No. 20-0401

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**



Preston Memorial Homecare, LLC, *et al.*,
Petitioners Below, Petitioners,

vs.) No. 20-0401

United Hospital Center, Inc., and
The West Virginia Health Care Authority,
Respondents Below, Respondents.

# BRIEF OF RESPONDENT UNITED HOSPITAL CENTER INC.

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**



**Statutes and Legislative Rules**

**Administrative Decisions**



**Court Rules**



**Other Authorities**

## RESPONDENT'S BRIEF

NOW COMES Respondent, United Hospital Center, Inc. ("UHC"), by counsel, James W. Thomas and Neil C. Brown of Jackson Kelly, PLLC, who submit this Respondent's Brief pursuant to Rule 10(d) of the W. Va. R. App. P. and the Scheduling Order issued by the Court.

## STATEMENT OF THE CASE

This matter involves the appeal of an administrative decision issued by Respondent West Virginia Health Care Authority (Authority"), which conferred Certificate of Need ("CON") approval for UHC to expand its existing home health service line into Preston County, West Virginia (the "Project").[1] J.A. at pp. 820-65.

The West Virginia CON program exists by virtue of W. Va. Code § 16-2D-1, *et seq.*, and jurisdiction over this program is vested in the Authority. *See* W. Va. Code § 16-2D-3(a)(1). The statutorily-enumerated purposes of the CON program are to ensure that needed health services are made available to West Virginians, while also protecting against the unnecessary and costly duplication of certain services. W. Va. Code §§ 16-2D-1(1)-(2). To this end, the CON program requires that certain "proposed health service[s]," as detailed by W. Va. Code § 16-2D-8, must be reviewed and approved by the Authority prior to their offering or development. W. Va. Code § 16-2D-8. UHC's Project constituted a reviewable "proposed health service" under the CON law because it involved the expansion of the service area of a home health agency pursuant to W. Va. Code § 16-2D-8(a)(11). *Id.* Accordingly, the Authority had jurisdiction to grant CON approval for the Project.

UHC is a 292 bed, non-profit, acute care hospital located in Bridgeport, West

[1] Citations "J.A. at p. __" refer to the Joint Appendix agreed upon by the parties to this appeal.

Virginia, and is one of 12 West Virginia hospitals which comprise the West Virginia United Health System, Inc. ("WVUHS"), a non-profit regional health system.[2] *Id.* at p. 31. UHC provides a broad range of inpatient and outpatient hospital and health-related services to the residents of Harrison County and the surrounding area, including home health services. *Id.* at p. 31. At the time UHC's instant CON application (CON File No. 17-6-11131-Z) was filed with the Authority, UHC was approved to provide home health services to the residents of Barbour, Doddridge, Harrison, Lewis, Marion, Taylor, and Upshur Counties. *Id.* at p. 31. The Project proposed to extend UHC's full range of home health care services to Preston County residents, including skilled nursing, home health aides, medical social services, speech therapy, occupational therapy, and physical therapy. *Id.* at pp. 32, 278. In addition to serving the unmet needs of Preston County, the Project sought to decrease re-hospitalization rates for patients receiving care from WVUHS facilities by seamlessly offering post-acute home health from the same non-profit health system, utilizing an identical health care record. *See id.* at p. 281.

UHC's CON application was reviewed by the Authority and determined to be complete on July 18, 2017. *See* J.A. at p. 1. A public administrative hearing was requested upon the Project by Preston Memorial Homecare, LLC ("PMH") and Tender Loving Care Health Care Services of West Virginia, LLC d/b/a Amedisys Home Health Care ("Amedisys" and together with PMH, "Petitioners"), which was convened at the Authority's offices on December 7, 2017. *See id.* at pp. 593-819. Both UHC and Petitioners were present and were afforded an opportunity to offer testimony, to introduce documentary evidence, and to otherwise be heard. *Id.* The Authority issued its Decision approving the Project (hereafter the "CON Decision") on February 15, 2018. *Id.* at pp. 820-65.

[2] When UHC's instant CON application was filed with the Authority, UHC was one of eight WVUHS member hospitals.

On February 28, 2018, Petitioners appealed this approval to the statutorily-designated appeal agency for CON purposes, the Office of Judges ("OOJ"). *Id.* at pp. 887-96. After the filing briefs, the parties argued the appeal to the OOJ at a hearing conducted on May 15, 2018. *See id.* at pp. 866-86. On June 28, 2018, the OOJ issued its *Decision* (the "OOJ Decision"), affirming the Authority's CON Decision to approve UHC's proposed expansion of home health services into Preston County. *Id.* at pp. 887-96.

On July 24, 2018, Petitioners filed a Petition for Appeal to the Circuit Court of Kanawha County, challenging the OOJ Decision. *See id.* at p. 897. Petitioners and Respondents fully briefed the issues to the Circuit Court during the fall of 2018. *Id.* On May 20, 2020, the Hon. Carrie L. Webster issued a *Final Order Denying Appeal And Affirming the Decision of the Office of Judges* (hereafter the "Circuit Court Order"), which denied Petitioners' appeal and upheld the Authority's CON Decision (as well as the OOJ's affirmance thereof). *See id.* at pp. 897-907.

On June 22, 2020, Petitioners filed a Notice of Appeal to this Court in opposition of the Circuit Court Order. The Court issued a *Scheduling Order* on July 20, 2020, setting forth a summary of deadlines. Petitioners timely filed their Brief on September 21, 2020. Petitioners also filed a Joint Appendix on that date, which was agreed upon by the parties to this appeal.

On September 24, 2020 both UHC and Petitioners filed separate Motions to Consolidate the instant appeal (Appeal No. 20-0401) with a substantially similar appeal currently pending before this Court (Appeal No. 20-0308).[3] *See, Amedisys West Virginia, L.L.C. dba Amedisys Home Health of West Virginia, et al. v. Personal Touch Home Care of W.Va. Inc, et al., and the West Virginia Health care Authority*, Appeal No. 20-0308 (Sep. 24, 2020). Both Motions to Consolidate remain under consideration by this Court.

[3] Both the instant appeal (Appeal No. 20-0401) and the pending appeal (Appeal No. 20-0308) involve similar factual patterns, the same determinative question of law, and nearly identical assignments of error.

## SUMMARY OF ARGUMENT

Petitioners, both for-profit West Virginia subsidiaries of national home health chains, present only one issue in their brief – that a Certificate of Need ("CON") applicant must **invariably** demonstrate an unmet need of at least 229 projected home health recipients in **every** home health CON application before the applicant can successfully demonstrate need under the methodology contained at Article V (the "Need Methodology") of the State Health Plan's Standards for Home Health Services (the "SHP Standards"). *See, e.g.*, Petitioners' Brief at p. 8 (setting forth one single question presented). Thus, Petitioners argue that UHC's projection of an unmet need of 44 home health recipients for Preston County falls short of this alleged "requirement." *Id.* at pp. 8, 31-32.

In considering the argument of Petitioners, this Court must have a clear understanding of **three** important points.

**First,** unlike what is repeated throughout Petitioners' Brief, the CON law is not simply about the elimination of potentially duplicative services. *See, e.g., id.* at pp. 3, 26, and 32. The law envisions a balancing test in which duplicative services are but one of many considerations that the Authority must weigh. While avoiding so-called "duplicative" services is a goal near and dear to the hearts of Petitioners (since it has the effect of shutting out their potential competitors), the Authority is also charged by the Legislature with considering other factors such as cost, quality, and access. For example, the law's legislative findings discuss how the Authority must ensure that "appropriate and needed health care services are made available for persons in the area to be served." W. Va. Code § 16-2D-1(2). The statutory factors themselves are not always in sync, *e.g.*, fewer services may mean lower costs, but it may also mean reduced access to needed care by the State's residents. The tunnel vision urged by Petitioners' Brief upon this Court to simply reduce

duplication at all costs injudiciously and unfairly undermines the Authority's legal responsibilities under the CON law.

**Second,** the clear implication of Petitioners' Brief is that the Authority has stubbornly, arbitrarily, and willfully disregarded its statutory duties for over two decades, leading to a proliferation of home health agencies in West Virginia. *See, e.g.,* Petitioners' Brief at pp. 4, 16, 31. Nothing could be further from the truth. The only thing that the Authority has disregarded in the SHP Standards is a final step calculation under the Need methodology that, by its clear and unambiguous wording, does not even apply to an applicant like UHC. It is a final step calculation that was added to the Need Methodology in the SHP Standards solely to provide a temporary (12 month) respite from additional competitors for newly-approved home health providers. This final step calculation was never intended to perpetually shield agencies like Petitioners (which have been profitably entrenched in the service area and the State for many years) from competition. Moreover, the administrative record is devoid of any evidence of a proliferation of home health agencies in this State, as Petitioners presented no such evidence at the administrative hearing.

