IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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Docket No. 24-ICA-100

PUTNAM COUNTY AGING PROGRAM, INC.,
and FAYETTE COUNTY SENIOR PROGRAMS,
Petitioners,

v.

VILLAGE CAREGIVING, LLC,
Respondent,

and

WEST VIRGINIA HEALTH CARE AUTHORITY,
Respondent.
.

BRIEF OF RESPONDENT VILLAGE CAREGIVING, LLC

Robert L. Coffield (WV Bar # 6297) [*]
Shaina D. Massie (WV Bar # 13018)
NELSON MULLINS RILEY & SCARBOROUGH LLP
949 Third Avenue, Suite 200
Huntington, West Virginia 25701
Telephone: (304) 526-3506
Facsimile: (304) 526-3599
bob.coffield@nelsonmullins.com
shaina.massie@nelsonmullins.com
Attorneys for Respondent, Village Caregiving, LLC

Nathaniel J. Pencook (admitted *pro hac vice*)
NELSON MULLINS RILEY & SCARBOROUGH LLP
301 Hillsborough Street, Suite 1400
Raleigh, NC 27603
Telephone: (919) 329-3831
Facsimile: (919) 329-3799
nate.pencook@nelsonmullins.com

[*] Pursuant to West Virginia Rule of Appellate Procedure 3(a), Attorney Coffield is designated counsel of record for the Respondents.

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STATEMENT OF THE CASE

I. Background of Village Caregiving

Village Caregiving, LLC ("Village Caregiving" or "Respondent") is a national home care agency founded and based out of Barboursville, West Virginia. Village Caregiving provides basic home care services, supporting clients who need assistance with activities of daily living, in twenty states including West Virginia, where it has nine strategically located offices from which it offers home care services and companion care.[2] (D.R. 9, 175-76, 594, 1409-10, 1484). Village Caregiving provides a range of home care services to assist seniors with activities of daily living and various non-medical services, including respite care, companionship, hygiene and bathing assistance, cooking, eating assistance, laundry, dressing assistance, light housework, errand assistance, and other basic needs. (*Id.*). At the time of its application, Village Caregiving provided senior services in a majority of West Virginia's fifty-five counties. (*Id.*).

II. The WVHCA's 2016 In-Home Personal Care Standards and the WVHCA's 2023 Revised In-Home Personal Care Standards

The West Virginia Certificate of Need ("CON") program was created and is governed under West Virginia Code § 16-2D-1, *et seq.*, and jurisdiction over this program is vested in the West Virginia Health Care Authority ("WVHCA"). *See* W. Va. Code § 16-2D-3(a)(1). The CON program requires that certain "proposed health service[s]," including in-home personal care services, must be reviewed, and approved by the WVHCA prior to the offering or development of the service. *Id.* § 16-2D-8.

[2] Village Caregiving's West Virginia offices are in Barboursville, Beckley, Chapmanville, Charleston, Clarksburg, Martinsburg, Morgantown, Parkersburg, and Point Pleasant, West Virginia. In addition to its West Virginia office locations, Village Caregiving has a total of sixty-two offices nationwide in twenty states.

West Virginia Code § 16-2D-6 governs changes to the certificate of need standards and sets forth the requirements and procedure for making changes to the certificate of need standards. West Virginia Code § 16-2D-6(a) outlines the process for publishing notice of the proposed changes with the West Virginia Secretary of State through the State Register, and states as follows:

> When the authority proposes a change to the certificate of need standards, it shall file with the Secretary of State, for publication in the State Register, a notice of proposed action, including the text of all proposed changes, and a date, time and place for receipt of general public comment. To comply with the public comment requirement of this section, the authority may hold a public hearing or schedule a public comment period for the receipt of written statements or documents.

The WVHCA identifies relevant criteria, collects information needed, and consults with health planners, organization, state or federal agencies, and any other source deemed relevant to the certificate of need standards proposed for change as needed. W. Va. Code § 16-2D-6. Further, West Virginia Code § 16-2D-6(c) states that the WVHCA "shall form task forces to assist it in satisfying its review and reporting requirements."

After the WVHCA has gone through the process of revising and changing the particular certificate of need standard with the input of the stakeholders and public comments, the proposed changes to the certificate of need standards are presented to the Governor for review and approval. West Virginia Code § 16-2D-6(f) states that "[a]ll proposed changes to the certificate of need standards, with a record of the public hearing or written statements and documents received pursuant to a public comment period, shall be presented to the Governor." West Virginia Code § 16-2D-6(f) provides that the Governor shall either approve or disapprove all or part of the amendments and modifications and that any amendments or modifications not approved by the Governor may be revised and resubmitted.

Prior to the adoption of the revised In-Home Personal Care Services CON standards approved by Governor James C. Justice, II on April 27, 2023 ("2023 In-Home Personal Care

Standards" or "Standards" (D.R. 615-20)), the 2016 In-Home Personal Care Services Standards stated, "[t]he applicant will use the following calculation to project the potential utilization for PC services: Total county Medicaid population (x) 1.25% = Total projected PC services users." (*See* D.R. 1566 (2016 In-Home Personal Care Standards, Section III.A)). The 2016 In-Home Personal Care Standards also required that the applicant conduct a written survey in order to document the existing Medicaid providers within the service area.[3] Applicants were then required to subtract the current utilization from the projected utilization to determine the unmet need in a county. (D.R. 1567 (2016 In-Home Personal Care Standards, Section III.C); *see also* D.R. 361-62 (Adkins Tr. 26:21-27:7)).

