the Office of Judges affirmed the WVHCA's approval. *Id.* On appeal, the Honorable David Nibert, Circuit Judge of the 5th Judicial Circuit, including the Circuit Court of Mason County, reversed the WVHCA and explicitly rejected the WVHCA's interpretation of the Home Health Standards as incorrect, arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. J.A. at 257. The WVHCA requested appeal of Judge Nibert's decision before this Court but was refused in an order dated April 3, 2008. J.A. at 259. An inconsistency and circuit court split of authority now exists between the decision authored by the Circuit Court of Mason County (J.A. at 248-257) in 2007 and the decision by the Circuit Court of Kanawha County (J.A. at 422-435) in this matter. Since the 2007 decision by the Circuit Court of Mason County, the WVHCA has completely ignored the decision by Judge Nibert, and has instead approved a multitude of home health certificate of need applications and, as a result, has overseen the proliferation of duplicative and unnecessary home health services throughout West Virginia.

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[5] Although W.Va. Code § 16-2D-16 currently limits appeal to the Circuit Court of Kanawha County, prior to June 10, 2016, affected persons were permitted to appeal certificate of need decisions to either the Circuit Court of Kanawha County or to the Circuit Court for the county in which the proposed project was proposed to be developed. *See* W.Va. Code § 16-2D-16.

[6] The respondents in the earlier matter were Family Home Health Plus, Inc. dba Ohio Valley Home Health, Inc. and the WVHCA. J.A. at 259. The petitioner on appeal was Pleasant Valley Hospital, Inc., which was represented in that appeal by Thomas G. Casto, Lewis Glasser, Casey & Rollins, PLLC, who is now counsel to Respondent Personal Touch and arguing the opposite position with respect to the 229-recipient threshold in this matter. *Id.*

SUMMARY OF ARGUMENT

The Circuit Court of Kanawha County erred on February 28, 2020 when it affirmed the underlying administrative decisions by the WVHCA dated April 4, 2018 and by the Office of Judges dated September 26, 2018. Those decisions are all affected by a fundamental failure – they prolong the WVHCA's complete disregard of a clear and conclusive requirement in the Home Health Standards requiring that a threshold number of projected unduplicated home health patients must be demonstrated before a certificate of need may be issued to allow a home health agency to offer home health services in the proposed county service area. In order to be consistent with the state health plan, as required by W.Va. Code § 16-2D-12(a), the Home Health Standards plainly and conclusively require that an applicant project a "threshold" unmet need of at least 229 home health patients, regardless of whether a new provider has been approved in the prior twelve-month period. Yet, the Application filed by Personal Touch was approved despite only projecting 29 patients in Cabell County and 55 patients in Wayne County. These projected numbers are well below the requirement that the 229-patient "threshold" be demonstrated. Yet, the WVHCA has incorrectly and impermissibly interpreted the Home Health Standards as not imposing any numerical patient threshold on the development of new home health services whatsoever. This flawed interpretation not only ignores the clear and unambiguous language of the Home Health Standards, but also ignores standard health planning requirements and public policy implications and is clearly wrong as a matter of law. Further, the WVHCA's decision was directly contrary to the well-reasoned decision by Judge Nibert that correctly interpreted the need methodology language of the Home Health Standards. For these primary reasons, the decision by the Circuit Court of Kanawha County on February 28, 2020 should be reversed by this Court.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners respectfully request oral argument on the grounds that this matter meets the criteria set forth in Rule 20(a) of the West Virginia Rules of Appellate Procedure and involves issues of first impression and inconsistencies among the decisions of lower tribunals, to wit, the Circuit Court of Mason County and the Circuit Court of Kanawha County. *See* W.Va. R. App. P. 20(a). Petitioners request twenty minutes of time for argument, as permitted by Rule 20(e). *See* W.Va. R. App. P. 20(e).

ARGUMENT

1. Question Presented.

Does the language of the Home Health Standards: "Conclusion: If the threshold is at least 229 projected home health recipients, an unmet need exists," appearing at the end of the four step quantifiable need methodology calculation used by the WVHCA to determine if an unmet need exists for home health services in a proposed county require the Applicant to project at least 229 unduplicated home health recipients in all circumstances, or is the WVHCA's disregard of the 229-recipient "threshold" except when a new home health provider has been approved in the prior twelve-months a permissible interpretation?

2. Standard of Review.

This appeal is taken on a question of law, namely whether the WVHCA's interpretation of the applicable certificate of need standards in the State Health Plan is permissible. The standard for this Court's review is found in W.Va. Code § 29A-5-4(g). *See* W. Va. Code § 16-2D-10; *St. Mary's Hospital v. SHPDA*, 178 W.Va. 792, 364 S. E.2d 805 (1987). That section provides as follows:

> (g), the circuit court may affirm the order or decision of the agency or remand the case for further proceedings. The circuit court shall reverse, vacate or modify the

> order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decisions or order are:
>
> (1) In violation of constitutional or statutory provisions; or
> (2) In excess of the statutory authority or jurisdiction of the agency; or
> (3) Made upon unlawful procedures; or
> (4) Affected by other error of law; or
> (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

See W.Va. Code § 29A-5-4(g). Although the subject of WVHCA deference is discussed in more detail *infra*, the task of the circuit court and now this Court is to determine "whether the [WVHCA's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Frymier-Halloran v. Paige*, 193 W.Va. 687, 458 S.E.2d 780, 788 (1995). "The 'clearly wrong' and the 'arbitrary and capricious' standards of review are deferential ones which presume the agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis." *Id.* Under this review, "an agency's determination of matters within its area of expertise is entitled to substantial weight." *Princeton Community. Hosp. v. State Health Planning*, 174 W.Va. 558, 328 S.E.2d 164, 171 (1985). However, "[t]his does not mean a court should shirk its obligation to make a searching and careful inquiry into the facts ..." *Id.* An agency cannot exceed its authority. *See e.g. Rowe v. West Va. Dept. of Corrections,* 170 W.Va. 230, 292 S.E.2d 650 (1982).

