IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Amedisys West Virginia, LLC dba Amedisys Home Health of West Virginia, St. Marys Medical Center Home Health Services, LLC, and LHC Group, Inc., Petitioners Below, Petitioners,

Vs) No. 20-0308

Person Touch Home Health Care of W.Va., et al., and The West Virginia Health Care Authority, Respondents Below, Respondents.

RESPONSE BRIEF ON BEHALF OF WEST VIRGINIA HEALTH CARE AUTHORITY

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I. STATEMENT OF THE CASE

This appeal concerns an administrative decision issued by the West Virginia Health Care Authority ("Authority") approving a Certificate of Need ("CON") Application filed by Personal Touch Home Care of W. Va. Inc. ("Personal Touch") to expand its home health services into Cabell and Wayne Counties. J. A. at 336.[1]

West Virginia's CON law is found in W. Va. Code § 16-2D-1, *et seq*. This legislation creates the CON program and vests jurisdiction over that program in the Authority. *See* W. Va. Code § 16-2D-3(a)(1). The Legislative purpose in creating the CON program was to ensure that the development of health services is accomplished in an orderly, economical manner which avoids unnecessary duplication of health services and contains the cost of delivering health services. *See* W. Va. Code § 16-2D-1(1).

Pursuant to W. Va. Code § 16-2D-8, certain health services, including home health services, must be reviewed and approved by the Authority before they may be developed or offered to the public, including an expansion of the service area for hospice or a home health agency regardless of the time period in which the expansion is contemplated or made. W. Va. Code § 16-2D-8(a)(11); J.A. at 334. Moreover, W. Va. Code § 16-2D-12(a) provides that a CON may only be issued if the proposed new institutional health service is "1) found to be needed, and; 2) Except in emergency circumstances . . . , consistent with the state health plan." "Institutional health services" include home health services. At issue in this appeal is the application of the State Health Plan Home Health Services Standards ("Standards") approved by the Governor on November 13, 1996. W. Va. Code § 16-2D-12; J.A. at 339. The Home Health Standards applicable to the instant matter are promulgated by the Governor and maintained by the Authority.

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[1]Citations "J.A. at ___" are to the Joint Appendix which was agreed to by the parties.

The Standards can be found at https://hca.wv.gov/certificateofneed/Pages/CONStandards.aspx. *See also* J.A. at 193-207.

The facts in this matter are few and not in dispute. Personal Touch, an existing home health provider located in Hurricane, West Virginia, filed an Application with the Authority to provide home health care services in Cabell and Wayne counties. Personal Touch proposed to provide a full array of home health services including nursing, physical therapy, occupational therapy, social work, and aides. Personal Touch filed a Letter of Intent on July 1, 2018. J.A. at 336. On August 10, 2018, the Application and appropriate filing fee were received. J.A. at 4-106. The Application was deemed complete on August 14, 2018, and a Notice of Review was issued on August 16, 2018. On September 14, 2018, St. Mary's Medical Center Home Health Services, LLC ("St. Mary's") and LHC Group, Inc. ("LHCG") requested affected person status and requested an administrative hearing. J.A. at 336-337. Also, on September 14, 2018, Amedisys West Virginia LLC d/b/a Amedisys Home Health of West Virginia ("Amedisys") requested affected person status and an administrative hearing. *Id.* The Authority held a public hearing on December 12, 2018, at which the parties presented their arguments, submitted evidence and presented expert testimony. J.A. at 260-333. The parties filed post-hearing briefs with the Authority on January 25, 2019, and the Authority issued a Decision approving the Application on April 4, 2019. J.A. at 334-376.

On May 3, 2019, Amedisys and St. Mary's jointly filed a Request for Review with the Office of Judges. Upon completion of briefing by the parties, the Office of Judges issued its Decision dated September 26, 2019, affirming the Authority's April 4, 2019, Decision. J.A. at 412-421. On October 23, 2019, Amedisys and St. Mary's filed an administrative appeal pursuant to W. Va. Code § 16-2D-16 to the Circuit Court of Kanawha County. J.A. at 422. The Circuit Court of Kanawha County assigned it Civil Action No. 19-AA-145 and assigned the case to the

Honorable Tod J. Kaufman. J.A. at 436. The Circuit Court established a briefing schedule and requested Proposed Orders from the Parties. After considering the record below, the Circuit Court affirmed the Authority's Order and the Office of Judges Decision on February 28, 2020. J.A. at 422-435.