**Third,** and perhaps most fundamentally, Petitioners' argument has been repeatedly and emphatically rejected by the Authority **for over 20 years**, and has also been rejected by two recent Circuit Court of Kanawha County decisions. This consistent approach over time has not resulted in the "parade of horribles" that Petitioners would have this Court believe will befall the West Virginia home health industry. There is not an unnecessary duplication of home health agencies in West Virginia; in fact, today there are significantly fewer agencies in West Virginia than in 1995 (around the time the SHP Standards were first promulgated by the Authority). The record contains no evidence that quality of care has deteriorated. The home health industry is not beset with bankruptcies or other financial disasters. To the contrary, Petitioners' have been

comfortably profitable for years. *See* J.A. at pp. 313-19, 333-41, 359-64, 375-77, 385-419. In short, the Authority has performed its job well and the SHP Standards have worked. With the usage of home health services projected to increase coincident with the growth of the State's elderly population over time, there is no reason for this Court to reverse the Authority's longstanding, rational, and successful interpretation of the SHP Standards.

So, while Petitioners may cloak themselves with righteous indignation over the Authority's administration of the CON law, their argument is nothing more than a thinly-veiled attempt to distort that law to protect market share and selfishly deny the provision of needed home health services to Preston County residents. Petitioners' appeal is therefore without merit, and must fail.

## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

UHC asserts that this case meets the criteria for Rule 20(a) oral argument pursuant to the West Virginia Rules of Appellate Procedure. W. Va. R. App. P. 20(a). This case involves a matter of first impression before this Court, and oral argument would be appropriate and beneficial to fully address the issues presented herein.

## ARGUMENT

### I. The standard of review for interpretation of the SHP Standards requires that substantial deference be accorded to the Authority's CON Decision.

The standard of review for an administrative appeal taken under the CON program is set forth at W. Va. Code § 29A-5-4. *See* W. Va. Code § 16-2D-10; *St. Mary's Hosp. v. State Health Planning & Dev. Agency*, 178 W. Va. 792, 364 S.E.2d 805 (1987). W. Va. Code § 29A-5-4 provides in relevant part the following:

> (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 constitutional or statutory provisions; or
>
> (2) In excess of the statutory authority or jurisdiction of the agency; or
>
> (3) Made upon lawful 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.

W. Va. Code § 29A-5-4(g).

While the review of an administrative appeal under W. Va. Code § 29A-5-4(g) is considered *de novo*, it has also been held that this review is limited to a determination of whether the agency's decision was based on a consideration of relevant factors, and whether there has been a clear error of judgment. *See Princeton Cmty. Hosp. v. State Health Planning*, 174 W. Va. 558, 328 S.E.2d 164 (1985). In discussing the deference to be accorded to a predecessor agency of the Authority under the CON program,[4] the Supreme Court of Appeals has stated that a determination of matters within that agency's area of expertise is entitled to substantial weight. *Princeton*, 328 S.E.2d at 171. Citing the case of *Ethyl Corporation v. EPA*, 541 F.2d 1 (D.C. Cir. 1979), *cert. denied*, 426 U.S. 941, 96 S.Ct. 2663, 49 L.Ed.2d 394 (1976), the Court further stated:

> But that function must be performed with conscientious awareness of its limited nature. The enforced education into the intricacies of the problem before the agency is not designed to enable the court to become a superagency that can supplant the agency's expert decision-maker. To the contrary, the court must give due deference to the agency's ability to rely on its own developed expertise. The immersion in the evidence is designed solely to enable the court to determine whether the agency decision was rational and based on consideration of the relevant factors.

*Princeton*, 328 S.E.2d at p. 171.

[4] The CON program was formerly administered by the State Health Planning and Development Agency ("SHPDA") until 1983.

More recently, the Supreme Court of Appeals has clarified that judicial review of an agency's decision-making authority involves two (2) separate but interrelated questions, the second of which furnishes an occasion for agency deference. On appeal, the court first must ask whether the Legislature has directly spoken to the precise question at issue. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984); *see also Appalachian Power Co. v. State Tax Dep't of W. Virginia*, 195 W. Va. 573, 466 S.E.2d 424 (1995); *see also W. Virginia Health Care Cost Review Auth. v. Boone Mem'l Hosp.*, 196 W. Va. 326, 472 S.E.2d 411 (1996). If the intention of the Legislature is clear, that is the end of the matter, and the agency's position must be upheld if it conforms to the Legislature's expressed intent. No deference is due an agency's actions at this stage.

However, if legislative intent is not clear, a reviewing court may not simply impose its own construction in its review of a statute, legislative rule, or other rule carrying the force of law. *See Appalachian*, 466 S.E.2d at 433; *Boone*, 472 S.E.2d at 421-22; *see also W. Virginia Consol. Pub. Ret. Bd. v. Wood*, 233 W. Va. 222, 232, 757 S.E.2d 752, 762 (2014) (citing *United States v. Mead Corp.*, 533 U.S. 218, 226-227, 121 S. Ct. 2164, 2171, 150 L. Ed. 2d 292 (2001)). Rather, if a statute, legislative rule, or rule carrying the force of law is silent or ambiguous with respect to the specific issue, the question for the reviewing court is whether the agency's answer is based upon a permissible construction of the applicable legal authority. *See Appalachian*, 466 S.E.2d at 433; *Boone*, 472 S.E.2d at 421-22; *see also Wood*, 757 S.E.2d at 762 (2014) (citing *Mead*, 533 U.S. at 226-227). If it is, then the interpretation of the statute, legislative rule, or rule carrying the force of law by the agency charged with its administration is given great deference and weight. *See Appalachian*, 466 S.E.2d at 433; *Boone*, 472 S.E.2d at 421-22; *see also Wood*, 757 S.E.2d at 762 (2014) (citing *Mead*, 533 U.S. at 226-227).

As a preliminary matter central to the instant appeal, one must consider a fundamental question – what are the SHP Standards? It is perhaps easier to state what they are not. They are not statutory enactments. They also do not constitute legislative rules in the formal sense, because they were not promulgated by the Authority and subsequently approved by the Legislature in accordance with the rulemaking requirements of the West Virginia Administrative Procedures Act, W. Va. Code § 29A-3-1 *et seq.* Rather, the SHP Standards are a document authored by the Authority based upon input from consumers, businesses, providers, payers, and other State agencies, and ultimately submitted to the Governor for final approval. The statute which currently outlines this process under the CON law is W. Va. Code § 16-2D-6. Once promulgated, the Authority utilizes the SHP Standards to adjudicate CON applications. An application cannot be approved unless it has been found to be both needed and consistent with the State Health Plan. *See* W. Va. Code §16-2D-12(a).

Given the unique nature of the SHP Standards, what legal significance do they have? Clearly, the Legislature intended to delegate power to the Authority to make and administer the SHP Standards. In fact – as Petitioners' acknowledge – the Legislature not only delegated such authority, but went a step further by ***affirmatively adopting*** the SHP Standards for CON in 2016, giving them "***full force and effect,***" so long as they were active before July 1, 2016.[5] *See* W. Va. Code § 16-2D-6(g); *see* Petitioners' Brief at p. 22. The SHP Standards here were approved by the

[5] The Legislature first added this language in 2006. *See* W. Va. Code § 16-2D-5(l)(4) (repealed 2016) (emphasis added); *see also* 2006 West Virginia Laws Ch. 101 (S.B. 773). This addition was made immediately after a 2005 decision by the Supreme Court of Appeals of West Virginia which determined that a specific CON Standard was not endorsed by the Legislature, noting that the CON Standards "exist by virtue of executive department action alone." *See Fairmont General v. United Hosp. Ctr. Inc.*, 218 W. Va. 360, 377, 624 S.E.2d 797, 814 n. 8 (W. Va. 2005). Since *Fairmont* was decided before the Legislature affirmatively adopted the CON Standards and specifically exempted them from the notice-and-comment process, *Fairmont*'s determination regarding deference due to the Authority is not instructive in the instant matter.