3. **The Home Health Standards Include a Threshold and Conclusively Require an Unmet Need of at Least 229 Projected Home Health Recipients in all Circumstances, not Just when a New Provider has been Approved in the Prior Twelve-Month Period.**

The fundamental disagreement between the Petitioners and the Respondents concerns the applicability of the "Conclusion" that is located at the end of the four-step need calculation in the

Home Health Standards. *See* J.A. at 199-201. Petitioners contend, for the reasons discussed herein, that the "Conclusion" applies to the entirety of the need methodology calculation in the Home Health Standards and unequivocally establishes a "threshold" number of projected home health recipients required in all circumstances. Such an interpretation is the only rational result possible, and benefits from ample support from the following:

- The clear language of the Home Health Standards, including the positioning of the 229 "Conclusion" language at the bottom of the four-step home health need methodology calculation (J.A. at 194-207);
- The administrative hearing testimony, including Petitioner's health care consultant and expert witness, Greg Gibbs, who logically analyzed the language of the Home Health Standards, distinguished the difference between the use of a "threshold" of 229 projected home health recipients as compared to an "adjustment" to the need calculation when a home health agency has been approved in the prior twelve month period, and detailed the historical development of the Home Health Standards under the "Draft" 1996 Standards dated April 17, 1996 (J.A. at 275 – 325);
- The administrative hearing exhibits that support the Petitioner's conclusions (J.A. at 191 – 259);
- The appellate Order issued by the Circuit Court of Mason County on March 27, 2007, in the matter of *Pleasant Valley Hospital, Inc. v. West Virginia Health Care Authority, Civil Action No. 06-AA-20*, which was prior to the Kanawha County appellate decision issued on February 28, 2020 (J.A. at 348 – 257); and
- Practical public policy considerations showing that there has been a proliferation of new home health agency services which is contrary to the WVHCA's mandate to prevent the unnecessary duplication of home health services and contain or reduce increases in the cost of delivering such home health services.

The Home Health Standards require "at least 229 projected home health recipients" as a minimum, and the Application only demonstrated 29 patients in Cabell County and 55 patients in Wayne County in its Application. J.A. at 36-40. For this reason, and because Personal Touch failed to use more recent, readily available population data demonstrating that no patients currently need home health services in Cabell County, the decision by the Circuit Court of Kanawha County entered on February 28, 2020 must be reversed.

A. The Home Health Standards include a threshold of 229 projected home health recipients.

The WVHCA is charged by statute with regulating the development of new health care services in West Virginia, including home health services, in a manner which is orderly, economical, and which avoids the unnecessary duplication of health services. *See* W.Va. Code § 16-2D-1. In that regard, the Home Health Standards conclusively require a threshold unmet need of at least 229 projected home health recipients or patients before a new home health provider can be approved. *See* Home Health Standards, J.A. at 194-207, § V (stating that "[i]f the threshold is at least 229 projected home health recipients, an unmet need exists"). The procedure as set forth in the Home Health Standards for calculating unmet need is as follows:

1. CALCULATION OF THE ACTUAL TOTAL COUNTY HOME HEALTH UTILIZATION RATE
(This compares current county and state home health utilization rate).

a.	Show total number of home health recipients for county for current year from the HCCRA Home Health Survey.	_____
b.	Show county population for current year.	_____
c.	Divide a by b.	_____
d.	Multiply c by 1000 for the current county home health utilization rate.	_____
e.	List current state home health utilization rate from HCCRA Home Health Survey.	_____
f.	Is the current county home health utilization rate below the state rate?	yes/no

If yes, continue with the following. If no, an unmet need does not exist.

2. CALCULATION OF THE ACTUAL NUMBER OF HOME HEALTH RECIPIENTS NEEDED TO OBTAIN THE STATE UTILIZATION RATE.

A. Components of formula - a, b, c.
a = List number of current home health recipients for county for current year (1.a) _____
b = List county home health utilization rate for

current year (1.d) _____
c = List state home health utilization rate for
current year (1.e) _____

Formula a x c / b = d
1. Multiply a x c _____
2. Divide a x c by b _____
d = Number of home health recipients for county
to meet state utilization rate _____

3. CALCULATION OF THE ACTUAL NUMBER OF HOME HEALTH RECIPIENTS BELOW THE STATE RATE.

Formula a - b = c
a. List number of home health recipients for county to obtain state rate (2.d) _____
b. List current number of home health recipients for county (1.a) _____
c. Subtract b from a to obtain the number of current county home health recipients below the state rate. _____

4. CALCULATION OF THE THRESHOLD (ADJUSTMENT FACTOR)
(This calculation is done only if there are agencies in the proposed county which received CON approval in the previous 12 months.)

Formula a - b = c
a. List the current county home health recipients below state rate (3.c) _____
b. Subtract adjustment factor for agencies receiving CON approval in previous 12 months. _____
c. Number above threshold adjustment. _____

Conclusion:

If the threshold is at least 229 projected home health recipients, an unmet need exists.

See Home Health Standards, J.A. at 194-207, §V(C) (emphasis added).

First, the home health utilization rate for the applied-for county is determined and compared to the state-wide home health utilization rate. Home Health Standards, J.A. at 194-207, §V(C). If the applied-for county use rate exceeds the statewide use rate, then the certificate of

need analysis ends. *Id.* If, however, the county use rate falls below the state use rate, then the calculation proceeds to a second step. *Id.* In the FY 2015 Home Health Need Methodology used in the Application, for example, the state use rate per 1,000 population was 27.8, so both Cabell County with a county use rate of 27.5 and Wayne County with a county use rate of 26.5 fell below the state use rate. J.A. at 36 – 41, specifically pages 36 and 40.

The second step, then, determines the projected number of home health recipients needed in the applied-for county to meet the previously determined state-wide utilization rate. *Id.* Using the numbers in the Application again, Cabell's calculation results in 2,687 recipients and Wayne's calculation results in 1,139 recipients. J.A. at 36 – 41, specifically pages 36 and 40.

Next, a third calculation determines the number of projected home health recipients below the state-wide utilization rate for the applied-for county by considering and subtracting the number of persons receiving home health services from existing, approved home health providers. *Id.* In the Application, this calculation resulted in 29 projected home health recipients in Cabell County and 55 projected home health recipients in Wayne County. J.A. at 36 – 41, specifically pages 36 and 40.

Finally, a fourth step provides for an adjustment to the projected home health recipient number, if needed, when another home health provider had sought and obtained certificate of need approval within the prior twelve-month period. When necessary, this final step requires the applicant to account for new providers in the proposed county who were approved in the prior twelve month period, by adjusting the calculated number of home health recipients and calculating the final projected need for home health services – the number of recipients above or below the 229 patient threshold. *See* Home Health Standards, J.A. at 194-207, § V. It is this fourth step of the calculation, which includes a parenthetical note that the fourth calculation "is

done only if there are agencies in the proposed county which received CON approval in the previous twelve months," that has led the WVHCA to adopt a nonsensical and baseless interpretation of the Standards. *Id.* at § V(C). In doing so, the WVHCA has opted to disregard not only the fourth step, but also the "Conclusion" in the Standards that "[a]n unmet need or threshold of at least 229 projected home health recipients must occur in the county before consideration will be given to issuing another Certificate of Need for the county." *Id.* at § V(C).