II. SUMMARY OF ARGUMENT

The Circuit Court of Kanawha County correctly affirmed the Office of Judges and the Authority's Decisions approving Personal Touch's application to provide home health services in Cabell and Wayne counties. For nearly two decades the Authority has consistently interpreted the Home Health Services Standards in the same manner. On multiple occasions the Authority's interpretation of the Standards has been reviewed and affirmed by the Office of Judges. At issue in this appeal is the need methodology contained in the Standards. Specifically, the need methodology consists of four Calculations to determine if there is an unmet need in a county. The final calculation, Calculation 4, provides that it only needs to be completed in instances in which a CON has been granted in a county within the prior twelve months. If this is the case, Calculation 4 provides for an adjustment threshold of 229-recipients which would be subtracted from the unmet need. The remaining number is the threshold adjustment. The purpose of the threshold adjustment is to allow a newly formed entity sufficient time to establish itself and let the unmet need of a county balance out before CON is granted to a competing entity. Following Calculation 4 is a "Conclusion" which provides that if the threshold is at least 229 projected home health recipients, an unmet need exists. The intent of the Home Health Standards is that this "Conclusion" applies to Calculation 4. When the Standards are read in their entirety, it is clear that every time an "adjustment" or "threshold" is discussed, it is in relation to Calculation 4.

Appellants erroneously argue that this "Conclusion" applies to all of the calculations, i.e., that regardless of whether an adjustment is made in Calculation 4, applicants must show an unmet need of 229-recipients for the application to be approved. Appellants' interpretation of the Standards is incorrect. The Standards do not provide a specific number of recipients an applicant must show under the need methodology. An unmet need of one recipient is sufficient. While Appellants disagree with the Authority's interpretation of the Standards, the Authority's interpretation of the Standards is well reasoned and not arbitrary and capricious. As the Agency charged with developing and maintaining the Standards, the Authority's interpretation of the Calculations and the intent of the need methodology should be given great weight.

The Kanawha County Circuit court properly rejected a 2007 decision from the Mason County Circuit Court which Appellants cite in support. In this case, the court's decision was clearly wrong. The court improperly substituted its interpretation of the Standards in place of the Authority. Moreover, it is clear from the hypothetical example in the court's decision that the court did not understand the calculations or how the adjustment threshold in Calculation 4 operates. Consequently, the result in the court's hypothetical is simply wrong.

Finally, the Applicant in this case utilized the most recent data publicly available at the time it submitted its application. Official health survey data is provided by the Authority on its website. Personal Touch utilized the most recent data available from the Authority in submitting its application. While the Authority was processing a more recent data survey, this information was not publicly available for months after Personal Touch's application was filed.

For these reasons, and the reasons discussed more fully below, the decision of the Kanawha County Circuit Court should be affirmed by this Court.

III. STATEMENT REGARDING ORAL ARGUMENT

The Authority agrees with Appellant that this case would meet the criteria for Rule 20(a) argument pursuant to the West Virginia Rules of Appellate Procedure. The issue involved is a matter of first impression and there are conflicting decisions from the Circuit Courts of Kanawha County and Mason County.

IV. ARGUMENT

A. Standard of Review

The standard of review for decisions appealed from the Authority is set forth in W. Va. Code § 16-2D-16 which provides, in pertinent part, that an appeal be processed "in accordance with the provisions governing the judicial review of contested administrative cases in article five, chapter twenty-nine-a of this code." *See also Princeton Community Hospital v. State Health Planning and Development Agency*, 174 W. Va. 558, 328 S.E.2d 164 (1985). The specific standard of review is found at W. Va. Code § 29A-5-4(g), which provides

> (g) The court may affirm the order or decision of the agency or remand the case for further proceedings. It 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, decision or order are
>
> (1) In violation of the constitutional or statutory provision; 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 of the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

See Syl. Pt. 2 *Shepherdstown Volunteer Fire Dep't. v. Human Rights Commission*, 172 W. Va. 627, 309 S.E.2d 342 (1983) . Under the Administrative Procedures Act, "the task of the circuit court is to determine whether the [agency's] decision was based on a consideration of the relevant factors and whether there is a clear error of judgment." *See Frymier-Halloran v. Paige*, 193 W.Va.

