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.

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

PETITIONERS' REPLY BRIEF

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REPLY

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"), hereby submit this reply to the following briefs filed by Respondents on August 13, 2020:

1. ***Response Brief on Behalf of West Virginia Health Care Authority***; and
2. ***Personal-Touch Home Care of W.Va., Inc.'s Response Brief***.

It is plainly apparent from those filings and the ***Petitioner Brief*** filed by Petitioners on June 29, 2020, that Petitioners and Respondents fundamentally disagree about the purpose of the conclusion in the Certificate of Need Standards for Home Health Services adopted by the Governor on November 13, 1996 (the "Home Health Standards"). The conclusion appears at the end of the four-step calculation used by the West Virginia Health Care Authority (the "WVHCA") to determine whether an unmet need for home health services exists in a proposed new county, and states as follows: "Conclusion: If the threshold is at least 229 projected home health recipients, an unmet need exists." *See* J.A. at 199-201.

The parties' disagreement about the purpose of the conclusion is manifested in the inconsistency between the decision by the Circuit Court of Kanawha County (J.A. at 422-435) in this matter and the earlier decision on this same question authored by the Circuit Court of Mason County (J.A. at 248-257) in 2007.[1] And, as a practical matter, the WVHCA's interpretation of the Home Health Standards has indisputably resulted in a proliferation of home health services throughout West Virginia, the avoidance of which is among the goals of the Home Health

[1] 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.

Standards and among the reasons that the WVHCA was overturned by the Circuit Court of Mason County (J.A. at 248-257) in 2007. In fact, the only way for this Court to reconcile the public policy underlying the Home Health Standards with the question presented by this appeal is to reject the decision by the Circuit Court of Kanawha County (J.A. at 422-435) in favor of the decision by the Circuit Court of Mason County (J.A. at 248-257). The Mason County decision is the only decision compatible with the "Conclusion" requirement in the Home Health Standards and gives proper weight to the distinction between an "adjustment" and a "threshold" as those two terms are used throughout the Home Health Standards. For these reasons, and because Respondent Personal Touch failed to use the most recent population data in its application, the decision by the Circuit Court of Kanawha County (J.A. at 422-435) must be reversed.

1. The Home Health Standards Include a Conclusion for Use in All Circumstances.

The "Conclusion" at the end of the Home Health Standards should be applied to the entirety of the need methodology calculation and explicitly establishes a "threshold" number of projected home health recipients required in all circumstances. J.A. at 248-257. In 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. Respondent WVHCA continues to rely on the proximity of the "Conclusion" language to the fourth step to reach its determination that the "Conclusion" must apply to step four only, which contemplates circumstances in which a new provider has been approved in the previous 12 months. *See* WVHCA Resp. Br., 11. 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, not just a subpart. As explained in the ***Petitioner Brief***, "[m]aterial 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)). 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, and instead is indented with the entirety of the unmet need calculation. *See* Home Health Standards, J.A. at 194-207. Moreover, common sense would seem to dictate that a conclusive statement applies to the entire calculation instead of just the fourth step, particularly where none of the previous three steps have independent conclusions. The conclusion in the Home Health Standards plainly applies to the entire unmet need calculation, not just the final step, and the Circuit Court of Kanawha County was incorrect when it affirmed the WVHCA's impermissible determination otherwise.

In the Mason County decision in 2007, Judge Nibert addressed this point and 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 [in the fourth step] 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, when another provider has been approved, but not in all circumstances. J.A. at 255. "Such a result offers more protection to a recently approved provider than it does to an existing one." *Id.* Based in part on this nonsensical scenario, Judge Nibert reiterated 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*, 207 W.Va. 90, 529 S.E.2d 110, 118 (2000)). Such a result can be avoided here by simply employing the threshold in the conclusion in all circumstances and requiring that a minimum unmet need be demonstrated. For this reason, the Circuit Court of Mason County was correct when it overturned the WVHCA on this question, and the Circuit Court of Kanawha County's decision in this matter should be reversed.