However, that position cannot be reconciled with several other provisions in the Standards that clearly state that the 229 threshold applies to all applications, namely: (1) that each of "the four calculations must be completed for each county to be served" (J.A. at 199, § V(C)); (2) that "an unmet need or threshold of at least 229 projected home health recipients must occur in the county before consideration will be given to issuing another Certificate of Need for the county" (*Id.*); (3) that "[a]n unmet need will exist if the need methodology yields a threshold of at least 229 projected home health recipients" (J.A. at 198, § V(A)); and (4) "Conclusion: If the threshold is at least 229 projected home health recipients, an unmet need exists." (J.A. at 199, § V(C)). These provisions make clear that the threshold of 229 projected home health recipients must be utilized regardless of whether a new provider has recently been approved. That is, the "Conclusion" should apply even when the fourth calculation does not.

The WVHCA mistakenly interprets the "Conclusion" found at the end of the unmet need methodology calculation to apply ***only*** to the fourth step. *See* Home Health Standards, J.A. at 194-207; *see also* J.A. at 346. This view is flawed for several reasons. As illustrated in the above excerpt from the Home Health Standards, the "Conclusion" is shifted to the far left and not included as a subpart of step four. J.A. at 346. The WVHCA relies on the proximity of the "Conclusion" language to reach the determination that it must apply to step four only. This

emphasis is misplaced and ignores the entire text of the Standards. J.A. at 199, § V(C). The placement of the "Conclusion" language is clearly meant to apply to the entire calculation. "Material within an indented subpart relates only to that subpart; material contained in un-indented text relates to all the following or preceding indented subparts." *Scherer v. Volusia Cnty. Dep't of Corr.*, 171 So. 3d 135, 138 (Fla. 1st Dist. Ct. App. 2015) (citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 156 (2012)). Additionally, "[p]erhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts." *N.C. DOT v. Mission Battleground Park, DST*, 370 N.C. 477, 483 (North Carolina 2018). A cardinal rule of textual interpretation requires, of course, that statutes and administrative rules "be construed as a whole, so as to give effect, if possible, to every word, phrase, paragraph and provision thereof." *See Weirton Med. Ctr., Inc. v. West Virginia Bd. of Med.*, 192 W.Va. 72, 75, 450 S.E.2d 661, 664 (1994) (quoting syl. pt. 8, in part, *Vest v. Cobb*, 138 W.Va. 660, 76 S.E.2d 885 (1953)). If the "Conclusion" only applied to step four, it would be aligned and directly below all the other information pertaining only to step four, but it plainly is not. *See* Home Health Standards, J.A. at 194-207. Moreover, common sense dictates that a conclusion statement, found at the end of a calculation section, applies to the entire calculation instead of just the fourth step. None of the previous three steps have their own independent conclusions, which is yet another indicia that the conclusion applies to the entire methodology, not just the final step.

B. The 229-recipient threshold in the Home Health Standards applies in all circumstances, not just when a new provider has been approved in the prior twelve-months.

In order to explain the otherwise illogical disregard of the "Conclusion" in the Home Health Standards, the WVHCA and Personal Touch have previously argued that the recurrence of the word "threshold" in both the fourth step and the "Conclusion" is telling. J.A. at 352. The inclusion of the word "threshold" in the "Conclusion" is significant, but actually supports the use of the "Conclusion" step as advocated by Petitioners *supra*. *See* Home Health Standards, J.A. at 194-207, § V(C). Contrary to the WVHCA, which treats the words ***threshold*** and ***adjustment*** as being "the same thing" and therefore interchangeable, the fourth step of the calculation parenthetically references the "Adjustment Factor" to the threshold and is literally meant to adjust the threshold by subtracting any agencies approved and granted a certificate of need in the previous 12-month period. J.A. at 353. The plain text above reveals a threshold contained in the "Conclusion", as well as the potential for an adjustment to that threshold in the fourth step. *See* Home Health Standards, J.A. at 194-207, § V(C). In other words, the fourth step is employed whenever an ***adjustment*** is required to the ***threshold*** (i.e. when another agency has been approved in the previous 12 months). Any interpretation, otherwise, including the tortured interpretation advanced by Personal Touch and the WVHCA in this matter begs the question: why do the Home Health Standards include an "Adjustment Factor" at all if the threshold in the Conclusion only applies in limited circumstances?

The WVHCA states in the underlying decision, "... the assumptions indicate that 'threshold' and 'adjustment' are the same thing, i.e., the median number of home health recipients receiving care from an agency identified in the 1995 West Virginia HCCRA Home Health Services Survey Summary." J.A. at 353. This position is completely contradictory to the

Standards. The Standards clearly provide "[a]n '***adjustment***' of 229 home health recipients has been added to the formula to allow for the development of agencies approved for CON in the previous 12 months." *See* Home Health Standards, J.A. at 194-207, § V(A)(emphasis added). The Standards then go on to explain that "[a]n unmet need will exist if the need methodology yields a "***threshold***" of at least 229 projected home health recipients." *Id.* The plain language of the Home Health Standards make a clear distinction between the terms "***adjustment***" and "***threshold***" as does the Merriam-Webster dictionary.[7] Any comparison between the definitions of those terms must lead to the conclusion that an ***adjustment*** is meant to consider whether any new home health agencies were approved in the previous 12 months and a ***threshold*** is the minimum number of home health recipients required to demonstrate that an unmet need exists for a new home health service provider. It is merely a mathematical coincidence that both the ***adjustment*** and ***threshold*** use 229 recipients as the appropriate reference.

The "threshold/adjustment factor" combination of words is found in three places in the Home Health Standards. *See* Home Health Standards, J.A. at 198-207. In the first instance, "[t]he threshold/adjustment factor of 229 is the median number of home health recipients receiving care from an agency..." *Id.* The Standards then go on to provide, "[t]he [WVHCA] shall consider adjusting the threshold/adjustment factor at the time it updates the need calculations." *Id.* Third, the Standards state, "[t]he [WVHCA] shall update the need calculations and shall consider updating the threshold/adjustment factor on a yearly basis." *See* Home Health Standards, J.A. at

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[7] Compare "adjustment", Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/adjustment (last visited June 26, 2020)(defined, in part, as "a correction or modification to reflect actual conditions"); with "threshold", Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/threshold (last visited June 26, 2020)(defined, in part, as "a level, point, or value above which something is true or will take place and below which it is not or will not").