687, 695, 458 S.E.2d 780, 788 (1995) *quoting Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, (1971). Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review. *Appalachian Power Co. v. State Tax Dep't of West Virginia*, 195 W. Va. 573, 466 S.E.2d. 424 (1995). "An inquiring court – even a court empowered to conduct *de novo* review – must examine a regulatory interpretation of a statute by standards that include appropriate deference to agency expertise and discretion." *Id.* at 582, 466 S.E.2d at 433. However, deference should only be given to an agency's construction of a statute or legislative rule if the legislative intent is not clear. *Chevron U.S.A., Inc.v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843; *Sniffin v. Cline*, 193 W. Va. 370, 374; 456 S.E.2d 451, 455 (1995).

Consequently, the Circuit Court's review of the Authority's interpretation in this appeal was limited to asking (1) whether the Home Health Standards were enacted pursuant to the procedures required by law; and (2) whether the Authority's interpretation and application of the rules were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. An agency's interpretation of a statutory provision or regulation it is charged with administering is entitled to a high degree of deference. Courts must, however, reject administrative orders and rules that are contrary to legislative intent. *See West Virginia Health Care Cost Review Authority v. Boone Memorial Hospital*, 196 W. Va. 326, 335, 472 S.E.2d 411, 420 (1996).

B. The Authority Correctly Concluded the Home Health Standards Require a Threshold of 229 Projected Home Health Recipients Only When a New Provider has been Approved in the Prior Twelve-Month Period.

The primary issue in this appeal is whether the Authority's application of the need methodology contained in the Home Health Services Standards was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The Authority's interpretation that the 229-recipient threshold only applies to Calculation 4 of the Standards is neither arbitrary nor capricious

and is well supported by the plain language of the Standards. Appellants' interpretation of the Standards has been considered and rejected by the Authority on several occasions.

C. The Home Health Standards only provide a 229 recipient threshold when a New Provider has been granted a CON within the prior twelve months.

Appellants contend first, that the Home Health Standards include a threshold of 229 projected home health recipients and, second, that the 229-recipient threshold in the Standards applies in all circumstances, not just when a new provider has been approved in the prior twelve months. Additionally, Appellants contend the "Conclusion" statement found at the end of Calculation 4 applies to the entirety of the need calculations, thus requiring an unmet need of 229 projected home health recipients before the Authority may issue an additional CON. These contentions are without merit. Appellants' interpretation is clearly wrong, is contrary to the intent of the Authority in developing the calculations, and ignores the plain language of the Home Health Services Standards.

The Need Methodology for the Home Health Standards are found in "Section V. Need Methodology." *See* J.A. at 194-207. When the Need Methodology for the Home Health Standards are read in their entirety it is abundantly clear that the 229-recipient threshold only applies to Calculation 4 rather than the entire need calculation. *See Vanderpool v. Hunt,* 241 W. Va. 254, 261, 823 S.E.2d 526, 533 (2019) (citation omitted) (this Court looks at the entirety of an enactment when ascertaining intent). In the introductory paragraphs to Section V., the Authority noted that

> [e]xpansion of services and the addition of new providers should be planned such that they occur in areas with clearly documented unmet need. The need should be based on measurable and readily available data in such a manner that the health care system is not negatively impacted.

The unmet need is not defined as any particular number, only that the unmet need be based on measurable and readily available data.

Next, Subparagraph A, Assumptions, provides for assumptions underlying the projection of need for home health services. One assumption provides as follows:

> [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. An unmet need will exist if the need methodology yields a threshold of at least 229 projected home health recipients. The threshold/adjustment factor of 229 is the median number of home health recipients receiving care from an agency identified in the 1995 West Virginia Health Care Cost Review Authority Home Health Services Survey Summary. The HCCRA shall consider adjusting the threshold/adjustment factor at the time it updates the need calculations.

This assumption clearly indicates that an adjustment of 229 home health recipients has been added to the formula when there has been a CON granted in a county during the previous 12 months.

Subparagraph C, Determining Unmet Need for Home Health Services, contains the actual calculations, and it begins by noting the following:

> Need calculations based on 1995 data have been completed by HCCRA using the following methodology. (See appendix for calculations). The HCCRA shall update the need calculations and shall consider updating the threshold/adjustment factor on a yearly basis. These calculations performed by the HCCRA shall be used to determine unmet need; this is the only demonstration of need that the HCCRA shall consider. They shall remain in effect until updated by HCCRA.