More recently the WVHCA undertook to update the 2016 In-Home Personal Care Standards and, in doing so, complied with the requirements set forth in West Virginia Code § 16-2D-6 when developing the revised in-home personal care standards. On September 29, 2022, the WVHCA held a task force meeting. (D.R. 28; D.R. 417-18 (Adkins Tr. 82:15-83:8)). The task

[3] The In-Home Personal Care Services CON Standards formerly stated,

> After establishing expected utilization, applicants must document the existing Medicaid providers within the service area and the extent to which the need is being met by the existing providers in the service area by county. The applicant must conduct a written survey, with a return receipt requested, for all existing providers in the proposed service area, submit information regarding the counties in which they provide services and data regarding the number of unduplicated patients served in each county during the most recent twelve-month period. Patients cannot be counted more than once. The applicant will include the survey receipts along with all responses to the survey to the Authority. In the event a conflict arises regarding the unduplicated patient count, the survey results provided by the BoSS [West Virginia Bureau of Senior Services] certified In-Home Personal Care provider(s), that also have a valid provider number for in-home PC services, will be presumed to be valid with respect to the unduplicated patient count. Failure by the existing Providers to respond to the survey will result in that Providers' utilization not being included in the total number of residents currently being served and may result in another provider being approved in the service area.

(*See* D.R. 1566 (2016 Standards, Section III.B)).

force meeting was open to representatives of consumers, businesses, providers, payers, and state agencies, as set forth by W. Va. Code § 16-2D-6(c), as well as all who were interested, including those who were interested in developing and offering Medicaid personal care services. (*Id.*). Numerous existing providers of personal care services from around the state were present at and participated in the stakeholder meeting, including PCAP's Executive Director, Jenni Sutherland.[4] (*See* D.R. 1822 (*In re: Elder Aide Services LLC dba Right at Home*, CON File #23-2/3/4-12697-PC Hearing Transcript ("Elder Aide Hearing Tr.") 119:15-19)). Timothy Adkins, Director of the Certificate of Need Program, testified that the purpose of this meeting was to review with the stakeholder group the WVHCA's recommendations for changes in the standards, obtain input from existing in-home personal care providers, providers wanting to expand and offer in-home personal care services, representatives from the Department of Health and Human Resources, and other who attended the stakeholder meeting. (D.R. 375 (Adkins Tr. 40:12-17)).

At the task force meeting on September 29, 2022, the proposed methodology presented to those in attendance included an increase in the multiplier from 1.25% to 3.00%.[5] (D.R. 377 (Adkins

[4] PCAP's Executive Director, Jenni Sutherland, testified at the public hearing in *In re: Elder Aide Services LLC dba Right at Home*, CON File #23-2/3/4-12697-PC, on October 4, 2023. Due to the similarity of the numerous certificates of need applications submitted by applicants to provide in-home personal care services which were all opposed by PCAP, the Authority permitted Village Caregiving and PCAP to utilize Ms. Sutherland's prior testimony in this matter. Accordingly, this transcript is incorporated into Village Caregiving's record. (*See* D.R. 1407 (Hearing Tr. 21:14-18)). However, Ms. Sutherland also offered additional testimony at the November 14, 2023, public hearing in *In re: Village Caregiving, LLC*, CON File #23-12-12717-PC.

[5] PCAP, along with other agency providers of Medicaid personal care services, filed a *Verified Complaint Seeking a Preliminary Injunction, Permanent Injunction, and Declaratory Judgment* in the Circuit Court of Kanawha County. *See* Civil Action Nos. 23-C-766, 23-C-767, 23-C-768, 23-C-769, 23-C-770, 23-C-771, 23-C-772, 23-C-773, 23-C-774, 23-C-775, 23-C-776, 23-C-777, and 23-C-778. The Court ultimately held that the plaintiffs failed to comply with the pre-suit notice provision of West Virginia Code § 55-17-3(a)(1) and failed to demonstrate irreparable harm. The Court therefore denied the *Verified Complaint Seeking a Preliminary Injunction, Permanent Injunction, and Declaratory Judgment* and dismissed the case.

Tr. 42:17-22)). Mr. Adkins testified that the increase in the multiplier came from concerns that the Department of Health and Human Resources, Bureau for Medical Services ("BMS") wanted to eliminate subcontracting relationships between Medicaid personal care providers. (D.R. 368 (Adkins Tr. 33:10-17)). Currently, there are multiple Medicaid personal care providers that use subcontractors to provide these services.[6] Mr. Adkins testified:

> We were informed that BMS was wanting to eliminate subcontractors. And BMS actually had said, we need more providers for, to do this . . . Subcontractors was a major issue in 2016. Those standards. And in those standards, we stated that whoever had the provider number that the residents or the residents receiving services belonged to that – to that group. Even though they may not be providing any of the services, they were subcontracting the services out. Now, when BMS said, in our next plan, we're going to eliminate, we're not going to allow subcontractors, then for me, I'm saying either that – either the agencies who are – are doing the subcontracting is going to have to pick up that additional, those additional patients, *or there's going to be individuals that go without services.*

(D.R. 368-69 (Adkins Tr. 33:12-34:8) (emphasis added)). These Medicaid-funded in-home personal care services are vital and necessary to those receiving them. The WVHCA has a statutory responsibility to assess those health services that it regulates, including in-home personal care services, and balance the questions of providing greater access to services while assessing the impact on the potential for unnecessary duplication of services and the impact on the overall cost of delivering such services. See W. Va. Code § 16-2D-1. West Virginia Code § 16-2D-1 states:

> That the offering or development of all health services shall be accomplished in a manner which is orderly, economical and consistent with the effective development of necessary and adequate means of providing for the health services of the people of this state and to avoid unnecessary duplication of health services, and to contain or reduce increases in the cost of delivering health services.