199. In each place this language is used, it is helpful to understand the context of this reference and the fact that when the Standards were developed in 1995, 229 was the median number of recipients per agency, and so this number was selected to set both the "threshold" and the "adjustment factor". *See* Home Health Standards, J.A. at 198.

To further explain that a distinction exists between the two terms, it is helpful to consider the use in the Home Health Standards of the forward slash between them, which is also known as a *virgule*. A *virgule* is defined as "a short oblique stroke (/) between two words indicating that whichever is appropriate may be chosen to complete the sense of the text in which they occur".[8] This small distinction is particularly relevant in the context of statutory interpretation. The virgule is used in the Home Health Standards when a threshold/adjustment factor is referenced and means that either can be used to complete the text as necessary. *See* Home Health Standards, J.A. at 198-207, §§ V(A), (C). A factually similar instance was considered in *Elcor Health Servs. v. Novello*, 295 A.D.2d 772, 774-775 (Appellate Division 3rd Dept. June 20, 2002). In *Elcor Health Servs.*, the Court reasoned:

> . . . it is rational to view the *virgule* as indicating that the reader should use the words that most appropriately complete the sense of the whole sentence. As the earlier phrase has two concepts with one anticipating future progress and the other reporting actual progress, the phrase 'patient has this potential/is improving' provides the choice between potential and actual circumstances depending upon whether a plan for a patient or a patient's progress is being considered. Interpreted this way, the regulation requires a therapy plan to set forth the patient's potential for improvement and the patient's progress notes to reflect actual improvement in order to qualify as restorative. Such an interpretation is also consistent with the overall regulatory scheme...

See Elcor Health Servs, 295 A.D.2d 772, 774-775 (2002).

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[8] "Virgule", Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/adjustment (last visited June 26, 2020)(defined, in part, as "a mark / used typically to denote "or").

Furthermore, "[a] 'slash,' also called a *virgule*, commonly means 'and/or' and does not mandate a choice between two things." *Com. v. Einis*, No. CRIM.A. CR2012-00063, 2012 WL 6758056, at *1 (Mass. Super. Dec. 27, 2012). According to the presumption of consistent usage, "'[a] word or phrase is presumed to bear the same meaning throughout [the] text' and [any] 'material variation in terms suggests a variation in meaning'". *Failla v. Citibank, N.A.*, 838 F.3d 1170, 1177 (citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012)). Again, the Standards refer to an adjustment in step four when a home health agency has received certificate of need approval in the previous twelve months. *See* Home Health Standards, J.A. at 198-207, § V(C). The Standards then separately refer to a threshold when applying the 229 threshold in the "Conclusion", which must be met before a certificate of need can be issued to a new health service provider. *Id.* The Circuit Court of Kanawha County erred when it determined that the recurrence of the word "threshold" in the "Conclusion" as well as in the fourth step, where the threshold is adjusted by an adjustment factor when another provider has been approved in the prior twelve month period. J.A. at 431. The simple recurrence of a term in multiple locations is not dispositive of the question presented here. *See e.g. South Dearborn Environmental Improvement Association, Inc. v. Department of Environmental Quality*, 502 Mich. 349, 917 N.W.2d 603 (Mich. 2018) ("Reviewing the entire text requires consideration of the relationship of text within a single statutory provision as well as its relationship to the text of other provisions within the same act.").

In his testimony on behalf of Petitioners at the underlying hearing, Mr. Greg Gibbs further explained that there is a distinction between the words ***threshold*** and ***adjustment*** in the Home Health Standards. *See* Hearing Transcript, J.A. at 284, 25:5-27:10. While the ***adjustment*** is meant to take into account circumstances such as a new provider within the last 12 months and

does not have to be applied in all cases, the ***threshold*** applies in all circumstances. *See* Hearing Transcript, J.A. at 286, 27:8-28:14. Mr. Gibbs also testified regarding the "Draft" 1996 Standards dated April 17, 1996 (approximately 7 months prior to the approval by the Governor of the November 13, 1996 Standards)("Draft" 1996 Standards"). *See* J.A. at 216-247; Hearing Transcript, J.A. at 295, 36:12-40:9. The "Draft" 1996 Standards are largely identical to the final 1996 Standards that were approved by the Governor on November 13, 1996 (J.A. at 194-207), but clearly include a conclusive determination regarding the threshold in all circumstances, not just when a new provider has been approved. *Id.* For these reasons, the two words are not interchangeable, and the threshold applies in all circumstances, not just when a new provider has been approved in the prior twelve-months.

C. The WVHCA's discretion on this question is not unlimited.

Two unmistakable themes underly the appeal decision by the Office of Judges on September 26, 2019 and the appeal decision by the Circuit Court on February 28, 2020 – discretion and deference. Yet, to the extent that the WVHCA has exercised its discretion to incorrectly interpret the Home Health Standards on previous occasions, those decision are not proper precedent and are not due any deference; the WVHCA is only entitled to deference when it permissibly interprets its Home Health Standards. *See W. Va. Consol. Pub. Ret. Bd. v. Wood*, 757 S.E.2d 752, 758, 233 W. Va. 222, 228 (2014) ("While this Court agrees with the proposition that the Board's interpretation is entitled to deference, it is imperative that a reviewing court also consider the possibility, as the circuit court did in the present case, that the Board's interpretation is erroneous."); *accord Lincoln County Board of Education v. Adkins*, 188 W.Va. 430, 424 S.E.2d 775 (1992)("Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous."). A reviewing court may not substitute its own

judgment for the agency's factual findings, regardless of whether the court would have reached a different conclusion on the same set of facts. *Franks Shoe Store v. W.Va. Human Rights Comm'n.*, 179 W.Va. 53, 365 S.E.2d 164, 171 (1985). It is plainly apparent that the Home Health Standards require a threshold unmet need of at least 229 patients before a new home health provider can be approved. *See* Home Health Standards, J.A. at 194-207, § V(C).

The seminal case for judicial review of administrative agency decisions is undoubtedly *Chevron U.S.A., Inc. v. Natural Resources Defense Council., Inc.*, 467 U.S. 837 (1984). *Chevron* sets forth a two-prong analysis which "first asks whether the Legislature has directly spoken to the precise [legal] question at issue." *Appalachian Power Co. v. State Tax Dep't of W. Virginia*, 195 W.Va. 573, 466 S.E.2d 424, 433 (1995) (citing *Chevron,* 467 U.S. at 842). If the legislative intent is clear, then the analysis ends. *Id.* However, the second prong indicates, "if [the] statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the [agency's decision] is based on a permissible construction of the statute." *Id.* A permissible construction is one that is not "arbitrary, capricious, or manifestly contrary to the statute." *Chevron, U.S.A., Inc.*, 467 U.S. at 844. The judiciary is the final authority on issues of statutory construction, and the Supreme Court of Appeals is obliged to reject administrative constructions that are contrary to the clear language of a statute. *See Domestic Violence Survivors' Support Grp., Inc. v. W. Virginia Dep't of Health & Human Res., Office of Health Facility Licensure & Certification*, 238 W. Va. 566, 797 S.E.2d 543 (2017).