Governor in 1996, and were in existence for almost 20 years prior to July 1, 2016. Moreover, the Legislature specifically stated in W. Va. Code § 16-2D-6(g) that any CON Standard adopted after July 1, 2016, is exempted from traditional notice-and-comment rulemaking,[6] further evidencing the fact that the Legislature intends the CON Standards to carry the force of law notwithstanding the fact that they are not legislative rules.

How then do the SHP Standards fit into the standard for review of an administrative decision, and does *Chevron* even apply? Even though the SHP Standards were not written by the Legislature, the answer is "yes." In the case of *United States vs. Mead,* cited above, the United States Supreme Court held that an agency-created rule may still be qualified for *Chevron* deference even though the rule was adopted without traditional notice-and-comment procedure. *Mead*, 533 U.S. at 226-227. Specifically, the Court held the following:

> We hold that administrative implementation of a particular statutory provision qualifies for Chevron deference ***when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law***, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. ***Delegation of such authority may be shown in a variety of ways***, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, ***or by some other indication of a comparable congressional intent.***

*Mead*, 533 U.S. at 226-227 (emphasis added); *see also Wood*, 757 S.E.2d at 762 n.9.

In both W. Va. Code § 16-2D-6(g) and W. Va. Code § 16-2D-12(a), the Legislature unambiguously demonstrated an indication of intent to delegate authority vis-à-vis the administration and enforcement of the SHP Standards to the Authority by overt statutory reference.

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[6] Instead, the CON Standards are subject to the approval procedure outlined in W. Va. Code §16-2D-6. *See* W. Va. Code §16-2D-6(g) ("The certificate of need standards . . . are not subject to article three, chapter twenty-nine-a of this code. The authority shall follow the provisions set forth in this section for giving notice to the public of its actions, holding hearings, or receiving comments on the certificate of need standards.").

*Mead*, 533 U.S. at 226-227; *see also Wood*, 757 S.E.2d at 762 n.9. Since the Legislature has explicitly vested the SHP Standards with the "full force and effect" of law, any "permissible" interpretation of the SHP Standards is entitled to the great deference and weight specified in *Chevron*, *Appalachian,* and *Boone*. *See Mead*, 533 U.S. at 226-227; *see also Wood*, 757 S.E.2d at 762 n.9.; *contra* Petitioners' Brief at pp. 2 (Assignment of Error No. 5); 20-23.

Here, the plain language used in the Need Methodology of the SHP Standards is clear and unambiguous. The final calculation contained in the Need Methodology calling for an unmet need equal to or greater than 229 patients (as alleged by Petitioners) does not even apply to UHC's Project. Under the first prong of the *Chevron* analysis, if the intent of the SHP Standards is clear, that is the end of the matter.

Even if one were to assume, *arguendo,* that the Need Methodology in the SHP Standards is ambiguous with respect to the specific issue presented by Petitioners, the question under the second prong of *Chevron* becomes whether the Authority's interpretation is based upon a permissible construction of those SHP Standards. *See Appalachian*, 466 S.E.2d at 433 (citing *Chevron,* 467 U.S. at 837); *see Boone*, 472 S.E.2d at 421-22; *see Wood*, 757 S.E.2d at 762 n.9 (W. Va. 2014) (citing *Mead*, 533 U.S. at 226-27); *see also Princeton*, 328 S.E.2d at 171. If it is, then such interpretation by the agency charged with its administration must be given great deference and weight by a reviewing court. *See Appalachian*, 466 S.E.2d at 433 (citing *Chevron,* 467 U.S. at 837); *see Boone*, 472 S.E.2d at 421-22; *see Wood*, 757 S.E.2d at 762 n.9 (W. Va. 2014) (citing *Mead*, 533 U.S. at 226-27); *see also Princeton*, 328 S.E.2d at 171. This is especially true here, where the agency is interpreting its own work product – the SHP Standards. *See Cookman Realty Grp., Inc. v. Taylor,* 211 W. Va. 407, 411-12, 566 S.E.2d 294, 298-99 (2002). As discussed in further detail below, the Authority's consistent interpretation of the SHP Standards is and has been

eminently reasonable, and hence, permissible.

## II. The Authority's conclusion that UHC satisfied the requirements of the Need Methodology under the SHP Standards was based upon the plain language of those Standards, and was a permissible construction of the Standards entitled to substantial deference and weight.

While there technically five Assignments of Error set forth in Petitioners' Brief, a closer reading of these Assignments of Error reveals that **there is only one** overarching, determinative issue in this matter. *See, e.g.*, Petitioners' Brief at pp. 1-2 (Assignments of Error Nos. 1-5); *see also* Petitioner's Brief at p. 8 (setting forth one single question presented). Specifically, the crux of the issue in this case is whether the demonstration of an unmet need of 44 patients in Preston County was sufficient under the Need Methodology of the SHP Standards for approval of the UHC Project, or whether UHC's Project should only have been approved upon a showing that the unmet need was at least 229 patients. *See, e.g.*, Petitioners' Brief at pp. 1-2 (Assignments of Error 1-5), 3-34. The Authority answered the question this way:

> After careful review and consideration of the arguments of both parties, the Authority finds that UHC has complied with the Need Methodology set forth in the Home Health Standards, and has established the need for its proposed expansion into Preston County. It is the Authority, and not the Applicant, who actually performs the calculations under the Need Methodology for home health services. At the time the UHC application was prepared and filed, the Authority provided UHC with a calculation under the Need Methodology based upon the Authority's most recent home health survey, which was the 2014 Annual Home Health Survey. Pursuant to the Authority's calculations, an unmet need of 44 unduplicated patients exists in Preston County, and that is a sufficient showing of need for UHC's project.

J.A. at pp. 836-37. To evaluate the correctness of the Authority's Decision, it is necessary to review the pertinent provisions of the Need Methodology.

The Need Methodology defines a specific procedure for determining need for the Project. *See id.* at pp. 465-69. This Need Methodology is determined on a county-by-county basis

by comparing county and State home health utilization data. The Need Methodology specifically provides:

> Need calculations based on 1995 data have been completed by HCCRA[7] using the following methodology ... 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 the HCCRA.

*Id.* at p. 467. The Need Methodology then describes four separate calculations, each of which is summarized below.

"Step 1" compares the home health utilization rate for the entire State to the county of the proposed service. If the use rate for a county exceeds the statewide use rate, no need exists in the county, and the CON analysis ends there. According to 2014 data,[8] the use rate for home health services within the State of West Virginia was 25 per 1,000 residents. *Id.* at p. 45. In contrast, the home health use rate for Preston County was lower, at 23.7 per 1,000 residents. *Id.* at p. 45. Thus, Step 1 revealed that fewer Preston County residents received home health services than the rest of the State as a whole. This disparity alone evidenced an access to care issue requiring attention in Preston County.

"Step 2" determines the total of potential home health recipients in Preston County needed to reach the State utilization level. Preston County's 2014 population was 35,054. *Id.* at p. 45. In order to equal the West Virginia use rate for home health services, approximately 876 residents were calculated to need home health services within Preston County based upon the FY 2014 data. *Id.* at p. 45.

"Step 3" determines the actual number of residents who received home health care

[7] The acronym "HCCRA" stands for the Health Care Cost Review Authority, the predecessor agency of the Health Care Authority.

[8] This was the most recently available data at the time the UHC application was filed.

in Preston County below the State utilization level. Data culled from the Authority's 2014 survey indicated that only 832 Preston County residents received home health services. *Id.* at p. 45. So even though 876 residents of Preston County were calculated to need home health services, only 832 received such services. As a result, the unmet need for Preston County was determined by the Authority to be 44 residents. *Id.* at p. 45. It was on this finding that the Authority approved the UHC application.

"Step 4" is used to determine the "threshold (adjustment factor)." *Id.* at p. 468. However, the plain language used in Step 4 says that this calculation is performed **only if there are agencies in the proposed county which received CON approval in the previous 12 months**. *Id.* (emphasis added). If there are, a final calculation and need threshold is temporarily set to at least 229 projected home health recipients to give the new agency a temporary "head start" in serving the local population. This "head start" purpose is confirmed by the plain language of the SHP Standards, which state that the threshold/adjustment is to "allow for the development of agencies approved for CON in the previous 12 months." *Id.* at p. 466; SHP Standards at V(A). After the elapse of 12 months, however, this temporary threshold/adjustment of 229 no longer applies. Since there were no CON approvals in Preston County within the 12 months prior to the UHC application, the Authority reasoned that the Step 4 was irrelevant to the UHC project.[9] *See id.* at p. 45.