[6] PCAP is one of these providers, as it provides a majority of its Medicaid personal care services through a subcontractor relationship with Loved Ones in Home Care, LLC. (*See* D.R. 1222-26).

Accordingly, the WVHCA proposed to increase the multiplier from 1.25% to 3.00% to ensure that no individuals would go without Medicaid personal care services if subcontracting was no longer permitted. (D.R. 371 (Adkins Tr. 36:2-17)).

During the task force meeting, Mr. Adkins made a presentation about the proposed standards and need methodology. (D.R. 376 (Adkins Tr. 41:15-18)). Those who attended in person received a paper copy of the presentation slides. (D.R. 377 (Adkins Tr. 42:7-15)). Attendees, both in person and on the phone, were able to ask questions and give their input. Notably, some changes were made to the 2016 In-Home Personal Care Standards due to comments made by current providers during the task force meeting. Mr. Adkins testified:

> And one was, there was language in the 2016 that talked about grandfathering. And we were going to remove that language because we – we actually felt it was no longer necessary because everybody that should have been grandfathered in should have been doing the service already. And there was a lot of concern about that, especially from senior centers that don't take that language out of the standard. And – and we agreed to – continue that. That grandfathering language.

(D.R. 376 (Adkins Tr. 41:2-10)).

Following the task force meeting, Mr. Adkins had a meeting with representatives from BMS and the Department of Health and Human Resources, Bureau of Senior Services ("BoSS"). (D.R. 387-88 (Adkins Tr. 52:22-53:21)). Mr. Adkins testified that during this meeting, "we actually developed the – the need methodology of them being able to give us the numbers of – of the actual patients who were receiving services." (D.R. 388 (Adkins Tr. 53:3-6)). This development is what permitted the WVHCA to move away from the prior survey process and ultimately develop the In-Home Personal Care FY 2023 Need Methodology.

Pursuant to West Virginia Code § 16-2D-6(a), the WVHCA then filed a notice with the West Virginia Secretary of State in which it announced the public comment period for the proposed

in-home personal care standards. (D.R. 28-29). This notice was published in the West Virginia State Register on November 4, 2022, and stated as follows:

> The West Virginia Health Care Authority (Authority) has scheduled a public comment period to receive comments on the following proposed Certificate of Need standards:
>
> - Birthing Centers
> - In-Home Personal Care
>
> Written comments may be submitted in care of Tiffany Dempsey, Secretary, West Virginia Health Care Authority, 100 Dee Drive, Charleston, WV 25311, or via email to Tiffany.D.Dempsey@wv.gov no later than 4:00 p.m., December 14, 2022. Copies of the proposed Standards set forth above have been filed with the Secretary of State (SOS). The Standards may be viewed at the Authority's website, www.hca.wv.gov, or copies may be obtained by contacting the Authority at (304) 558-7000.

(*Id.*). This notice was also posted in the West Virginia State Register on November 10, 2022, November 18, 2022, November 23, 2022, and December 2, 2022. *(*D.R. 29, 421). Notice of the public comment period was also posted in the West Virginia Health Care Authority newsletter on November 4, 2022, November 10, 2022, November 23, 2022, December 2, 2022, and December 9, 2022. *See* (*Id.*).

The WVHCA received comments regarding the proposed standards from multiple stakeholders during the comment period, including the West Virginia Directors of Senior & Community Services, BMS, Village Caregiving, LLC, Harrison County Senior Citizens Center, Inc., Panhandle Support Services, Lincoln County Opportunity Company, Inc., Putnam County Aging Program, Inc., Council on Aging, Inc., All Care Home and Community Services, Inc., and Summers County Council on Aging, Inc. (D.R. 29). Many of the senior centers, coordinated by their trade association, the West Virginia Directors of Senior & Community Services, submitted public comments opposing any changes to the existing In-Home Personal Care Services CON standards, including the increase in the multiplier from 1.25% to 3.00%. (*Id.*). The BMS submitted

public comments on the proposed standards' definitions, quality, continuum of care, and cost sections. (D.R. 29, 420-21). Notably, however, BMS made no comments regarding the need methodology and the increase in the multiplier, which clearly indicates that BMS was not opposed to this change. (D.R. 420-21). Following the close of the public comment period, the WVHCA sent the proposed standards and comments to the Department of Health and Human Resources ("DHHR") for their review. (D.R. 29, 451 (Adkins Tr. 116:16-20)). The DHHR then forwarded them to the Office of the Governor. (D.R. 451-52). Governor James C. Justice, II approved the revised standards on April 27, 2023. (D.R. 29, 451-52).