The Home Health Standards are part of the state health plan, which is a document prepared by the WVHCA to establish a strategy for future health services in West Virginia. *See* W. Va. Code § 16-2D-2(42). Since the West Virginia Legislature did not draft the Home Health Standards, the first prong of the administrative review process in *Chevron* is not applicable.

Thus, this matter is reviewed under the second prong of the *Chevron* analysis which requires a court to "examine the agency's interpretation to see how it relates to the statute." *Appalachian Power Co.*, 466 S.E.2d at 439.

The WVHCA is only entitled to deference when it permissibly interprets its Standards. *Wood*, 233 W.Va. 222, 757 S.E.2d 752. As noted in *Wood*, the Board was entitled to deference, however, the court stated, "it is imperative that a reviewing court also consider the possibility, as the circuit court did in the present case, that the Board's interpretation is erroneous." *Wood*, 757 S.E.2d at 758. The "[i]nterpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous." *Adkins*, 424 S.E.2d 775, 779. Deference does not permit full authority and free rein for an agency to act without judicial oversight. A court "does play an important role in the implementation of legislation by acting as a safeguard against bureaucratic excesses." *Appalachian Power Co.*, 466 S.E.2d 424, 439–40.

While the West Virginia Legislature has expressly vested the Home Health Standards with the "full force and effect" of law (W. Va. Code § 16-2D-6(g)), this delegation does not authorize the WVHCA to adopt capricious practices and issue impermissible decisions that are contrary to the plain language and clear intent of the Home Health Standards. This mandate is in furtherance of the "Legislative Findings" preamble to the certificate of need law, wherein it is declared to be the public policy of West Virginia "[t]hat the offering or development of all health services shall be accomplished in a manner which is orderly, economical and consistent with the effective development of necessary and adequate means of providing for the health services of the people of this state and to avoid unnecessary duplication of health services, and to contain or reduce increases in the cost of delivering health services." *See* W.Va. Code § 16-2D-1(1). In this

sense, the longtime incorrect interpretation by the WVHA is not due any deference whatsoever, because it is clearly wrong.

Any interpretation that only actually concludes the unmet need calculation in the Home Health Standards if another agency has been approved, in which case it employs both the 229 patient adjustment factor in the fourth step *and* the 229 patient threshold in the "Conclusion" – a double calculation, is clearly wrong and erroneous.

Clearly, the Home Health Standards require the application of an unmet need threshold in keeping with the WVHCA's statutory dictate to regulate the development of new home health services and to avoid the duplication of services. This cannot be accomplished if the unmet need threshold of 229 is ignored, and yet the WVHCA has developed a practice of consistently ignoring the clear language contained in the Standards, as evidenced by several decisions approving home health projects despite an insufficient need as compared against the unmet need threshold. In that regard, the WVHCA's oft-repeated interpretation of the Home Health Standards is clearly erroneous and is therefore due no deference. The Home Health Standards conclusively require an unmet need of 229 projected home health recipients or patients, and the decisions must be reversed.

D. The Circuit Court of Mason County's interpretation of the Home Health Standards is the only correct interpretation.

Prior to the decision by the Kanawha County Circuit Court that is the subject of this appeal, the only appellate authority on this subject was a decision authored by the Honorable Judge David Nibert of the Circuit Court of Mason County in 2007. J.A. at 248-257. The Circuit Court of Kanawha County simply states in one paragraph that Judge David Nibert of the Fifth West Virginia Judicial Circuit (consisting of Jackson, Mason, Roane, and Calhoun Counties) was wrong in 2007 when he determined that the Standards require that the unmet need threshold be

satisfied in all cases. J.A. at 248-257. Yet, that matter involved a similar factual situation, wherein the WVHCA had approved a certificate of need application by Family Home Health Plus, Inc. d/b/a Ohio Valley Home Health, Inc., despite an unmet need of only 198 patients, below the 229 unmet need threshold in the Standards. *Id.* The WVHCA's decision approving the application was upheld by the Office of Judges, but ultimately reversed on appeal by Judge Nibert. In his decision, Judge Nibert reasoned, in part, as follows:

> For example, if the first three steps of the calculation are completed and result in a finding that there is 1 patient in need of home health services in a given county, but there has been no recently approved home health agency in that county in the previous twelve months, under the Authority's interpretation of the Standards the application would be approved. However, if the methodology results in a finding of 230 new patients, but a home health agency has been approved in the last twelve months, the application would be denied because the fourth step requires a subtraction of 229 cases from the result of the three previous steps. The result would obviously be a finding that there is still, as before, one new patient in excess of the 229 removed to allow a sufficient patient base for the new provider. Given the Authority's interpretation, the application would be denied when the result, a net unmet need of one patient is the same.

J.A. at 254-255.

Judge Nibert reasoned that "the purpose of the fourth part of the methodology is to provide a patient base of 229 new patients so that a recently approved provider of home health can establish a business without being adversely impacted by a newer provider coming into the market." J.A. at 255. However, he determined that "it was not reasonable to assume that the WVHCA would set aside the average patient base of 229 new patients for a recently approved provider and yet allow another new provider to enter the market and offer duplicative services with a lesser projected patient base, even a base consisting of one patient" if the threshold was applied in some circumstances, but not in another. J.A. at 255. "Such a result offers more protection to a recently approved provider than it does to an existing one." *Id.* Judge Nibert compared several hypothetical scenarios before concluding that the "Supreme Court has long

noted that it is a Court's duty to avoid wherever possible a construction of a statute which leads to an absurd, inconsistent, unjust or unreasonable result." *See* J.A. at 255 (citing *Expedited Transp. Systems, Inc. v. Vieweg*, 529 S.E.2d 110, 118 (2000)).

Judge Nibert also summarized the purpose behind the West Virginia Certificate of Need law and the Standards, stating as follows:

> "[t]he clear intent of the Standards is to regulate the development of new home health care services and to avoid the duplication of services. See Standards, Sections I, IV(A) and V. This cannot be accomplished if the threshold of 229 is ignored. To grant certificates of need when the finding of unmet need is as low as 1 projected home health recipient does not prevent the duplication of home health services, it constitutes the duplication of those services. This contradicts the intent and language of the Standards and is in direct violation of the Authority's legislative charge contained in W.Va. Code § 16-2D-1(l).