The Home Health Standards provide that the need methodology is comprised of four calculations which must be completed for each county to be served.

At issue is Calculation 4 which is used to determine a threshold adjustment factor. Subparagraph C, specifically provides that

> [c]alculation 4 involves an adjustment factor for the agencies receiving Certificate of Need approval in the previous 12 months to allow for their initiation and development of home health services. Each agency is allowed a 229 home health recipient adjustment factor for each county in the approved service area. 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.

Thus, Calculation 4 is performed only if there are agencies in an applicable county which have received a CON approval to provide home health services within the previous 12 months. Because there were no such approvals within the previous 12 months, the calculation of this threshold adjustment factor was not necessary in the instant matter.

Calculation 4 is set forth in the Standards as follows:

> 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.

Appellants argue this "Conclusion" section applies to the entirety of the need calculations rather than only applying to Calculation 4. Such an interpretation is without merit and ignores the plain language of the Home Health Standards as a whole. Appellants cite to several provisions of the Standards they assert support their interpretation. Upon close examination, however, these passages actually contradict Appellants' interpretation of the Standards. First, Appellants cite § V(C) Determining Unmet Need for Home Health Services. J.A. at 199. Appellants note this section states "the four calculations must be completed for each county to be served." But, Calculation 4 provides an instruction to complete Calculation 4 "only if there are agencies in the proposed county which received CON approval in the previous 12 months." This does not mean the Authority does not complete all the Calculations. The Authority must still consider requirements of Calculation 4. The requirement to complete Calculation 4 hinges on whether the

Authority has granted a CON in that county during the last twelve months. If so, a threshold adjustment is made. If not, then Calculation 4 is unnecessary.

Next, Appellants note this same section states "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." Appellants quote this sentence out of context. The sentence is contained within the paragraph discussing Calculation 4 and clearly applies only when a CON has been granted in the prior twelve months. J.A. at 199. Appellants' third recitation is from § V(A) and states "[a]n unmet need will exist if the need methodology yields a threshold of at least 229 projected home health recipients." This statement is similarly taken out of context. The sentence immediately preceding it states "[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." This 229-recipient threshold is clearly in relation to the adjustment found in Calculation 4. Finally, Appellants simply restate the "conclusion" found at the end of Calculation 4. Read in their proper context, Appellants' citations to the Standards actually support the Authority's interpretation of the Standards rather than Appellants' interpretation.

A reading of the Home Health Standards as a whole clearly indicates that the 229 recipient threshold found in Calculation 4 is only to be utilized in instances in which a provider has been issued a CON in that county within the last 12 months. This language appears in the Assumptions of the Standards, the initial language of subparagraph C determining the unmet need as well as the explanation of Calculation 4 itself. The purpose of this threshold is to allow for the initiation and development of home health services for providers who have been operating for less than a year. Absent a showing of a large unmet need of 229 recipients, it allows the new provider time to get its operation up and running before another CON would be granted in that county.

Moreover, the Appellants' interpretation of the Standards defies common sense. Calculation 4 is titled "Calculation of the Threshold (Adjustment Factor)." Calculation 4 is the only calculation that contains the word "threshold." The "Conclusion" Appellants contend applies to all of the calculations clearly states, "If the threshold is at least 229 projected home health recipients, an unmet need exists." Given the "Conclusions" proximity to Calculation 4 and the fact that only the conclusion and Calculation 4 use the word "threshold," it is clear that the Authority intended the "conclusion" to apply only to Calculation 4.[2]

Appellants next assert that the terms "adjustment" and "threshold" have separate meanings in the Standards. This is not the case. Every time "threshold" or "adjustment" are used in the Standards, it is in the context of Calculation 4. In § V(A) Assumptions, the Standards include a paragraph illustrative of the fact that "adjustment" and "threshold" are intended to be treated the same. J.A. at 198. This paragraph states that an "adjustment" of 229 home health recipients has been added to the formula to account for the development of agencies approved for CON in the previous twelve months. An unmet need will exist if the need methodology yields a threshold of at least 229 projected home health recipients. The "threshold" in this sentence directly relates to the adjustment in the prior sentence. The next sentence states what that threshold/adjustment factor is. It is the median number of home health recipients receiving care from an agency as identified in the Health Care Cost Review Authority Home Health Services Survey Summary. Appellants make much ado of the fact that the words "threshold" and "adjustment" are separated by a *virgule.* They assert that the forward slash categorically proves the two words refer to different calculations