III. Village Caregiving's Certificate of Need Application

On June 15, 2023, Village Caregiving submitted a letter of intent with the WVHCA. (D.R. 10, 51-52). Village Caregiving subsequently submitted its certificate of need application to develop and provide In-Home Personal Care Services in 51 counties in West Virginia on June 26, 2023 (D.R. 122-213), and subsequently submitted replacement pages to its certificate of need application on September 6, 2023, pursuant to the Time Frame Order issued in the certificate of need matter. (D.R. 269-81). Village Caregiving's application proposed to provide Medicaid personal care services in Berkeley, Boone, Braxton, Brooke, Cabell, Calhoun, Clay, Doddridge, Fayette, Gilmer, Grant, Greenbrier, Hampshire, Hancock, Hardy, Harrison, Jackson, Jefferson, Kanawha, Lewis, Lincoln, Logan, Marion, Marshall, Mason, McDowell, Mercer, Mineral, Monongalia, Monroe, Morgan, Nicholas, Ohio, Pleasants, Pocahontas, Preston, Putnam, Raleigh, Randolph, Ritchie, Roane, Summers, Taylor, Tyler, Upshur, Wayne, Webster, Wetzel, Wirt, Wood, and Wyoming County, West Virginia (hereinafter, the "proposed service area"). (D.R. 9, 150-51). The certificate of need application proposed securing a certificate of need for the proposed service area, credentialing with West Virginia Medicaid and West Virginia Bureau of

Senior Services ("BoSS"), enrolling members, providing clinical nurse assessments of those members, providing caregiver education by registered nurses, and providing assistance through caregiver staff with members' activities of daily living. (D.R. 9, 151). The proposed capital expenditure was a mere $1,500. (D.R. 10, 152).

The application goes on to identify the quantifiable unmet need in the proposed service area using the WVHCA's calculation of the in-Home Personal Care Services FY 2024 Need Methodology for July 2022 – December 2022, effective June 1, 2023 ("In-Home Personal Care FY 2023 Need Methodology" (D.R. 622-24)), and further states that unmet need exists based on "[c]onsumer input" received by Respondent through its existing adult/disabled waiver ("ADW") offices. (D.R. 160-68, 175, 270-74). Village Caregiving's application further addressed in detail numerous other goals of the certificate of need law, under W. Va. Code § 16-2D-1 et seq. and the In-Home Personal Care Standards including quality, continuum of care, cost, and accessibility. (D.R. 31-37, 180-85). Village Caregiving responded to the application's prompts regarding comparative factors, including the impact of its proposal on providers of similar services by noting that its application seeks to meet the significant unmet need, demonstrating that the existing providers who are not currently meeting that need will not be negatively impacted by a new provider. (D.R. 192, 270-71).

IV. Procedural History

Following the filing of Village Caregiving's letter of intent and certificate of need application, sixteen existing providers of personal care services in the proposed service area filed for affected party status to contest Village Caregiving's application and requested an administrative hearing. (D.R. 10-11, 118-21, 217-54). All but two of the existing senior center personal care providers withdrew prior to the administrative hearing after exchanging initial

discovery requests and responses; only two of them—the Petitioners[7] here—continued their contested case as an affected party through the administrative hearing process.

The administrative hearing challenging Village Caregiving's certificate of need application was overseen by Heather Connolly, an Assistant Attorney General with the West Virginia Office of the Attorney General, as the hearing examiner, including an evidentiary deposition of Timothy Adkins, the Director of the CON program within the WVHCA (D.R. 336-496), a pre-hearing conference was held on November 1, 2023 (D.R. 1330-85), and the administrative hearing itself was held on November 14, 2023 (D.R. 1387-481). After post-hearing briefing, the WVHCA board — not the hearing examiner, Ms. Connolly — rendered its decision approving the Village Caregiving certificate of need application on February 7, 2024, granting a certificate of need to provide in-home personal care services in the 51-county service area. (D.R. 8-43). The WVHCA's decision was well-reasoned and based upon the administrative record in the matter. It addressed each of the arguments raised by Petitioners below, countering each with detailed analysis supported by record evidence. Dissatisfied with the WVHCA's approval of a new competitor for Petitioners, Petitioners initiated this appeal.

SUMMARY OF ARGUMENT

Responding to Petitioners' first assignment of error: The WVHCA's decision to approve Village Caregiving's application was correct. There was unmet need in each of the counties identified in Village Caregiving's application as demonstrated by the In-Home Personal Care FY 2023 Need Methodology calculation issued by the WVHCA. Petitioners' argument that the WVHCA's need methodology was in error ignores the substantial record evidence of the

[7] Notably, the two Petitioners, Putnam County Aging Program, Inc. and Fayette County Senior Programs, operate as a single legal entity under the registered corporation, Putnam County Aging Program, Inc. Fayette County Senior Programs is merely an unregistered tradename or DBA used by the corporation for its office in Fayette County, West Virginia. (D.R. 1488, n.5)

WVHCA's careful consideration and faithful adherence to statutory mandates under the certificate of need law. Petitioner focuses on four counties to argue there was not sufficient evidence of unmet need. Yet the evidence Petitioners rely on for Putnam and Fayette Counties—the two counties in which they operate—is both self-serving and unreliable. The anomaly in Brooke County was explained as the result of inclusion of that county's data with another county. And the prior approval of another applicant in Doddridge County after Village Caregiving's application was submitted does not preclude its approval. In short, there is significant and widespread unmet need for in-home personal care services in West Virginia and in the proposed service area in particular, and Petitioners do not demonstrate that the WVHCA's finding of the same was clearly wrong.