J.A. at 254.

He continued, saying that "[b]y approving applications where this is no recently approved provider and where the unmet need is less than 229, the WVHCA is providing less protection for existing providers. If a new provider is granted a CON based upon a projected need of one patient, the rest of its patient base must come from somewhere. That place would be from existing providers. This duplication of services will result in several underutilized and underfunded agencies. That is the very result the WVHCA is charge[d] with preventing." J.A. at 256. Duplication of services and quality of care are precisely what is at stake here, because the proposed service areas, Cabell County and Wayne County are already extensively and adequately serviced by other, experienced providers including Petitioners. In fact, there are currently 10 home health agencies approved to offer home health services in Cabell County and there are 11 home health agencies approved to offer home health services in Wayne County. J.A. 36 – 41.

With regard to the prior matters in which the WVHCA incorrectly interpreted the Standards and developed a practice of not enforcing the unmet need threshold, Judge Nibert determined that "[t]he Authority's decisions ... are not due any deference as the Authority's interpretation of the Standards, particularly Section V, was incorrect and thus, the Standards were misapplied." J.A. at 256. That very same error now effects the WVHCA decision in this matter and should lead to the same result, despite being affirmed by the Office of Judges and the Circuit Court of Kanawha County. J.A. at 412-421; 422-435. The WVHCA's incorrect interpretation previously led Judge Nibert to conclude that "[b]ecause the Decisions of the Authority and [Office of Judges] in this matter are arbitrary, capricious, constitute an abuse of discretion, are otherwise not in accordance with law, are manifestly contrary to the [Home Health] Standards and are not in accordance with the [Home Health] Standards, the decisions are due no deference." J.A. at 257. Similarly, the WVHCA should be compelled to apply "the entirety of the need methodology, including the stated conclusion that defines an unmet need as proof that there are at least 229 projected home health recipients" as suggested by Judge Nibert (J.A. at 256) in 2007, and the underlying decisions must be reversed.

E. Health planning and public policy considerations support the 229-recipient threshold.

The intent of the Home Health Standards is to regulate the development of new home health services and to avoid the duplication of services, to rationally allocate resources and to avoid excess costs to the health care system. *See* Home Health Standards, J.A. at 194. This goal cannot be realized, however, if the unmet need threshold of 229 patients is ignored. Proliferation of home health agencies was among the reasons for the Home Health Standards in the first place, according to the testimony of Greg Gibbs at the hearing in this matter. *See* Hearing Transcript, J.A. at 294, 35:12-23. And yet, Personal Touch proposes to be the 11th provider of home health

services in Cabell County and the 12th provider of home health services in Wayne County. Allowing Personal Touch to expand into Cabell and Wayne Counties is an affront to the Home Health Standards, which provide that "[t]he focus on containing health care costs through efficient utilization of resources while ensuring the availability of adequate and quality health care services must be the underpinning of health planning." *See* Home Health Standards, J.A. at 194-207, § V.

The WVHCA's disregard for the threshold in the Home Health Standards has unquestionably coincided with a current and ongoing proliferation of home health services in West Virginia. In fact, a basic search of the WVHCA's online document filing system reveals that sixteen different applications proposing to provide home health services have been approved by the WVHCA since October 30, 2015. *See In re: Caring Angels Home Health, LLC*, CON File No. 14-8/9-10231-Z (approval dated October 30, 2015 for Berkeley, Hampshire, Jefferson, Mineral and Morgan counties); *In re: Personal Touch Home Care of W.Va., Inc.*, CON File No. 15-3-10660-Z (approval dated November 20, 2015 for Kanawha and Putnam counties); *In re: Stonerise Reliable Healthcare LLC*, CON File No. 17-5-11187-Z (approval dated December 11, 2017 for Pleasants and Tyler counties); *In re: United Hospital Center, Inc.*, CON File No. 17-6-11131-Z (approval dated February 15, 2018 for Preston County); *In re: Stonerise Reliable Healthcare LLC*, CON File No. 18-7/8-11305-Z (approval dated March 9, 2018 for Grant and Tucker counties); *In re: Stonerise Reliable Healthcare LLC*, CON File No. 18-9-11512-Z (approval dated December 10, 2018 for Berkeley and Jefferson counties); *In re: Personal Touch Home Care of W. Va., Inc.*, CON File No. 19-6-11596-Z (approval dated March 25, 2019 for Monongalia County); *In re: Personal Touch Home Care of W. Va., Inc.*, CON File No. 19-9-11597-Z (approval dated March 26, 2019 for Berkeley and Jefferson counties); *In re: Personal*

Touch Home Care of W. Va., Inc., CON File No. 18-2-11421-Z (approval dated April 4, 2019 for Cabell and Wayne counties); *In re: Stonerise Reliable Healthcare LLC*, CON File No. 18-8/9-11510-Z (approval dated April 24, 2019 for Hardy and Morgan counties); *In re: Stonerise Reliable Healthcare LLC*, CON File No. 18-8-11511-Z (approval dated April 24, 2019 for Hampshire and Mineral counties); *In re: United Hospital Center, Inc.*, CON File No. 19-6-11728-Z (approval dated December 23, 2019 for Monongalia County); *In re: United Hospital Center, Inc.*, CON File No. 17-6-11131-Z (approval dated February 15, 2018 for Preston County); *In re: Personal Touch Home Care of W. Va. Inc.*, CON File No. 18-2-11421-Z (approval dated April 4, 2019 for Cabell and Wayne counties); *In re: United Hospital Center, Inc.*, CON File No. 19-5-11592-Z (approval dated November 18, 2019 for Wirt County); and *In re: Personal Touch Home Care of W. Va. Inc.*, CON File No. 19-6/7-11595-Z (approval dated November 14, 2019 for Barbour and Taylor counties).

These applications are evidence of a precipitous expansion of services by new providers in twenty-five counties, one with as few as 6 projected home health recipients. *See In re: Stonerise Reliable Healthcare LLC,* CON File No. 17-5-11187-Z, Dec. 11, 2017 (approving a certificate of need application by Stonerise Reliable Healthcare LLC to provide services in Tyler County and Pleasants County despite a projected unmet need of 6 patients and 8 patients, respectively, in those two counties). The addition of new providers when insufficient additional need exists is harmful to existing providers, results in overcapacity in the service area, and contributes to the inefficient allocation and coordination of health care resources. If each of those recently approved providers is allocated 229 patients per county, as unquestionably contemplated by the Home Health Standards (J.A. at 194-207, § V), then the last several years have seen an increased capacity of nearly 6,000 total patients added to the home health care system state-wide.