[2] Also, it should be noted that in the calculations as outlined in the Home Health Standards after Calculation 1 it states, "If yes, continue with the following. If no, an unmet need does not exist." It is common sense this statement applies only to step one of the Calculations just as the "Conclusion" statement applies only to step 4 of the Calculations. It also shows that all four calculations are not always completed. Yet Appellants' argument would require that all four calculations be completed for every county every time a provider seeks a CON.

and cite various cases that support their position. However, there are also cases discussing *virgules* which hold otherwise. *See Danco, Inc. v. Commerce Bank/Shore , N.A.,* 675 A.2d 663, 666 (N.J. App. Div. 1996) ("In modern writing, the word 'virgule' means a short slanting stroke drawn between two words and indicating that either may be used by the reader to interpret the sense of the text."); and *Ryland Group, Inc. v. Gwinnett Cy. Bank*, 259 S.E.2d 152, 153 (Ga. App. 1979) ("a short slanting stroke drawn between two words, usually [and/or] . . . indicat[es] that either may be used by the reader to interpret the sense.") When read in the context of the entire paragraph in which the *virgule* is used, it is clear that the Standards intend to use the words interchangeably. Moreover, the Authority as the Agency who develops and drafts the Standards is the Agency in the best position to interpret the meaning of the words and punctuation of the Home Health Standards.

Indeed, the Authority has consistently interpreted this provision in such a manner for decades.[3] *See In re: Three Rivers Home Care,* CON File No. 00-2-7110-X/Z (Feb. 26, 2002) in which an unmet need of 69 patients in Wayne County resulted in CON approval; *In re: Pleasant Valley Hospital d/b/a Pleasant Valley Home Health and Pleasant Valley Private Duty,* CON File No. 01-2/3/5-7206-Z (May 2, 2002) in which an unmet need of 75 patients in Wayne County, 127 in Jackson County, 386 in Putnam County and 97 patients in Lincoln County resulted in CON approval; *In re: Memorial Hospital Home Health d/b/a Mingo Wayne Home Health and Preferred Home Health,* CON File No. 02-1/2/3-7399-Z (Jul. 3, 2003) in which an unmet need of 125 patients in Boone County, 5 patients in Cabell County, 98 in Lincoln County, 180 in Logan County and

[3] There is one case from 1997, *In re: Critical Care Nursing Agency, Inc.,* CON File No. 96-2/3-5790-X/Z, which denied an application for a CON and a request for a variance that the Appellants cited below as the correct interpretation of the Home Health Standards by the Authority. However, in that Decision the Authority performed Calculation 4 in deciding the matter because another entity had been granted a CON to operate home health services in the same counties within the last twelve months. Therefore, the Authority found the threshold of 229 applied to Calculation 4.

212 in Wyoming County resulted in CON approval; *In re: Jefferson Memorial Home Care,* CON File No. 03-9-7597-X/Z (Jan. 9, 2004) in which an unmet need of 195 patients in Berkeley County resulted in CON approval; *In re: Elite Health Care, Inc.,* CON File No. 04-1-7801-Z (Jun. 22, 2004) in which an unmet need of 76 patients in Wyoming County resulted in CON approval; *In re: Medi Home Health Agency, Inc.,* CON File No. 07-2-8664-Z (Nov. 14, 2008), Decision on Request for Reconsideration, in which an unmet need of 30 patients in Lincoln County and 19 patients in Wayne County resulted in CON approval; *In re: Caring Angels Home Health, LLC,* CON File No. 14-8/9-10231-Z (Oct. 30, 2015), in which an unmet need of 961 patients in Berkeley County, 203 in Hampshire County, 606 in Jefferson County, 116 in Morgan County and 130 in Mineral County all resulted in CON approval; and *In re: Stonerise Reliable Healthcare, LLC,* CON File No. 17-5-11187-Z (Dec. 11, 2017) in which an unmet need of 8 patients in Pleasants County and 6 in Tyler County resulted in CON approval.