Responding to Petitioners' second assignment of error: The revised 2023 In-Home Personal Care Standards were properly promulgated by the WVHCA in compliance with the certificate of need law and approved by Governor Justice on April 27, 2023. The WVHCA provided a reasonable rationale for its increase in the threshold from 1.25% to 3.00%, including the fact that the threshold has been suppressed since 2016 (creating for years a de facto moratorium on the approval of any new personal care providers, and effectively a monopoly among the senior centers around the state, including the Petitioners) when the WVHCA considered setting the threshold at 2.5% and the fact that BMS was considering prohibiting the use of subcontractors, which would significantly impact the availability of personal care services without further adjustment. Further, as a practical point, the threshold percentage has been used over the years by the WVHCA, with input from BMS and BoSS, to control the overall budget costs of personal care services under the West Virginia Medicaid Program. Containing or reducing increases in costs of health services is one of the public policy factors the WVHCA is required to consider under the certificate of need law. It was not arbitrary or capricious for the WVHCA to rely on these

considerations when deciding to increase the threshold. West Virginia courts provide great deference to the WVHCA when adopting Standards that are squarely within the authority delegated to it by the Legislature. Moreover, the WVHCA, not the Intermediate Court of Appeals of West Virginia (the "Court"), is the correct entity to balance the difficult policy issues that were considered in adopting the Standards. Importantly, the use of the term "duplication" in the certificate of need law does not preclude competition, despite Petitioners' arguments to the contrary. Further, the WVHCA followed proper procedure in adopting the revised 2023 In-Home Personal Care Standards, including utilizing a task force consisting of relevant providers, key players in the personal care industry, and state governmental officials to obtain input on the revised standards, receiving and reviewing public comments after the required public notice of changes, and ultimately submitting the revised standards for review and approval by Governor Justice.

Responding to Petitioners' third assignment of error: The phrase "other services or providers" in the 2023 In-Home Personal Care Standards refers to personal care services, not any other services that personal care service providers might offer that do not fall under the definition of personal care services. The WVHCA properly interpreted that phrase to refer to personal care services rather than the transportation and meal delivery services that Petitioners claim will be impacted, both in the application and in its decision. Moreover, even if Petitioners' interpretation of "other services" was correct, there is no evidence in the record of negative impacts to Petitioners' transportation and meal delivery services beyond Petitioners' naked assertions. The certificate of need law does not contain any mandates that the WVHCA must cost shift profits from one health service to support services that are otherwise underfunded by state, federal, or other payor sources. Moreover, the record demonstrates that the nonprofit Petitioners have millions

of additional funds reserved and available to cover any shortfalls that might result from Respondent's competition.

Responding to Petitioners' fourth assignment of error: The WVHCA's decision should not be overturned because of alleged bias by the administrative hearing examiner. First, under prevailing West Virginia law, there is no inherent conflict of interest in the WVHCA's appointment of Ms. Connolly, an employee of the Office of the West Virginia Attorney General who is assigned to the WVHCA, as the administrative hearing examiner. Second, Ms. Connolly does not have a personal stake in the outcome of this review. Third, Petitioners exaggerate and mischaracterize the record to argue bias, when those examples simply indicate a hearing examiner reasonably controlling the conduct of the administrative hearing while making note of objections and issuing rulings for the record. Finally, the hearing examiner's alleged bias is ultimately irrelevant to the final decision made, as the WVHCA board, not Ms. Connolly, made the decision at issue in this appeal.

Responding to Petitioners' fifth assignment of error: Although it is unclear what relief, if any, Petitioners seek in connection with this assignment of error, it is not appropriate for Petitioners to seek to overturn the 2023 In-Home Personal Care Standards in this appeal, the subject of which is the WVHCA's approval of Village Caregiving's application, *not* the Standards themselves.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefs and record on appeal, and the Court's decision process would not be significantly aided by oral argument. *See* W. Va. R. App. P. 18(a)(4). If the Court determines that this matter is appropriate for oral argument, then Rule 19 of the *West Virginia Rules of Appellate*

Procedure should apply because this case involves assignments of error in the application of settled law (i.e., the WVHCA's application and interpretation of the certificate of need law, including the need methodology under the In-Home Personal Care Services standards). *See* W. Va. R. App. P. 19(a)(1).

ARGUMENT

I. The Standard of Review is deferential to the WVHCA's decision.

This Court has jurisdiction over this appeal pursuant to West Virginia Code § 51-11-4 (2022). Pursuant to West Virginia Code §§ 16-2D-16 and 29A-5-4(g), this Court may only reverse, vacate, or modify the order or decision of any agency if the substantial rights of the Petitioners have been prejudiced because the administrative findings, inferences, conclusions, decisions, or order are:

(1) In violation of constitutional or statutory provisions;
(2) In excess of the statutory authority or jurisdiction of the agency;
(3) Made upon unlawful procedures;
(4) Affected by other error of law;
(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) (2021); *See St. Joseph's Hosp. of Buckhannon, Inc. d/b/a St. Joseph's Hosp. v. Stonewall Jackson Memorial Hosp. Co. and West Virginia Health Care Authority*, No. 22-ICA-147, 2023 WL 4197305, at *6 (W. Va. Ct. App. June 27, 2023); *Shepherdstown Volunteer Fire Dep't v. State ex rel. W. Va. Human Rts. Comm'n*, 172 W. Va. 627, 309 S.E.2nd 342 (1983).