2. The Home Health Standards Include a Threshold and an Adjustment that Are Not Interchangeable.

Respondent WVHCA argues in its response brief that the recurrence of the word "threshold" in both the fourth step and the "Conclusion" indicates that the Authority intended the "Conclusion" to apply to only to the fourth step, and that these two words are therefore interchangeable. WVHCA Resp. Br., 11. However, the "Adjustment Factor" to the threshold in the fourth step is literally meant to adjust the threshold by factoring in and subtracting any agencies approved and granted a certificate of need in the previous 12-month period. J.A. at 353. The plain text of the Home Health Standards 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). It would be unnecessarily duplicative and redundant for the Home Health Standards to include an "Adjustment Factor" if the threshold in the Conclusion only applies in those limited circumstances when another provider has not been approved in the previous twelve-month period.

In fact, any argument that the terms 'threshold' and 'adjustment' mean the same thing is completely contradictory to the Home Health Standards, the definitions of those two terms, and at least one of the WVHCA's past decisions. The Standards 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" following the adjustment *Id.* The Home Health Standards are clear in this distinction, and so is the Merriam-Webster dictionary.[2] Again, the Standards refer to a modification 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 minimum or threshold when applying the 229-patient requirement in the "Conclusion" which must be met before a certificate of need can be issued to a new health service provider. *Id.*

There is no better example of these two terms in use than the matter *In re: Critical Care Nursing Agency, Inc.*, CON File No. 96-2/3-5790-X/Z (decided Mar. 20, 2007). In the *Critical Care* matter, the number of projected recipients below the state rate in (coincidently) Wayne County based on the WVHCA's 1995 unmet need calculation was 453. However, a new provider had been approved in Wayne County in the previous 12 months, so the ***adjustment*** was applied and subtracted 229 projected home health recipients, leaving a balance of 224 home health recipients as follows:

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[2] 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").

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) 453

b. Subtract adjustment factor for agencies receiving CON approval in previous 12 months. 229

c. Number above threshold adjustment. 224

Conclusion:

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

See In re: Critical Care Nursing Agency, Inc., CON File No. 96-2/3-5790-X/Z, 7. Based on the unmet need calculation excerpt above and because 224 patients were projected – five patients below the threshold of "at least 229 projected home health recipients" – the WVHCA determined that another provider was not needed in Wayne County and denied the application. *Id.* at 9. The *Critical Care* matter unmistakably demonstrates that the terms ***adjustment*** and ***threshold*** are not meant to be interchangeable, but also illustrates the irrationality of the WVHCA's position on the applicability of the conclusion in some circumstances, but not all circumstances. How were 224 home health recipients in Wayne County an insufficient projection in *Critical Care*, and yet 55 recipients (the number projected by Personal Touch in Wayne County) a sufficient projection in this matter? Why were both the ***adjustment*** and the ***threshold*** applied in *Critical Care*, but neither was applied in this matter?

In adopting the WVHCA's interpretation, the Circuit Court of Kanawha County erred when it determined that the simple recurrence of the term "threshold" in multiple locations is 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."). For the reasons above, the two words "adjustment" and "threshold" are not interchangeable, and the threshold applies in all circumstances, not just when a new provider has been approved in the prior twelve-months and an adjustment is required. Any other interpretation allows the WVHCA to set aside a patient base of 229 patients for a recently approved provider and yet allows another provider to enter the market and offer duplicative services with a lesser projected patient base, even a base consisting of one patient. This distinction was among the problems identified by Judge Nibert in his 2007 decision (J.A. at 255) and, along with the *Critical Care* decision referenced above, demonstrate that the Kanawha County decision must be overturned in this matter.

3. The WVHCA is Not Entitled to 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*, 233 W.Va. 222, 228, 757 S.E.2d 752, 758 (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). Deference does not permit full authority and free rein for an agency to act without judicial oversight.

It is accurate, as argued by Respondents, that the WVHCA has categorically rejected the conclusion to the Home Health Standards in nearly every matter since 2000, including those cited by Respondents. Personal Touch Resp. Br., 7. Unsurprisingly, the WVHCA's disregard of the threshold requirement in these matters has also coincided with an astounding proliferation of home health agencies caused by the WVHCA's approval of new providers in counties with as few as 6 or 8 projected patients. In fact, it is apparent from the ongoing duplication of home health services throughout West Virginia that the WVHCA's disregard of the "Conclusion" is frustrating the very purpose of the Home Health Standards. As described in the ***Petitioner Brief***, sixteen different applications proposing to provide home health services have been approved by the WVHCA since October 30, 2015, 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 "Conclusion" and 229-recipient threshold in the Home Health Standards are 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 disrupting existing providers.