Accordingly, an unmet need of 44 unduplicated home health patients in Preston County was deemed sufficient to justify a finding of need under the SHP Standards.

A. *The plain language of the Need Methodology under the SHP Standards unambiguously states that Step 4 does not apply to the UHC Project.*

[9] It is critical to note that even Petitioners' expert witness, Gregory Gibbs, testified that Step 4 does not apply to UHC's application. *See* J.A. at pp. 767-68. Despite Mr. Gibbs' testimony that Step 4 does not apply to the UHC project, Petitioners erroneously rely on the "Conclusion" located at the end of Step 4. *See id.* at pp. 770-71.

Petitioners erroneously assert that every home health CON applicant must present an unmet need of at least 229 projected patients to earn approval. *See, e.g.*, Petitioners' Brief at pp. 1-2 (Assignments of Error Nos. 1-5), 10-33. This argument stems from Petitioners' misreading of the Need Methodology under the SHP Standards. As noted above, the Need Methodology progresses from Step 1 through Step 3, ultimately resulting in a value which reflects the actual number of patients in need of home health care (i.e. the unmet need). Petitioners elect to ignore this unmet need, and instead re-focus upon the "Conclusion" that appears at the end of Step 4. *See, e.g.*, *id.* at pp. 1-2 (Assignment of Error No. 3); 14-16. This "Conclusion" reads as follows:

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

J.A. at p. 469 (emphasis added). Petitioners argue that this "Conclusion" applies to every CON application, and not just to those invoking Step 4 when another home health agency has been approved in the last 12 months. *See, e.g.*, Petitioners' Brief at pp. 1-2 (Assignment of Error No. 3); 14-16.

The plain language of Step 4 contradicts Petitioners' interpretation, however. The title of Step 4 is "CALCULATION OF THE **THRESHOLD** (ADJUSTMENT FACTOR)." J.A. at p. 468 (emphasis added). As noted above, Step 4 provides specifically as follows:

> This calculation is done only if there are agencies in the proposed county which received CON approval in the previous 12 months.

*See id.* at 468. In the case of UHC's Project, there were no new agencies approved in the last 12 months, and therefore Step 4 unambiguously did not apply.

Moreover, the "Conclusion" which Petitioners attempt to impose upon all applicants (and not just those in counties with new agencies) references only what the **"threshold"** calculation is. *Id.* at p. 468 (emphasis added). Hence, the "Conclusion" is inextricably linked to

only what is calculated in Step 4. *Id.* To be sure, the word "threshold" **does not even appear** in Steps 1 through 3. The "CALCULATION OF THE THRESHOLD (ADJUSTMENT FACTOR)" is the actual title of Step 4. While Petitioners argue that a threshold of 229 applies in all cases, the plain language of the Need Methodology states just the opposite. The "Conclusion" about the "threshold" calculated under Step 4 likewise has no relevance to Steps 1 through 3. *See id.* at pp. 467-69.

The Authority's CON Decision relied on the plain text and purpose of the SHP Standards to reject Petitioners' irrational interpretation of the Need Methodology, stating:

> An analysis of the text and purpose behind the Home Health Standards shows that the Petitioners' interpretation must fail. First, the "Conclusion" language that the Petitioners rely upon clearly uses the word "threshold." See Home Health Standards Article V(C), at p. 7. The word "threshold" appears in the SHP Standards when the SHP Standards reference a need to support the development of new CON applicants approved within the previous 12 months, a matter exclusively addressed by Step 4. See, Home Health Standards Article V(A) at p. 5, V(C) at p. 6, V(C) at p. 7. This occurrence is not a coincidence, as the only rational utility for the "threshold" adjustment of 229 is to augment the determination of need from Step 3 in order to more fairly reflect the patient load of a new home health provider. Thus, the use of the word "threshold" in the "Conclusion" inseparably ties the "Conclusion" language to Step 4. Since it is uncontested that no CON applications have been approved within the previous twelve months in Preston County, Step 4 does not apply to UHC's application, and there is no logical reason to apply the "Conclusion" language to UHC's application.

*Id.* at p. 838.

Any interpretation of the Need Methodology that disembodies the "Conclusion" language from Step 4 would create a *de facto* "Step 5." That is, after the completion of Steps 1 - 4, there would always be an additional calculation to subtract 229 from the unmet need calculation. The SHP Standards clearly state that "[t]he Need Methodology is comprised of ***four (4) calculations***." *Id.* at p. 467 (emphasis added). The SHP Standards also state that "***[t]hese***

***calculations*** shall be used to determine unmet need; this is the ***only*** demonstration of need that the HCCRA shall consider." *Id.* at p. 467 (emphasis added). By attempting to artificially use Step 4's "Conclusion" language to create a new "Step 5" for the Authority to consider, Petitioners again contradict the plain language of the SHP Standards.

In summary, the Circuit Court Order must be affirmed under the first part of the *Chevron* analysis since the intent of the SHP Standards may be unambiguously discerned from its plain language.

B. *The Authority's determination that the unmet need in Preston County is not required to meet or exceed 229 patients was a permissible construction of the Need Methodology under the SHP Standards.*

Petitioners do much to create ambiguity in the SHP Standards where none exists. In doing so, Petitioners cite to several provisions of the SHP Standards in support their erroneous interpretation. *See* Petitioners' Brief at p. 14. However, when closely examined and read in their proper context, each of the provisions cited by Petitioners actually controvert their tortured construction. Though UHC contends that this appeal may be fully disposed under the first part of the *Chevron* analysis, what follows demonstrates that the Authority's longstanding interpretation of the SHP Standards most certainly constitutes a permissible one under part two of *Chevron.*

First, Petitioners cite Section V(C) of the SHP Standards, noting that this section states "the four calculations must be completed for each county to be served." J.A. at p. 525. This sentence only mandates the Authority to determine whether the threshold/adjustment encompassed by Step 4 applies, and if it does, to account for the threshold/adjustment formula. *Id.* Hence, **the determination of the applicability** of Step 4 is what is referenced in the provision cited by Petitioners. *Id.* This determination (that Step 4 did not apply to the UHC Project) was properly conducted by the Authority. *Id.* As more fully detailed above, Step 4 contains an explicit direction

to be completed "only if there are agencies in the proposed county which received CON approval in the previous 12 months," and the provision cited by Petitioners does not override this explicit instruction. *Id.* at pp. 468, 526. It is undisputed that a home health CON was not granted for Preston County in the previous 12 months, and as such, the Authority properly considered and concluded that Step 4 did not apply to UHC's Project. *Id.* at pp. 468, 526, 767-68.

Next, Petitioners note that the narrative portion of this same Section V(C) of the SHP Standards 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." (Emphasis added.) Petitioners' Brief at p. 14; J.A. at p. 525. However, Petitioners fail to acknowledge that this sentence is contained within the paragraph discussing Step 4, and thus clearly applies only when a CON has been granted in the prior 12 months. Petitioners' Brief at p. 14; J.A. at p. 525. This conclusion is corroborated by the Authority's use of the term "another," obviously referencing "another" agency in addition to the one approved in the last 12 months.

Petitioners subsequently cite the bullet point in Section V(A) of the SHP Standards, which states "[a]n unmet need will exist if the need methodology yields a threshold of at least 229 projected home health recipients." Petitioners' Brief at p. 14; J.A. at p. 524. The Petitioners' reliance on this provision is similarly quoted out of context. *See* Petitioners' Brief at p. 14; *see also* J.A. at p. 524. In fact, the sentence immediately preceding it states that "[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." Petitioners' Brief at p. 14; J.A. at p. 524. This 229-recipient threshold undoubtedly relates to the threshold/adjustment formula contained in Step 4 – since as discussed in more detail above – Step 4 is the **only** calculation which refers to the 229 number or the need to "allow for the development of agencies approved for CON in the previous

12 months." Petitioners' Brief at p. 14; J.A. at pp. 524-27.