West Virginia courts provide significant deference to decisions made by the WVHCA regarding its interpretation of its own CON standards. West Virginia courts will not disturb the

Agency's findings of fact unless they are "clearly wrong." *Minnie Hamilton Health Care Ctr., Inc. v. Hosp. Dev. Co.*, No. 22-ICA-149, 2023 WL 2424614, at *2 (W. Va. Ct. App. Mar. 9, 2023) ("[Where] an appellate court [is] charged with reviewing the decision of an administrative agency's factfinder . . . the [appellate] court is required to accord deference to the hearing examiner's findings of fact unless they are "[c]learly wrong in view of the reliable, probative, and substantial evidence on the whole record[.]" (alterations in original) (quoting *W. Va. State Police v Walker*, 246 W. Va. 77, 866 S.E.2d 142, 149 (2021)).

Moreover, West Virginia courts defer to agency interpretations of the laws they are tasked with implementing. The only circumstance where West Virginia courts will not defer to an Agency's interpretation is where "the Legislature has directly spoken to the precise question at issue. If the intention of the Legislature is clear, that is the end of the matter, and the agency's position only can be upheld if it conforms to the Legislature's intent." *Amedisys W. Va., LLC v. Pers. Touch Home Care of W. Va., Inc.*, 245 W. Va. 398, 408, 859 S.E.2d 341, 351 (2021). Otherwise, the question for the Court is "whether the agency's answer is based on a permissible construction of the [Standards]." *Id.* at 411, 859 S.E.2d at 354 (quoting *Appalachian Power Co. v. State Tax Dep't of W. Va.*, 195 W. Va. 573, 582, 466 S.E.2d 424, 433 (1995)). "[A] valid legislative rule is entitled to substantial deference by the reviewing court. As a properly promulgated legislative rule, the rule can be ignored only if the agency has exceeded its constitutional or statutory authority or is arbitrary or capricious." *Id.* (quoting Syl. Pt. 6, *Murray Energy Corp. v. Steager*, 241 W. Va. 629, 827 S.E.2d 417 (2019)).

As the Supreme Court of Appeals of West Virginia has noted, the "clearly wrong" and "arbitrary and capricious" standards "are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis." *Webb v.*

W. Va. Bd. of Med., 212 W. Va. 149, 155, 569 S.E.2d 225, 231 (2002) (quoting Syl. Pt. 3, *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). Under this narrow scope of review, "a court is not to substitute its judgment for that of the hearing examiner." *Martin v. Randolph Cnty. Bd. of Educ.*, 195 W. Va. 297, 304, 465 S.E.2d 399, 406 (1995).

Importantly, Petitioners advance no argument that the WVHCA's decision is not entitled to this deference and that this matter should be subject to *de novo* review. Petitioners do not argue that the WVHCA misinterpreted the certificate of need law; instead, Petitioners merely disagree with the WVHCA's decision for transparently anticompetitive reasons.[8] This Court should defer to the WVHCA's expertise and affirm its decision here.

II. The WVHCA correctly found unmet need in the proposed service area.

There is substantial evidence in the record supporting the WVHCA's finding of unmet need in the proposed service area. Governor Justice approved the Standards for In-Home Personal Care Services on April 27, 2023, which include a typical need methodology approach under the certificate of need law (the "Need Methodology") requiring applicants to "demonstrate with specificity" the following:

1. there is an unmet need for the proposed service;
2. the proposed service will not have a negative effect on the community by significantly limiting the availability and viability of other services or providers; and
3. the proposed services are the most cost effective alternative.

(*See* D.R. 17-18, 617).

The In-Home Personal Care FY 2023 Need Methodology issued by the WVHCA and effective on June 1, 2023, demonstrates a need in each of the counties included in Village

[8] Petitioners only feebly attempt to argue that the need methodology does not promote the public policy and legislative findings of the certificate of need law. (Petitioners' Br. 23). That argument does not even survive *de novo* review based on Petitioners' single-minded focus on the term "duplication," as discussed further *infra*.

Caregiving's proposed service area, as the Standards consider a county "open" to additional providers if there is an unmet need of 25 or more. (*See* D.R. 165-67 (Village Caregiving's Certificate of Need Application and the In-Home Personal Care FY 2023 Need Methodology) (showing a need of at least 35 and as much as 1,554 in each county))[9].

The WVHCA correctly found that Village Caregiving's certificate of need application demonstrated unmet need in each of the counties in its proposed service area. (D.R. 22-23). Village Caregiving was permitted to demonstrate unmet need by using the need methodology calculation created by the WVHCA, which resulted from the Standards that the WVHCA lawfully developed pursuant to West Virginia Code § 16-2D-6. Pursuant to the In-Home Personal Care FY 2023 Need Methodology that was developed by the WVHCA, there is a documented quantifiable unmet need in each of the counties which Village Caregiving has applied for CON approval. Several other applicants have availed themselves of the same calculation and have successfully applied for approval and the issuance of certificates of need under identical circumstances.[10] Like these other successful applicants, Village Caregiving appropriately demonstrated unmet need by using the WVHCA's need methodology calculation. Additionally, Village Caregiving demonstrated unmet need not only through the Need Methodology itself, but also through testimony of Tim Adkins who stated that the WVHCA "continually" gets questions and calls about personal care services, and an affidavit produced by Village Caregiving that "clearly illustrates the multitude of calls it has received from individuals interested in receiving Medicaid personal care services from Village

[9] Except for Brooke County's need of -26.00, which was a well-explained error, as discussed further herein.