Moreover, the Office of Judges on appeal has consistently held that the Authority's interpretation of the adjustment factor found in Calculation 4 of the Home Health Standards is to be applied only in situations in which a provider has been approved in the previous 12 months in the same service area is the correct interpretation. *See In Re: Family Home Heath Plus/d/b/a Ohio Valley Home* Health, CON File No. 04-2-7897-Z, App. Doc. No. 05-HC-04; Interim *HealthCare of SE Ohio, Inc.,* CON File No. 08-10-8687-Z, Ap. Doc. No., 10-HC-01; *United Hospital Center, Inc.,* CON File No. 17-6-11131-Z, Ap. Doc. No., 18-HC-01 (This case is currently on appeal to the Supreme Court. *See* Case No. 20-0401.)

D. The Circuit Court of Kanawha County did not err in granting the Authority deference to interpret the Home Health Standards.

Appellants' third argument is that the Kanawha County Circuit Court erred by granting the Authority too much deference in interpreting the Home Health Standards. Appellants assert the

Authority is only entitled to deference when it permissibly interprets its Home Health Standards. *W. Va. Consol. Pub. Ret. Bd. v. Wood*, 757 S.E.2d 752, 758, 233 W. Va. 222, 228 (2014). A review by an appellate court pursuant to *Chevron*, must begin with an analysis of whether the Legislature has directly spoken to the precise question at issue. If not, a reviewing court cannot simply impose its own construction in its review of a statute, legislative rule, or other rule carrying the force of law. *Chevron,* 467 U.S. at 842-43. The Legislature has not directly spoken to the precise question at issue. Rather, the Legislature has delegated to the Authority the task of developing Standards to determine whether an unmet need exists so that additional health care services might be developed based upon criteria established by the Authority.

In his concurring opinion in *Cookman Realty Group, Inc. v. Taylor*, Justice Starcher noted that

> [t]he agency's construction, while not controlling upon the courts, nevertheless constitutes a body of experience and informed judgement to which a reviewing court should properly resort for guidance. The weight that must be accorded an administrative judgement in a particular case will depend upon 1) the thoroughness evident in its consideration, 2) the validity of its reasoning, 3) its consistency with earlier and later pronouncements, and 4) all those factors which give it power to persuade, if lacking power to control.

211 W. Va. 407, 417-18, 586 S.E.2d. 294, 304-305 (2002) (Starcher, J. concurring). The Authority, as the body that drafted the Home Health Standards, is in the best position to interpret the meaning it intended when drafting the Standards. Moreover, the Authority has consistently interpreted the Standard in the same manner, thoroughly considered the criteria in the Standard when applying it to Personal Touch's CON application, and provided a valid reckoning of its decision-making process. While Appellants may not agree with the Authority's interpretation of the Standards, the Authority's interpretation cannot be said to be arbitrary and capricious, clearly wrong, or an error of law.

E. The Kanawha County Circuit Court correctly rejected the Mason County Circuit Court's interpretation of the Home Health Standards.

The Kanawha County Circuit Court correctly rejected the Mason County Circuit Court's decision in *Pleasant Valley Hospital, Inc. v. West Virginia Health Care Authority and Family Home Health Plus, Inc. dba Ohio Valley Home Health, Inc.,* Civil Action No. 06-AA-20, (Mar. 27, 2007). In the *Pleasant Valley* Decision the circuit court erroneously substituted its own interpretation of the Standards for that of the Authority. The court inexplicably found that because the Standards provide that all four Calculations must be completed and that Calculation 4 indicated it only needed to be completed if a CON had been approved in the prior twelve months, a conflict existed within the provisions of the Standards regarding the enforcement and application of Calculation 4. J.A. at 253. The court then gave an example that is simply false. It stated that if Calculation 4 is not necessary and there is an unmet need of 1 recipient, the Authority would grant a CON application. It then said if Calculation 4 is necessary and there is a finding of 230 new patients the application would be denied. This is false. Once the adjustment threshold is applied there would still be an unmet need of one recipient and the application would be granted. The Standards only require a showing of unmet need. Even an unmet need of one would satisfy the requirements of the Calculations. The Mason County Circuit Court therefore incorrectly found that under the Authority's interpretation the application would be denied when the result, a net unmet need of one patient, is the same. The court thought this was an absurd and unreasonable result. J.A. at 255. However, this conclusion was simply wrong. It did, however, find that the application of the 229 threshold adjustment in a county in which a CON had been granted in the prior twelve months was reasonable. The court's decision finding the Authority's action arbitrary and capricious and contrary to the Standards was based upon a misunderstanding of the need

methodology. The example it used to illustrate its reasoning is clearly wrong. Consequently, the Circuit Court of Kanawha County was correct to reject that reasoning.