Finally, Petitioners assert that the presence of a forward slash – also known as a virgule – contained in Step 4's "Conclusion" supports their flawed interpretation of the Need Methodology. *See* Petitioners' Brief at pp. 18-19. However, Petitioners' argument on this point is confusing at best, and internally inconsistent at worst. *Id.* For example, Petitioners state that ". . . a virgule commonly means 'and/or' and does not mandate a choice between two things." *Id.* at p. 18. This argument appears to support the notion that "threshold" and "adjustment" are interchangeable within the SHP Standards – a notion which actually contradicts Petitioners' Need Methodology argument that the terms "threshold" and "adjustment" represent two differentiated concepts. *Id.* at p. 19. This internal inconsistency further exemplifies the tortured nature of Petitioners' interpretation. Petitioners also fail to mention that the virgule is not even used uniformly in the Need Methodology, as Step 4 also pairs these terms without a virgule but encloses one term (Adjustment Factor) parenthetically as if to further define the other term "Threshold."

Petitioners' philological examination of the terms "threshold" and "adjustment" notwithstanding, a document must ultimately be read organically and purposefully to ascertain the meaning of the words contained within its four corners. As the Authority permissibly determined – the phrase "threshold/adjustment" must be considered in light of the entire text and purpose of the SHP Standards. *See, e.g.,* J.A. at p. 838. When this holistic analysis is conducted, it is evident that regardless of how these terms are variously presented – as "threshold," as "adjustment," as "threshold/adjustment," or as "threshold (adjustment factor)" – they are uniformly linked to the calculation in Step 4. Since Step 4 does not apply to the Project, an application of the "threshold/adjustment" factor is clearly not warranted in the UHC Project.

In summary, the Authority logically and rationally determined that Step 3 produces

the one and only unmet need calculation applicable to the UHC application. The Authority's need determination was concisely and adequately explained in its CON Decision. The Authority's interpretation was a "permissible construction" of the SHP Standards consistent with part two of *Chevron*. The Circuit Court Order therefore properly upheld the OOJ and CON Decisions, and must be affirmed by this Court.

C. *Requiring an unmet need of 229 would violate the Legislative intent of the CON law.*

Petitioners' interpretation of the Need Methodology directly conflicts with one of the fundamental purposes of the CON law as determined by the Legislature – to ensure that "appropriate and needed health care services are made available for persons in the area to be served." W. Va. Code § 16-2D-1(2). Petitioners ignore this fundamental statutory purpose, and instead repeatedly reference the elimination of duplicative services as the applicable guiding principle. *See, e.g.,* Petitioners' Brief at pp. 3, 26, and 32. Petitioners ***completely fail*** to address or even acknowledge the goal of access to needed services in their brief. As a result, Petitioners' interpretation of the Need Methodology only serves to preclude the delivery of needed health care services to patients, unless the number of patients needing services rises to the unacceptably high number of 229.

This Court has explicitly stated that any interpretation of the CON law which does not undertake a "balanced consideration" of all applicable statutory criteria is improper. *See Fairmont Gen. Hosp., Inc. v. United Hosp. Ctr.*, Inc., 218 W. Va. 360, 365, 624 S.E.2d 797, 803 (2005). Specifically, in *Fairmont*, the Court referenced a Florida CON rule which mandated that home health providers had to have an average base of 300 patients to obtain a CON. *Id.* As the Court noted:

> The stated purpose of the rule was to halt the proliferation of home

> health agencies. However, the record before the hearing officer showed that the rule of 300 was designed to protect the existing industry from competition . . . [T]he rule of 300 precluded a balanced consideration of all statutory criteria. The rule allows [the Department of Health and Rehabilitative Services] to ignore some statutory criteria and emphasize others, contrary to the legislative purpose it is supposed to implement.

*Fairmont*, 624 S.E.2d at 803 (citing *Dep't of Health & Rehab. Servs. v. Johnson & Johnson Home Health Care, Inc.*, 447 So. 2d 361 (Fla. Dist. Ct. App. 1984) (internal quotations omitted)). Just like the proponents of the Florida "rule of 300," Petitioners present a self-serving argument predicated upon the goal of corporate protectionism. Petitioners' proposed interpretation of the Need Methodology ***does not even consider*** another statutory purpose behind the CON law – whether "needed health services are made available for persons in the area to be served." *See* W. Va. Code § 16-2D-1(2).

For example, Petitioners summarily proclaim that the home health needs of Preston County residents "are already extensively and adequately serviced," despite the Authority's undisputed projection that there is an unmet need of 44 projected home health recipients in Preston County. *See* Petitioners' Brief at p. 25. Petitioners further argue that the Authority's interpretation of the SHP Standards is improper because it technically permits a showing of an unmet need of one person to be sufficient for home health CON approval purposes. *See, e.g., id.* at p. 24. Yet, Petitioners fail to consider the inverse of their argument – that this denial of access to services should be mandatory if the unmet need is one, but also if there are **228 people in need in every proposed service area county**. *See, e.g., id.* at pp. 19-20.

The Petitioners' interpretation of the term "unmet need" is simply unprincipled. It is not based upon sound health planning concepts, but is instead an argument subsumed by self-interest. As such, it undermines the Authority's ability to ensure that needed health services are

made available to Preston County residents, a statutory purpose behind the CON law wholly ignored by Petitioners. W. Va. Code § 16-2D-1(2). Since Petitioners completely "ignore [one] statutory criteria and emphasize [the other]," their argument certainly does not take a "balanced consideration" of each of the CON program's statutory purposes, and must fail. *Fairmont*, 624 S.E.2d at 803; W. Va. Code § 16-2D-1(2).

In fact, if an unmet need of at least 229 projected patients was required for every home health CON application, several West Virginia counties could theoretically **never** be eligible to receive home health services. J.A. at pp. 378-84, 709-11. UHC's expert health planner, Raymona Kinneberg, testified about this issue at the administrative hearing. *See id.* at pp. 378-84. She demonstrated that in 10 West Virginia counties, the total number of home health recipients needed to meet the State use rate each fall below the number 229. *See id.* Therefore, an additional subtraction of 229 from the calculation would unvaryingly result in a showing of no unmet need for these counties, regardless of the actual number of residents of those counties who are underserved. *Id.* Specifically, under Petitioners' interpretation of the Need Methodology, the residents of Calhoun (190), Doddridge (215), Gilmer (216), Pendleton (185), Pleasants (189), Pocahontas (211), Tucker (176), Tyler (223), Webster (223), and Wirt (146) Counties would ***never*** be eligible to have a home health agency approved to serve their residents if current home health providers elect to cease operations in these respective counties. J.A. at pp. 378-84; *see also id.* at 709-11.

A closer look at the Authority's 2014 statewide need survey data confirms this cause for concern. *Id.* at pp. 381, 383. Specifically, according to this data, Pendleton and Webster Counties were each only served by two existing agencies. *Id.* Should these home health providers, for any reason, choose to cease operations in these counties, residents would subsequently be

**unable** to receive home health services based on Petitioners' interpretation of the Need Methodology. *Id.* The potential of leaving home health services wholly unavailable to the residents of sparsely populated West Virginia counties clearly contradicts the legislative intent of the CON law to ensure "that appropriate and needed health services are made available for persons in the area to be served." W. Va. Code § 16-2D-1(2).

Ultimately, the purpose of the CON program is not to protect the market share of existing providers, nor is it to safeguard Petitioners' profit margins. *See generally* J.A. at pp. 313-19, 333-41, 359-64, 375-77, 385-419; *see also* W. Va. Code §§ 16-2D-1(1)-(2). Instead, it is to ensure needed health services are made available to West Virginians while also protecting against unnecessary duplication. *Id.* While Petitioners desire to be permanently protected from additional competition through the creation of a 229-patient threshold/adjustment "bubble," their protectionist motivation contradicts both the CON law and the home health care needs of Preston County residents. A home health agency is given that protection for only 12 months, and then only when it first is approved to serve a county. That is the sole purpose of Step 4 of the Need Methodology.