[10] *See e.g., In re: Hometown Care, LLC*, CON File No. 23-6-12704-PC (July 26, 2023); *In re: Hometown Care, LLC*, CON File No. 23-5/10-12706-PC (July 26, 2023); *In re: Southern Home Care Services, Inc.*, CON File No. 23-5/6-12701-PC (Aug. 4, 2023); *In re: Southern Home Care Services, Inc.*, CON File No. 23-2/5-12698-PC (Sept. 27, 2023); *In re: Hometown Care, LLC*, CON File No. 23-8/9-12705-PC (Sept. 27, 2023); *In re: Southern Home Care Services, Inc.*, CON File No. 23-1/4-12700-PC (Oct. 25, 20232); *In re: Hometown Care, LLC*, CON File No. 23-4/7-12703-PC (Oct. 25, 2023).(*See* D.R. 22-23)).

Caregiving." (D.R. 20-21, 523 (Village Caregiving's Answer to Interrogatory 8), 610-613 (Village Caregiving Aff.) (illustrating the number of inquiries about personal care services that Village Caregiving received from July 1, 2022 to June 30, 2023)).

Petitioners cannot and do not reasonably dispute that Village Caregiving's application demonstrated unmet need for the vast majority of the counties in its service area. Instead, they focus on Putnam, Fayette, Brooke, and Doddridge Counties in an effort to undermine Village Caregiving's entire application. The WVHCA's decision for these counties was supported by substantial evidence, and Petitioners have not and cannot show that the WVHCA's findings were clearly wrong.

A. Petitioners' self-serving evidence does not prove that the WVHCA's finding of unmet need was clearly wrong.

Petitioners' brief focuses on the two counties where they operate (Putnam and Fayette Counties) to undermine the WVHCA's well-reasoned decision. Petitioners' arguments completely mischaracterize the record and invite this Court to substitute its reading of a cold record for the WVHCA's findings of fact, which are not clearly wrong.

Petitioners' argument about the nonexistence of a "waitlist" in these counties is misdirection. First, a waitlist is not required to demonstrate an unmet need under the 2023 In-Home Personal Care Standards. The purpose of the Standards is to enable development of health care assets to meet expected, projected demand based on a growth metric applied to existing data. The lack of a waitlist does not demonstrate a lack of need for the proposed services. Second, the Bureau of Medical Services ("BMS") does not maintain a waitlist for In-Home Personal Care Services like it does for other waiver program services like the Aged and Disabled Waiver Program or the Intellectually/Developmental Disabilities Waiver Program. The Petitioners misconstrue and misuse "waitlist" to mean a list of individuals who desire to have a service and cannot receive the

service because there is not a provider of those services available. Instead, in the context of the waiver program services, a "waitlist" is defined and used as a term to represent a certain number of designated slots for the service under the waiver program. If all the designated Medicaid slots are filled, then a waitlist is kept by the BMS for those individuals who desire to have the waiver service if a slot becomes available (i.e., an individual who currently qualifies for the West Virginia Medicaid waiver services drops out of the program). In this context, waitlists are used by BMS to contain costs by only allowing a certain number of individuals to receive care under a particular program. Where the Petitioners are confused is that BMS does not utilized a waiver service slot system for personal care services. Instead, if an individual qualifies for personal care services, that person receives the personal care services, and the costs are paid for by BMS under the West Virginia Medicaid Program. The email referenced by the Petitioners from Teresa McDonough, Program Manager for the West Virginia Personal Care Program, highlights Petitioners' confusion of personal care services with another program:

> "There is not, never has been or ever will be a 'waitlist' for the Personal Care Services Program. Perhaps you are thinking of the Aged/Disabled Waiver (ADW) program. . . . As far as I know there is not a 'wait list' for the ADW program either."

(D.R. 1571).

Moreover, the very portion of the Adkins transcript cited in Petitioners' Brief only demonstrates that a waitlist does not exist, not that a waitlist exists and is empty because all existing needs are met. (D.R. 1548:4-6). Petitioners' claim that this testimony suggests Mr. Adkins lacks knowledge of unmet need in Putnam and Fayette Counties strains credulity. Instead, the full transcript from Mr. Adkins' deposition makes abundantly clear that Mr. Adkins was *never asked* about his personal knowledge of the unmet need in Putnam and Fayette County. And, when he was asked generally about the unmet need for personal care services, he testified that the WVHCA

"continually" gets questions and calls about personal care services, including as recently as the preceding week. (D.R. 1548:4-13). In short, Petitioners' waitlist argument lacks merit and fails to rebut the substantial evidence in the record demonstrating an unmet need exists in these counties.