And yet, the "Conclusion" and 229-recipient threshold in the Home Health Standards is designed to prevent this precise harm by ensuring that new providers have adequate projected patient populations in order to enter the proposed service area without undue disruption to existing providers.

In its capacity as the agency responsible for health planning and development in West Virginia pursuant to W.Va. Code § 16-2D-3(a)(1), the WVHCA is responsible for the various standards. *See* W.Va. Code § 16-2D-3. Notably, nearly every other healthcare standard within the purview of the WVHCA includes an unmet need threshold. *See* Computed Tomography Services Standards[9] (requiring a minimum projection of 700 scans annually); Cardiac Surgery Standards[10] (requiring 1,000 Diagnostic Cardiac Catheterization cases in the preceding 12 months); Hospice Services Standards[11] (stating that "[i]f the total projected hospice users exceed the current utilization by 25 patients, then an unmet need exists."); Cardiac Catheterization Standards[12] (requiring a minimum projection of 36 procedures); Megavoltage Radiation Therapy Services Standards[13] (requiring a minimum projection of 350 patients in the service area);

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[9] Computed Tomography Services Standards, West Virginia Health Care Authority, https://hca.wv.gov/certificateofneed/Documents/CON_Standards/cts.pdf (last visited June 27, 2020).

[10] Cardiac Surgery Standards, West Virginia Health Care Authority, https://hca.wv.gov/certificateofneed/Documents/CON_Standards/Hospice_Services.pdf (last visited June 27, 2020).

[11] Hospice Services Standards, West Virginia Health Care Authority, https://hca.wv.gov/certificateofneed/Documents/CON_Standards/Hospice_Services.pdf (last visited June 27, 2020).

[12] Computed Tomography Services Standards, West Virginia Health Care Authority, https://hca.wv.gov/certificateofneed/Documents/CON_Standards/CardiacCath.pdf (last visited June 27, 2020).

[13] Megavoltage Radiation Therapy Services Standards, West Virginia Health Care Authority, https://hca.wv.gov/certificateofneed/Documents/CON_Standards/MRTapp.pdf (last visited June 27, 2020).

Positron Emission Tomography Standards[14] (requiring a minimum projection of 1,250 procedures); Fixed Magnetic Resonance Imaging Standards[15] (requiring 2,000 procedures in the preceding 12 months); In-Home Personal Care Standards[16] (stating that "[a]n Unmet Need if 25 or more residents exist for every county proposed."); Intermediate Care Facilities for Individuals with Intellectual Disabilities[17] (stating that "[i]f Calculation 5 results in a difference of 4 or more, an unmet need exists in that county."); and End Stage Renal Disease Standards[18] (requiring a minimum of ten dialysis stations in order to demonstrate unmet need). Of those, many of the standards also include an adjustment to allow for service providers approved in the prior twelve months. *See e.g.* Intermediate Care Facilities for Individuals with Intellectual Disabilities ("If a new ICF/IID Group Home has been approved since the calculation of the HCA need methodology, the applicant will subtract 4 from the applicable county."); *see also* In-Home Personal Care Standards ("If a new provider has been approved within the previous 12 months, the applicant will subtract 25 from each applicable county proposed.").

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[14] Positron Emission Tomography Standards, West Virginia Health Care Authority, https://hca.wv.gov/certificateofneed/Documents/CON_Standards/Positron_Emission_Tomography.pdf (last visited June 27, 2020).

[15] Fixed Magnetic Resonance Imaging Services, West Virginia Health Care Authority, https://hca.wv.gov/certificateofneed/Documents/CON_Standards/mri.pdf (last visited June 27, 2020).

[16] In-Home Personal Care Standards, West Virginia Health Care Authority, https://hca.wv.gov/certificateofneed/Documents/IN_HOME_PER_C.pdf (last visited June 27, 2020).

[17] Intermediate Care Facilities for Individuals with Intellectual Disabilities Standards, West Virginia Health Care Authority, https://hca.wv.gov/certificateofneed/Documents/ICF%20Standards%20FINAL%207-24-18.pdf (last visited June 27, 2020).

[18] End Stage Renal Disease Standards, West Virginia Health Care Authority, https://hca.wv.gov/certificateofneed/Documents/CON_Standards/ESRD.pdf (last visited June 27, 2020).

Clearly, health planning considerations support the use of a ***threshold*** for nearly all new health services, and the use of an ***adjustment*** when a new health service provider could otherwise disrupt existing services. Especially when compared to the other standards for health services, it is completely irrational to contend that the Home Health Standards only include a threshold when a new provider has been approved in the prior twelve-months a permissible interpretation. Instead, for the reasons explained *supra*, the Home Health Standards are consistent with the other standards cited above that include a ***threshold*** in all circumstances and an ***adjustment*** in some circumstances. The WVHCA's disregard of the threshold except when a new provider has been approved in the prior twelve-months is not supported by any legitimate health planning consideration and is not a permissible interpretation of the Home Health Standards. The decision by the Circuit Court of Kanawha County and the underlying decisions must be reversed.

F. The Application by Personal Touch failed to project an unmet need of at least 229 home health recipients

Unfortunately, this matter is the latest example of the WVHCA disregarding the clear and unambiguous language of the Home Health Standards and failing to apply an unmet need threshold of at least 229 projected home health recipients. J.A. at 334-376. The unmet need projected by Personal Touch (29 in Cabell County and 55 in Wayne County) for its proposed new health service clearly falls significantly below the threshold of at least 229 project home health recipients as required by the Home Health Standards.

The Home Health Standards are not subject to interpretation and plainly require that there must be "at least 229 projected home health recipients" to demonstrate that "an unmet need exists." *See* Home Health Standards, J.A. at 194-207, § V. Personal Touch failed to demonstrate that such an unmet need exists because Cabell County's calculation only results in an unmet

need of 29 home health recipients, and Wayne County's calculation only results in an unmet need of 55 recipients. Accordingly, the Application should have been denied by the WVHCA because Personal Touch failed to satisfy the requisite unmet need threshold – a fundamental requirement in W.Va. Code 16-2D-12 for the approval of a certificate of need. The number of recipients projected by Personal Touch clearly falls significantly below the threshold mandated by the Home Health Standards, leading Mr. Gibbs, to opine, in accordance with the "Conclusion" in the Home Health Standards, that the Application does not satisfy the unmet need requirement and should not be approved. *See* Hearing Transcript, J.A. at 288, 29:14-21.