D. *The Authority has consistently and repeatedly interpreted the SHP Standards to not require an unmet need of at least 229 patients when there are no newly-approved agencies within the proposed service area county.*

As noted in the Authority's CON Decision, Petitioners' erroneous interpretation of the SHP Standards has been repeatedly and emphatically rejected by the Authority. *See In re: Three Rivers Home Care*, CON File No. 00-2-7110-X/Z (a February 26, 2002 Decision 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 (a May 2, 2002 Decision in which an unmet need of 75 patients in Wayne County,

127 patients in Jackson County, 386 patients in Putnam County, and 97 patients in Lincoln County all 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 (a July 3, 2003 Decision in which an unmet need of 125 patients in Boone County, 5 patients in Cabell County, 98 patients in Lincoln County, 180 patients in Logan County, and 212 patients in Wyoming County all resulted in CON approval); *In re: Jefferson Memorial Hospital d/b/a Jefferson Memorial Home Care*, CON File No. 03-9-7597-X/Z (a January 9, 2004 Decision 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 (a June 23, 2004 Decision 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 (a November 14, 2008 Decision on Request for Reconsideration that determined an unmet need of 30 patients in Lincoln County and 19 patients in Wayne County was sufficient for CON approval in both counties); *In re: Caring Angels Home Health, LLC*, CON File No. 14-8/9-10231-Z (a October 30, 2015 Decision in which an unmet need of 203 patients in Hampshire County, 116 patients in Morgan County, and 130 patients in Mineral County all resulted in CON approval); *In re: Stonerise Reliable Healthcare LLC*, CON File No. 17-5-11187-Z (a December 11, 2017 Decision determining that an unmet need of 8 patients for Pleasants County and 6 patients for Tyler County was a sufficient showing for home health CON approval in both counties); *In re: United Hospital Center, Inc.*, CON File No. 17-6-11131-Z (a February 15, 2018 Decision determining that an unmet need of 44 patients in Preston County was a sufficient showing for home health CON approval); *In re: Personal Touch Home Care of W. Va., Inc.*, CON File No. 18-2-11421-Z (an April 4, 2019 Decision determining that an unmet need of 29 patients in Cabell County and 55 patients in Wayne County was a sufficient showing for home health CON approval

in both counties); *In re: Stonerise Reliable Healthcare LLC,* CON File No. 18-8/9-11510-Z (an April 24, 2019 Decision determining that an unmet need of 42 patients in Hardy County and 64 patients in Morgan County was a sufficient showing for home health CON approval in both counties); *In re: Stonerise Reliable Healthcare LLC,* CON File No. 18-8-11511-Z (an April 24, 2019 Decision determining that an unmet need of 165 patients in Hampshire County and 166 patients in Mineral County was a sufficient showing for home health CON approval in both counties); *In re: United Hospital Center, Inc.,* CON File No. 19-5-11592-Z (a November 18, 2019 Decision determining that an unmet need of 27 patients in Wirt Count was a sufficient showing for home health CON approval); *see also* J.A. at pp. 836-37.

The OOJ has likewise been consistent in upholding the Authority's long-standing interpretation of the SHP Standards. The OOJ stated the following in its Decision in the instant matter:

> [t]he issue of the application of the 4th calculation raised by [Petitioners] has been addressed on several occasions by [the OOJ].

*See In Re: United Hospital Center, Inc*, CON File No. 17-6-11131-Z, Ap. Doc. No. 18-HC-01. Even as far back as February 18, 2011, the OOJ noted that Petitioners' argument was a stale and incorrect interpretation of the law:

> This is not an issue of first impression before the Offices of Judges . . . The Authority has been consistent in its position that the 229-adjustment factor in the Home Health Services Standards only applies when a CON has been approved for the same service area for less than 12 months. The sections of the Standards aforecited, clearly articulate that the adjustment of 229 home service recipients has been added to the formula to allow for the development of agencies with recently approved CONs. Each agency is allowed a 229 home health recipient adjustment factor for each county in the approved service area. An unmet need 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. The example set forth in Section X of the Home Health Services

> Standards does not utilize the 229-threshold factor, corroborating the agency view that the threshold is to be utilized only when other agencies have received CON approval in the past 12 months.

*Interim HealthCare of SE Ohio, Inc.*, CON File No. 08-10-8687-Z, Ap. Doc. No. 10-HC-01. The Authority's instant CON Decision follows these precedents, and Petitioners have provided no valid basis to overturn the Authority's longstanding, consistent interpretation.

E. *The 1995 draft SHP Standards are not a persuasive indicator that the SHP Standards are being incorrectly applied.*

The Petitioners proffer use of a draft version of the SHP Standards to substantiate their flawed interpretation of the Need Methodology. *See, e.g.,* Petitioners' Brief at pp. 19-20; *see also* J.A. at pp. 488-518. Specifically, Petitioners' first argue that a chart which was associated with the draft standards demonstrates that the SHP Standards necessitate a minimum unmet need of 229 in every county. *See, e.g.,* Petitioners' Brief at pp. 19-20; *see also* J.A. at pp. 488-518. The Authority appropriately rejected this argument in its CON Decision after Petitioners (then the "Affected Persons") made the same assertion at the public administrative hearing:

> The Authority does not find the inclusion of the chart referenced in the "Draft" standards persuasive as to the Affected Persons' argument. As the Affected Persons admitted at the hearing, the final Home Health Standards sent to and approved by the Governor in 1996 omitted this chart. This decision to not include the chart in the final standards sent to the Governor indicates that the chart actually contained an inaccurate portrayal of the Need Methodology. Accordingly, it was removed during the approval process.

J.A. at pp. 838-39. As the Authority correctly identified, the draft chart on which Petitioners' rely was not included in the final SHP Standards, and the "Need Methodology Example" provided in Section X of the final SHP Standards directly contravenes this draft chart. *Compare* J.A. at pp. 506-07 *with* J.A at pp. 532-33; *see also* J.A. at pp. 838-39. Hence, the draft standards presented by Petitioners lack both credibility and influence as to the instant determinative inquiry. *Compare*

J.A. at pp. 506-07 *with* J.A at pp. 532-33; *see also* J.A. at pp. 838-39.

F. *The Circuit Court of Mason County's 2007 decision conflicts with the Authority's longstanding precedents, precludes a balanced consideration of the statutory criteria for CON reviews, and impermissibly accorded no deference to the Authority's permissible interpretation of the SHP Standards.*

Petitioners argue that the Circuit Court Order erred by failing to adopt a 5th Judicial Circuit Court decision from Mason County (hereafter the *Pleasant Valley* decision), which conflicts with the Authority's longstanding and well-reasoned interpretation of the Need Methodology. Petitioners' Brief at pp. 2 (Assignment of Error No. 4), 23-26; *see* J.A. at pp. 581-90. In *Pleasant Valley*, the Circuit Court of Mason County sided with a local hospital to preclude the development of a competing home health agency in Mason County by an out-of-state company. *See* J.A. at pp. 581-90. In doing so, it adopted Petitioners' argument that there must be an unmet need of at least 229 projected patients before any CON application for additional home health services may be approved. *Id.* The Circuit Court reversed the decision of the Authority and denied the application.[10]

In its CON Decision, the Authority explicitly declined to accept the *Pleasant Valley* outcome. *See, e.g., id.* at pp. 837-38. In a previous decision, the Authority also highlighted *Pleasant Valley's* substantive determination in a dubious fashion, noting that *Pleasant Valley* improperly "gave no deference to the Authority's home health decisions." *See In re: Medi Home Health Agency, Inc.*, CON File No. 07-2-8664-Z, Decision on Request for Reconsideration (November 14, 2008) at p. 8.

[10] The *Pleasant Valley* decision was rendered before the Revised Rules of Appellate Procedure took effect on December 1, 2010, and thus, the parties were not afforded the now-guaranteed right to receive a written opinion on the merits of any case appealed to the West Virginia Supreme Court of Appeals. *See* W. Va. R. App. P. 21. The Supreme Court's ultimate refusal to hear the petition for appeal in *Pleasant Valley* was not a decision made on the merits of the case, and therefore the refusal does not have preclusive effect regarding consideration of the matters raised therein. *See* Syl. pt., *Smith v. Hedrick*, 181 W. Va. 394, 382 S.E.2d 588 (1989). Thus, the *Pleasant Valley* Decision does not constitute binding authority in the instant matter.

The OOJ likewise considered and explicitly declined to follow the *Pleasant Valley* decision in the instant appeal.

> . . . [*Pleasant Valley*] is not binding on this tribunal.
>
> It remains the opinion of this body that based on the plain language of the Home Health Services Standards and the Authority's consistent application thereof, that the adjustment factor of calculation 4 is only applicable in those situations where a provider has been approved in the previous 12 months in the same service area.

J.A. at p. 895.

Like the Authority and the OOJ, the Circuit Court of Kanawha County has also declined to accept Pleasant Valley and its incorrect interpretation of the SHP Standards in two separate, recent decisions. *See id.* at pp. 897-907; *see also Amedisys West Virginia, L.L.C. dba Amedisys Home Health of West Virginia, et al. v. Personal Touch Home Care of W.Va. Inc, et al., and the West Virginia Health care Authority*, Civil Action No.: 19-AA-145 (Sep. 26, 2019).