It is well established public policy in 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 impermissible interpretation by the WVHCA is not due any deference whatsoever, because it is clearly wrong. The language is clear that 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 unmet need.

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 absolutely at issue in Cabell and Wayne

County, which 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 cited by Respondents in which the WVHCA incorrectly interpreted the Standards, 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, which requires the reversal of the decision by 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 decision by the Circuit Court of Kanawha County must be reversed.

4. Health Planning and Public Policy Considerations Support the 229-Recipient Threshold in All Circumstances.

As stated elsewhere herein, and in the ***Petitioner Brief***, the Home Health Standards are intended 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 has not been realized under the WVHCA's tortured interpretation of the Home Health Standards, and allowing Personal Touch to expand into Cabell and Wayne Counties is the WVHCA's latest 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 is the agency responsible for health planning and development in West Virginia pursuant to W.Va. Code § 16-2D-3(a)(1), and is responsible for the various standards including the Home Health Standards. *See* W.Va. Code § 16-2D-3. As stated in the ***Petitioner Brief***, nearly every other healthcare standard within the purview of the WVHCA includes an unmet need threshold. Even Respondent WVHCA seems to concede as much, saying the "[w]hile one can debate the merits of whether the Home Health Standards should have a general recipient threshold with a specific number, the fact of the matter is that the current Home Health Standards do not." WVHCA Resp. Br. 16. 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 irrational to contend that the Home Health Standards are different and only include a threshold when a new provider has been approved in the prior twelve-months. 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.

In response, Respondent Personal Touch alleges that fairness demands approval of its expansion into Cabell and Wayne County, because prior applicants have been granted a

certificate of need under similar circumstances without satisfying the 229-recipient threshold. Personal Touch Resp. Br., 13 ("That practical position is simply unfair and, as noted above, it is legally unfounded."). However, it is equally unfair to Petitioners for the WVHCA to continue to allow the duplication of services in counties with multiple approved providers, because it negatively impacts Petitioners and the other providers.

Accordingly, the Application by Respondent Personal Touch should have been denied by the WVHCA because Personal Touch failed to satisfy the 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 – 29 in Cabell County and 55 in Wayne County – clearly falls significantly below the 229-recipient threshold mandated by the Home Health Standards. The WVHCA previously denied an application in Wayne County in the *Critical Care* matter when 224 recipients had been projected, so why now should an application be approved that only projected 55 recipients? The decision by the Circuit Court of Kanawha County must be reversed.

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

Personal Touch could have, and should 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). Instead, Personal Touch relied on old data supplied by the WVHCA instead of obtaining more recent and readily available data, the 2017 home health survey data, for use in its Application. J.A. at 4-106. Pursuant to the more recent 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, Personal Touch failed to demonstrate need for its proposed health service because the proposed project would result in

unnecessary and duplicative services in Cabell County. The Application by Personal Touch should have been denied, and the Circuit Court decision affirming the WVHCA's decision must be reversed.

CONCLUSION

The Home Health Standards have been incorrectly and impermissibly interpreted by the WVHCA for decades despite plainly requiring a minimum projection of 229 home health recipients in every county. The irrationality of the WVHCA's disregard of the threshold has resulted in inconsistent decisions between two circuit courts and, even worse, a proliferation of duplicative services throughout West Virginia that can easily be avoided through strict adherence to the plain language and purpose of the Home Health Standards. For these reasons, and because Respondent 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,

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CERTIFICATE OF SERVICE

I, Caleb P. Knight, counsel for the Petitioners, do hereby certify that I have served the foregoing ***Petitioners' Reply Brief*** upon counsel of record this 2nd day of September, 2020, addressed as follows:

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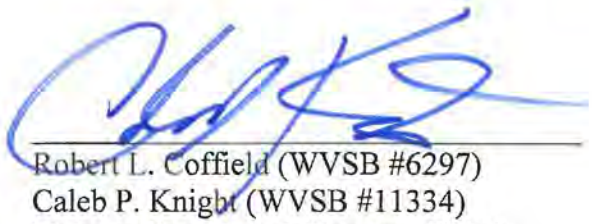

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