4. Personal Touch Should Have Been Required to Use More Recent Data.

The Home Health Standards clearly state that "[t]he need should be based on measurable and ***readily available data*** in such a manner that the health care system is not negatively impacted." Home Health Standards, J.A. at 197, § V (emphasis added). The failure of Personal Touch to utilize the most recent home health survey data is important because the more recent home health survey data demonstrates a significant decrease in the number of projected home health recipients in Cabell County, from 29 unduplicated home health patients to a ***negative 195*** unduplicated home health patients. J.A. at 191. Allowing additional home health providers in a service area with a negative unmet need is irrational from a health planning and public policy perspective and will undoubtably have a negative impact on the health care system in Cabell County.

Personal Touch could have accessed the most recent home health survey data by requesting and compiling the data, much as the Petitioners did prior to the hearing before the WVHCA (J.A. at 191), but instead relied on data that was three years old. J.A. at 8. The WVHCA's staff emailed a home health utilization survey to all current providers of home health

services in West Virginia, including Personal Touch, in early 2018, and the responses to this survey were collected and aggregated by the WVHCA by June 22, 2018, at least a month prior to the filing of Personal Touch's letter of intent on July 31, 2018 and the Application on August 10, 2018. See J.A. at 4, 185-189. Yet, Personal Touch failed to include or use the most "***readily available data***", the 2017 home health survey data, in its Application. J.A. at 4-106. Instead, Personal Touch used data from the 2015 home health survey for purposes of applying to expand its services in Cabell and Wayne Counties in 2018. J.A. at 36-41.

The Petitioner's hearing expert, Mr. Gibbs, testified extensively with respect to the availability of this data and the expectation that the 2017 home health survey data should have been utilized in the application. *See* J.A at 279, 20:14-21. Mr. Gibb's firm prepared a calculation using the data that was available in response to the 2017 home health survey "[t]o see what the results would be if the most current data that was available at the time the applicant filed their letter of intent and filed their application ...." *See* J.A. at 289, 30:12-23; J.A. at 191. Mr. Gibbs stated that "[e]ven under the previous rulings from the [WVHCA] on the application of the 229 threshold . . . which we believe [has] been inconsistent, the application would be denied because it does not meet the threshold requirement as previously interpreted by the [WVHCA]." J.A. at 290, 31:6-12.

The Home Health Standards provide that the WVHCA "[s]hall update the need calculations and shall consider updating the threshold/adjustment factor on a yearly basis." Home Health Standards, J.A. at 199, § V(C). Yet, the WVHCA failed at that responsibility, and then compounded its error by allowing Personal Touch to use home health survey data from 2015 for an application filed in 2018. Existing providers such as Petitioners should not be disadvantaged because the WVHCA fails, through inaction, to provide updated need calculations

on an annual basis. Here, the WVHCA did not provide Personal Touch with updated need calculations and failed to update the need methodology calculations annually as recommended under the Home Health Standards. J.A. at 36-41.

The Home Health Standards also require that need be established for ***each*** county listed in the application. *See* Home Health Standards, J.A. at 197-198, § V (emphasis added). Pursuant to the 2017 home health survey data, there is a negative unmet need of 195 in Cabell County and an unmet need of 62 projected home health recipients in Wayne County. J.A. at 191. Since the Home Health Standards require an unmet need in each county listed in the application, it is abundantly clear that Personal Touch has failed to demonstrate need for its proposed health service because the proposed project would result in unnecessary services in Cabell County. *Id.* The Application by Personal Touch should have been denied, and the Circuit Court decision affirming the WVHCA's decision along with the underlying decisions must be reversed.

4. Conclusion

The Home Health Standards have been incorrectly and impermissibly interpreted by the WVHCA despite plainly requiring that a minimum threshold of 229 patients be demonstrated in every county prior to the offering or development of home health services. The irrationality of the WVHCA's disregard of the plain language of the Home Health Standards has resulted in differing and inconsistent decisions between lower circuits, namely the Circuit Court of Kanawha County and the Circuit Court of Mason County and should be rejected by this Court. Such a result is supported by the Home Health Standards and would refocus the WVHCA's health planning mandate in W.Va. Code § 16-2D-1 and placate the ongoing proliferation of home health services throughout West Virginia, as evidenced by the multitude of recent applications cited *supra*.

For these reasons, and because Personal Touch relied on outdated population data to support the need methodology in the Application, the decision by the Circuit Court of Kanawha County should be reversed pursuant to W.Va. Code § 29A-5-4 because:

a. The Decision is in violation of constitutional or statutory provisions;

b. The Decision is in excess of the statutory authority or jurisdiction of the agency;

c. The Decision is made upon unlawful procedures;

d. The Decisions is affected by other errors of law;

e. The Decision is clearly wrong in view of the reliable, probative and substantial evidence on the whole record; and

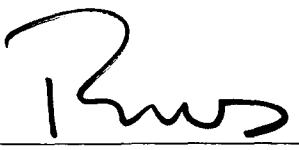
f. The Decision was arbitrary, capricious, characterized by abuse of discretion, and clearly was an unwarranted exercise of discretion.

WHEREFORE, on the basis of the foregoing authorities and arguments made thereupon, the Petitioners respectfully request that the decision of the Circuit Court of Kanawha County dated February 28, 2020 be reversed because it is based on an incorrect and impermissible interpretation of the Home Health Standards and that this Court award such other and further relief as it may deem proper.

Respectfully Submitted,

AMEDISYS WEST VIRGINIA, L.L.C.
dba AMEDISYS HOME HEALTH OF WEST VIRGINIA,
ST. MARYS MEDICAL CENTER HOME HEALTH SERVICES, LLC,
AND LHC GROUP, INC

By Counsel for Petitioners,



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No. 20-0308

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

AMEDISYS WEST VIRGINIA, L.L.C.
dba AMEDISYS HOME HEALTH OF WEST VIRGINIA,
ST. MARYS MEDICAL CENTER HOME HEALTH SERVICES, LLC,
AND LHC GROUP, INC., Petitioners Below

Petitioners,

v.

PERSONAL TOUCH HOME CARE OF W.VA. INC. AND
THE WEST VIRGINIA HEALTH CARE AUTHORITY, Respondents Below,

Respondents.

CERTIFICATE OF SERVICE

I, Robert L. Coffield, counsel for the Petitioners, do hereby certify that I have served the foregoing ***Petitioner Brief*** upon counsel of record this 29th day of June, 2020, addressed as follows:

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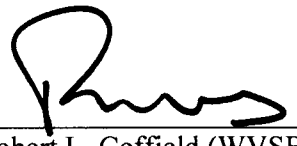

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