Specifically, on May 20, 2020, the Hon. Carrie L. Webster of the Circuit Court of Kanawha County asserted the following regarding *Pleasant Valley* in the Circuit Court Order which is the subject of this appeal:

> This Court is not persuaded by [*Pleasant Valley*] which contradicts the Authority's longstanding and consistent interpretation of the SHP Standards . . . The *Pleasant Valley* decision failed to acknowledge that the purpose of the CON law extends beyond the mere elimination of duplicative services. Like Petitioners, the *Pleasant Valley* decision repeatedly cites the need to avoid unnecessary duplication to the exclusion of any other statutory factor or purpose. See [*Pleasant Valley*] at pp. 4, 5, 7, 8, 9.
>
> The statutory purpose of ensuring that "appropriate and needed health care services are made available for persons in the area to be served" was totally discounted by the Court in *Pleasant Valley*. See *W.* Va. Code § 16-2D-1(2). The Mason County Circuit Court therefore failed to undertake a "balanced consideration" of **all applicable** statutory criteria as envisioned by the West Virginia

> Supreme Court of Appeals. See Fairmont General v. United Hosp. Ctr. Inc., 624 S.E.2d 797, 803 (W. Va. 2005).

J.A. at pp. 905-06 (emphasis added).

Likewise, on September 26, 2019, the Hon. Tod Kaufman of the Circuit Court of Kanawha County also issued an Order which rejected *Pleasant Valley*, and similarly affirmed the Authority's decision to grant CON approval to an applicant who sought to expand home health services to multiple counties – all of which had an unmet need below 229 projected home health recipients.[11] Like Judge Webster, Judge Kaufman was also made aware of the *Pleasant Valley* decision, but rejected it outright as "wrongly decided:"

> Petitioners rely on [*Pleasant Valley*] to support their position. Petitioners' reliance on this decision is misplaced. This decision has no precedential value upon this Court. Moreover, this decision is wrongly decided. The decision of the Mason County Circuit Court committed error by ignoring the plain language of the Home Health Standards and substituting its own interpretation of the Home Health Standards for those of the Agency charged with developing and applying them. The court in Pleasant Valley, found there to be conflict within the provisions of the Standards that simply does not exist. The court ignored the rational interpretation of the Authority and substituted its own interpretation in clear contravention of the applicable case law . . .

*See Amedisys West Virginia, L.L.C. dba Amedisys Home Health of West Virginia, et al. v. Personal Touch Home Care of W.Va. Inc, et al., and the West Virginia Health Care Authority*, Civil Action No.: 19-AA-145, at 13 (Sep. 26, 2019).

The *Pleasant Valley* decision, quite frankly, was overly protective of the local hospital's market share against a potential competitor, criticizing the Authority's interpretation of

[11] Judge Kaufman's Order has been appealed to this Court in the currently pending Appeal No. 20-0308. Petitioners in the instant appeal and petitioners in pending Appeal No. 20-0308 are related entities, and all are represented by the same legal counsel. Due to the substantial similarity between the cases, both UHC and Petitioners filed separate Motions to Consolidate the instant appeal with pending appeal No. 20-0308 on September 24, 2020. These Motions to Consolidate are currently under consideration by this Court.

the Need Methodology as offering "... more protection to a recently approved provider than it does to an existing one." J.A. at p. 588. But that is the whole point of Step 4, is it not? It offers the new guy on the block some temporary protection to allow it to stand up its operation. It is not a permanent guarantee of protection for all existing providers as sought by the *Pleasant Valley* decision. As such, the *Pleasant Valley* decision overreached in a manner contradictory to the plain language of the Need Methodology.

Finally, it is worth noting that the *Pleasant Valley* decision does not – as repeatedly alluded to by Petitioners – effectively create a "circuit split" which will lead to inconsistent Authority decisions. *See, e.g.*, Petitioners' Brief at pp. 3, 6-7, 23-26, 31-32. This is because an appeal of a CON decision can no longer be litigated in the 5th Judicial Circuit pursuant to statute. *See* W. Va. Code § 16-2D-16(f). When *Pleasant Valley* was decided, the CON law provided that a decision issued by the Authority could be appealed:

> . . . in either the circuit court of Kanawha county, **or in the circuit court of the county in which the petitioner or any of the petitioners resides or does business** . . .

W. Va. Code § 16-2D-10(f) (1999) (emphasis added). In *Pleasant Valley*, the petitioner chose to litigate the appeal in the circuit court of the county in which it conducted business – which was the Circuit Court of Mason County. However, petitioners of CON decisions **no longer have this option** since every CON appeal from the OOJ must now (by statute) be filed in the Circuit Court of Kanawha County. *See* W. Va. Code § 16-2D-16(f). As specified above, the Circuit Court of Kanawha County has expressly rejected *Pleasant Valley* and its incorrect interpretation of the SHP Standards. *Pleasant Valley* is therefore neither precedential nor even persuasive authority in the only Circuit Court which is currently authorized by law to review appeals from the OOJ.[12]

[12] The Authority is a State administrative agency located in Kanawha County, West Virginia. None of the

Fundamentally, *Pleasant Valley* was an incorrectly decided case: it failed to acknowledge that purpose of the CON law extends beyond the elimination of duplicative services (and as a result, failed to undertake a "balanced consideration" of all applicable statutory criteria); it failed to account for the plain language of the SHP Standards; and, it improperly failed to accord any deference to the authority's longstanding, consistent, and permissible construction of the SHP Standards. *See Fairmont*, 624 S.E.2d at 803; *see Appalachian*, 466 S.E.2d at 433 (citing *Chevron,* 467 U.S. at 837); *see Boone*, 472 S.E.2d at 421-22; *see Wood*, 757 S.E.2d at 762 n.9 (citing *Mead*, 533 U.S. at 226-27); *see also Princeton*, 328 S.E.2d at 171. This Court should accordingly reject this flawed decision from the 5th Judicial Circuit.

G. *Various other iterations of State Health Plan's Standards do not encompass a minimum numerical threshold as a requisite for CON approval.*

Petitioners argue that "nearly every other healthcare standard within the purview of the [Authority] includes an unmet need threshold." Petitioners' Brief at p. 28. Yet, any thoughtful examination of the Authority's various State Health Plan's Standards for CON refutes this argument as an obvious overstatement.

For example, Petitioners conveniently fail to reference perhaps the most commonly utilized iteration of the State Health Plan's Standards – the Standards for Ambulatory Care Centers (the "Ambulatory Care SHP Standards").[13] Like the Home Health Services SHP Standards, the Ambulatory Care SHP Standards include a need methodology that an applicant must utilize to demonstrate that an ambulatory care center is needed (the "Ambulatory Care Need Methodology").

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Authority's proceedings take place within the 5th Judicial Circuit, and as a State administrative agency, the Authority is not in any way controlled by or associated with the 5th Judicial Circuit. The Affected Persons cannot cite – and in fact do not attempt to cite – any legal authority which supports the notion that the Authority is bound to follow 5th Judicial Circuit precedents, even when a CON review matter involves a party which conducts business in the 5th Judicial Circuit.

[13] West Virginia Health Care Authority, AMBULATORY CARE CENTERS (1992), https://hca.wv.gov/certificateofneed/Documents/CON_Standards/Ambulatory_Care_Centers_2_ASC.pdf.

*Id.*; *see also* J.A. at pp. 465-69. In fact, the three steps of Ambulatory Care Need Methodology closely track Steps 1 through 3 of the Home Health Services Need Methodology. J.A. at pp. 465-69. Just like Steps 1 through 3 of the Home Health Services Need Methodology, the three steps of the Ambulatory Care Need Methodology encompass establishing the demand (or expected utilization) for a proposed service in the service area, identifying existing providers of the proposed services in the service area, and subsequently determining the extent to which existing providers are currently meeting the demand for such services (i.e. determining the unmet need). *See id.* at pp. 462, 465-69. Critically, there is no minimum numerical threshold encompassed by the Ambulatory Care Need Methodology. *Id.* Instead, the focus is upon the documented unmet need for a service to the exclusion of any numerical threshold. *See id.* at pp. 462, 465-69.