F. Home Health Care Standards do not currently have a 229-recipient threshold. Consequently, Applicants were not required to project an unmet need of at least 229 home health recipients.

Appellants contend that health planning and public policy considerations support the application of a 229-recipient threshold. While 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. Contrary to Appellants' assertion, the Authority is not disregarding a general threshold in the Standards. Under the current Home Health Standards, an Applicant is merely required to show an unmet need for home health services in a county. An unmet need of one recipient is sufficient. The Applicant met its burden in this case. The Applicant was able to show an unmet need of 29 recipients in Cabell County and 55 recipients in Wayne County. No CONs were approved in these counties in the prior twelve months, so the 229-recipient threshold adjustment calculation was unnecessary. If Appellants are seeking to change the current Home Health Standards, there is a Legislatively prescribed process for that.

G. Personal Touch used the most recent data available.

Appellants argue that Personal Touch failed to utilize the most "readily available" home health survey data in its Application. Appellants contend Personal Touch relied upon three-year-old data from 2015 rather than 2017 home health survey data collected and aggregated by the Authority's staff by July 2018. Appellants argue this is important because the newer survey data demonstrated that the unmet need for home health care services in Cabell County declined to minus 195 patients which showed that no unmet need existed in that county. However, Appellants' argument must fail. It is the Authority, not the applicant, who performs the calculations under the Need Methodology for home health services.

At the time the Personal Touch application was prepared and filed, the Authority provided Personal Touch with the 2015 Home Health Need Methodology, which was the most current Home Health Need Methodology available at the time of the application. The 2017 Home Health Need Methodology was issued by the Authority on December 7, 2018, and was not available on the Authority's website until December 8, 2018. Consequently, the Authority correctly found the 2015 Home Health Need Methodology was the most recent data publicly available at the time the application at the time the instant application was filed. J.A. at 350. As such, Personal Touch utilized the correct Home Health Need Methodology and, pursuant to the Authority's calculations, there was an unmet need of 29 recipients in Cabell and 55 recipients in Wayne County.

V. CONCLUSION

The Authority correctly applied the Standards for Home Health Services to the application filed by Personal Touch. The Authority correctly found that Personal Touch complied with the Need Methodology set forth in the Home Health Standards and established the need for its project to provide home health services in Cabell and Wayne Counties. An unmet need of 229 recipients is not required for all home health applications. The Home Health Standards unambiguously state that an unmet need of 229 recipients is only required in instances in which a CON has been awarded to another provider within the previous 12 months. In the instant matter, there was no new provider in the prior 12 months. Pursuant to the Standards, the 229-recipient threshold adjustment provided for in Calculation 4 is not indicated. Consequently, the Applicant showed an unmet need. Upon appellate review, the Authority's interpretation of the Home Health Standards is entitled to substantial deference. Appellants have failed to show the Authority's interpretation of the Home Health Standards is clearly wrong, arbitrary and capricious, or contrary to law.

WHEREFORE, for the reasons stated more fully above, the West Virginia Health Care Authority respectfully requests the February 28, 2020, decision of the Circuit Court of Kanawha County be AFFIRMED.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Amedisys West Virginia, LLC dba
Amedisys Home Health of West Virginia,
St. Mary's Medical Center Home Health
Services, LLC, and LHC Group, Inc.,
Petitioners Below, Petitioners,

Vs) No. 20-0308

Person Touch Home Health Care of W.Va., et al., and
The West Virginia Health Care Authority,
Respondents Below, Respondents.

CERTIFICATE OF SERVICE

I, B. Allen Campbell, Senior Assistant Attorney General for the West Virginia Health Care Authority, do hereby certify that a true and exact copy of the foregoing "response Brief on Behalf of West Virginia Health Care Authority" was served electronically and by depositing the same, postage prepaid in the United States Mail, this 13th day of August, 2020, addressed as follows:

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