Furthermore, each of the need methodologies contained within the following State Health Plan's Standards also do not mandate a minimum numerical threshold: Renovation-Replacement of Acute Care Facilities and Services,[14] Birthing Centers,[15] Behavioral Health/Developmental Disabilities Services,[16] Operating Rooms,[17] and Neonatal Intensive Care Units.[18]

The bottom line is that the Authority utilizes various considerations – both quantitative and qualitative - to determine the need for the different types of health services it

[14] West Virginia Health Care Authority, RENOVATION-REPLACEMENT OF ACUTE CARE FACILITIES AND SERVICES (2010), https://hca.wv.gov/certificateofneed/Documents/CON_Standards/RenovAcute.pdf.
[15] West Virginia Health Care Authority, BIRTHING CENTERS (1992). https://hca.wv.gov/certificateofneed/Documents/CON_Standards/Birthing_Centers.pdf.
[16] West Virginia Health Care Authority, BEHAVIORAL HEALTH/DEVELOPMENTAL DISABILITIES SERVICES (1995), https://hca.wv.gov/certificateofneed/Documents/CON_Standards/Behavioral_Health.pdf (while many of the health services contained within the Behavioral Health/Developmental Disability Services Standards are now exempted from full CON review, no minimum numerical threshold existed in the need methodology of these Standards before they were exempted).
[17] West Virginia Health Care Authority, OPERATING ROOMS (1992), https://hca.wv.gov/certificateofneed/Documents/CON_Standards/Operating_Rooms.pdf.
[18] West Virginia Health Care Authority, NEONATAL INTENSIVE CARE UNITS (2020), https://hca.wv.gov/certificateofneed/Documents/NICU%20Standards%20Governor%20Approved.pdf.

regulates. As identified, several of the State Health Plan Standards clearly do not encompass a minimum numerical threshold. Hence, Petitioners' argument that "nearly every other healthcare standard . . . includes an unmet need threshold" must fail. *See* Petitioners' Brief at p 28.

H. *No public policy goals are advanced by requiring an unmet need of at least 229 patients.*

Before concluding this discussion of the Need Methodology, it must be noted that when the SHP Standards were drafted in 1996, there was a concern that the home health market would become oversaturated with providers. J.A. at 712. However, contrary to Petitioners' undocumented assertion of proliferation, this concern never materialized. *See, e.g.*, Petitioners' Brief at pp. 26-28. The Petitioners' summarily argue that – because a "basic search" of the Authority's online document filing system purportedly shows numerous approved home health CON applications since October 30, 2015 – there "unquestionably [exists] a current and ongoing proliferation of home health services in West Virginia." *Id.* at p. 26.

The details of this so-called proliferation were never documented or presented in evidence to the Authority by Petitioners at the administrative hearing. Petitioners cite cases, but have done nothing to prove that a proliferation of agencies actually exists. As such, Petitioners' diaphanous reference to a "basic search" in post-hearing briefing clearly goes beyond the administrative record made below. The West Virginia Administrative Procedures Act is clear that all evidence must be made a part of the record, "... and no other factual information or evidence shall be considered in the determination of the case." W. Va. Code § 29A-5-2(b).

Even more importantly, Petitioners' ad-hoc, specious argument is overwhelmingly refuted by expert testimony and data contained within the record. *See, e.g.*, J.A. at pp. 378, 537-41, 712-15, 831. In fact, there has been a great deal of consolidation in the home health industry since 1995. *Id.* The Authority's January 29, 1996, Moratorium Order stated that West Virginia

home health recipients were being served by at least 120 approved home health agencies, and perhaps by as many as 300 home health agencies. *See id.* at p. 538. However, at the time of the Authority's 2014 home health need survey, there were ***only 59*** home health agencies operating in West Virginia. *See id.* at pp. 378, 831. In addition, there were significantly more home health recipients in 2014 – 46,334 recipients in 2014 as opposed to 35,938 recipients in 1995. *Compare* J.A. p. 378 *with* J.A. at p. 507. Furthermore, the State use rate of home health services was projected to increase in the future, coinciding with a projected increase of the State's elderly population. J.A. at pp. 712-15. Therefore, Petitioners' proposed adoption of a highly restrictive interpretation of the SHP Standards does not reflect the realities of the current home health marketplace (since there is no current proliferation of home health agencies), and would only serve to harm the citizens of West Virginia by needlessly restricting access to a less expensive form of health care. *Id.* at pp. 714-15.

Petitioners also infer that the Authority has somehow neglected an obligation to update the threshold/adjustment factor. *See* Petitioners' Brief at pp. 3-4. While the SHP Standards instruct the Authority to "consider" updating the threshold/adjustment on a yearly basis, an update of the threshold/adjustment factor would only exacerbate, not alleviate, the problem of access to care. *See* J.A. at p. 467.

The SHP Standards state that the threshold/adjustment factor of 229 was the median number of West Virginia home health recipients receiving care from a single West Virginia home health agency in 1995. *See* J.A. at p. 466. As Petitioners correctly identify, this median number has not been updated since 1996.[19] *See* Petitioners' Brief at pp. 3-4. However, as previously indicated, the record clearly reflects that substantially fewer home health providers existed in 2014

[19] In this regard, the SHP Standards are not unique, as many of the various State Health Plan Standards have successfully been implemented for many years. *See, e.g., supra* nn. 14-17.

than in 1995, and also simultaneously reflects that there were significantly more home health recipients in 2014 than in 1995. *Compare* J.A. at p. 538 *with* J.A. at p. 378; *Compare* J.A. p. 507 *with* J.A. at p. 378. If the threshold/adjustment factor of 229 were to be updated to reflect the data current as of 2014 (as Petitioners infer is proper), the 229 number would therefore increase dramatically. *Compare* J.A. at p. 538 *with* J.A. at p. 378; *Compare* J.A. p. 507 *with* J.A. at p. 378. This dramatic increase would have the practical effect of virtually shutting down home health expansion statewide under the legal interpretation urged by Petitioners, thereby further protecting the market shares of existing agencies for decades to come. This argument makes abundantly clear that – to the detriment of Preston County residents in need of home health services – Petitioners' real health planning concern is their own self-interest.

## VI. CONCLUSION

The Authority's interpretation of the SHP standards was not in violation of constitutional or statutory provisions, was not arbitrary or capricious, and did not constitute an abuse of discretion or clearly unwarranted exercise of discretion. The Authority's interpretation was instead based upon the plain language used therein, and was certainly a "permissible construction" entitled to be accorded with great deference and weight. *Appalachian*, 466 S.E.2d at 433; *Boone*, 472 S.E.2d at 421-22; *Wood*, 757 S.E.2d at 762 n.9 (citing *Mead*, 533 U.S. at 226-27).

Reviewing courts are not intended to function as "a superagency that can supplant the agency's expert decision-mak[ing] [process]," especially in an area as intricate and complex as public health planning. *See Princeton*, 328 S.E.2d at 171. The dramatic re-write of the SHP Need Methodology sought by Petitioners should follow the formal amendment process set forth at W. Va. Code § 16-2D-6 of the CON law. That way, substantial public input may be solicited and

considered from consumers, health care providers, third party payers, and health planning experts. UHC's CON application is not the proper venue to uproot the Authority's longstanding, successful, and permissible interpretation of the SHP Standards.

WHEREFORE, Respondent respectfully requests that this Court affirm the Circuit Court of Kanawha County's *Final Order Denying Appeal and Affirming the Decision of the Office of Judges*.

Respectfully submitted,

**UNITED HOSPITAL CENTER, INC.**

By: _____

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No. 20-0401

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

Preston Memorial Homecare, LLC, *et al.*,
Petitioners Below, Petitioners,

vs.) No. 20-0401

United Hospital Center, Inc., and
The West Virginia Health Care Authority,
Respondents Below, Respondents.

## CERTIFICATE OF SERVICE

I, James W. Thomas, do hereby certify that true and exact copies of the foregoing **BRIEF OF RESPONDENT UNITED HOSPITAL CENTER, INC.** were caused to be served upon the following via electronic mail and United States Mail on this 5th day of November 2020:

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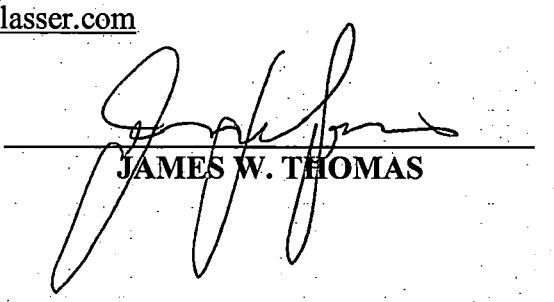

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