Furthermore, Petitioners remaining arguments regarding these counties are mere disagreements on facts that do not prove that the WVHCA's findings were clearly wrong. Contrary to Petitioners' mischaracterizations, Village Caregiving's application and affidavit provided evidence that it received a multitude of calls related to the provision of Medicaid personal care services at each of its nine offices received from July 1, 2022, through June 30, 2023, and that every county in the state is served by one of those offices. (D.R. 520-21 (*Village Caregiving's Witness and Exhibit List*, Int. No. 2, FSB000385-FSB000386, Nov. 1, 2023); D.R. 610-13 (FSB000475-FSB000478, Nov. 1, 2023); D.R. 175 (Respondent's Application) ("Consumer input tells us that there is unmet need for additional agencies across the state, in terms of quantity and quality.")). Putnam's only evidence offered to counter Village Caregiving's evidence is their own self-serving statement that they "strive to serve all Medicaid participants" is itself pure speculation and simply does not demonstrate that the WVHCA's finding of unmet need in Putnam and Fayette Counties was clearly wrong.

B. There was substantial evidence to support the WVHCA's determination that there was unmet need in Brooke County.

Petitioners' argument regarding unmet need in Brooke County is similarly unavailing. At the same time Petitioners argue that the existence of need in every other county in the Need Methodology does not demonstrate unmet need in those counties, Petitioners argue that the -26.00 need for Brooke County in the Need Methodology means there is "literally no evidence" of unmet need in that county. (Petitioners' Br. 15-16). Of course, this negative need immediately stands out as an outlier in the Need Methodology, and Petitioners would have this Court ignore the logical

explanations provided for the existence of such outlier data. Although the In-Home Personal Care FY 2023 Need Methodology *does* show an unmet need of -26.00 for Brooke County, Village Caregiving has presented evidence sufficient to demonstrate that this number was inaccurately calculated and that there *is* an unmet need for Medicaid personal care services in Brooke County. The "6 month Medicaid Recipient Average" data provided by BMS and utilized by the WVHCA to prepare the need calculation for Brooke County was inadvertently included with the Hancock County data, which caused it to appear as though Brooke County has a negative need for Medicaid personal care services when *that is not really the case.* (*See* D.R. 272-73 and n.3 (Village Caregiving's Certificate of Need Application, Section E, Replacement Page 3, Footnote 3*)*). Notably, prior to Village Caregiving filing its application and in response to Village Caregiving's inquiry about the unmet need in Brooke County, Timothy Adkins explicitly stated, "[a]ccording to the folks in data, the numbers for Brooke and Hancock are so small *they add them together.* If you want to go into Brooke I will allow it so long as Hancock is not filled." (*See* D.R. 582 (Email from Adkins to Walker, May 30, 2023)). Mr. Adkins also testified as follows:

> Q. Do you think that looking at some of those other counties that are listed, does the Hancock number look larger than what you think – you believe it should be? I mean, is – is the thought that you believe they're combined?
>
> A. I, that's what I think. I think 13,000 for Hancock seems like a lot of – lot of people.

(D.R. 440 (Adkins Tr., 105:6-12)). Adding together the unmet need totals for Brooke (-26.00) and Hancock County (374.00) illustrates that there is an unmet need of 348.00 between these two counties that has not been filled. Further, the WVHCA previously approved a certificate of need application for Medicaid personal care services which included Brooke and Hancock County as part of the service area. (*See* D.R. 16 (noting that the WVHCA found unmet need in Brooke County in *In re: Panhandle Support Services, Inc.*, CON File #23-10/11-12696-PC (July 26, 2023)). This

decision specifically found that all counties in the proposed service area (including Brooke County) had an unmet need of greater than 25.00. This evidence is more than "rumors and conjecture." It is testimony of the WVHCA that is consistent with its prior decision finding an unmet need for Medicaid personal care services in Brooke County. Petitioners have failed to show that the WVHCA's findings regarding Brooke County were clearly wrong.

C. The approval of another applicant proposing personal care services in Doddridge County does not preclude a finding of need.

Petitioners' final argument related to unmet need—that "multiple" applications have been approved that eliminated the unmet need in "various counties"—is as meritless as the rest. Petitioners provide Doddridge County as the only example, and only disclose one other application that had been approved to provide Medicaid personal care services there. (Petitioners' Br. 16). Petitioners argue that the WVHCA's approval of another application on July 26, 2023 requires the WVHCA to subtract 25 from the existing need in Doddridge County. (*Id.*). This argument directly contradicts the Supreme Court of Appeals of West Virginia's holding in *Amedisys*, pursuant to which an applicant is permitted to rely on the most current need methodology available. *See Amedisys W. Va., LLC v. Pers. Touch Home Care of W. Va., Inc.*, 245 W. Va. 398, 415, 859 S.E.2d 341, 358 (2021) (approving the WVHCA's acceptance of an applicant's use of the most currently published need methodology, even when more recent raw data was available). In this case, the most current need methodology to Village Caregiving's application was the In-Home Personal Care FY 2023 Need Methodology dated June 1, 2023. As such, there did exist a need in Doddridge County at the time of Village Caregiving's application, and the WVHCA properly found an unmet need in approving Village Caregiving's application.

III. The WVHCA properly relied on the 2023 In-Home Personal Care Services Standards in determining unmet need in the service area, as those standards were correctly promulgated.

The WVHCA appropriately drafted, published, sought public comments, gathered the stakeholders for feedback, and obtained Governor Justice's final approval of the 2023 In-Home Personal Care Standards in accordance with the procedures outlined in West Virginia Code § 16-2D-6. Petitioners' principal argument that the WVHCA's Standards were arbitrary and capricious ignores the record evidence demonstrating a carefully considered plan because Petitioners disagree with the result that allowed other providers to obtain a certificate of need, develop in-home personal care services, and compete directly with the Petitioners and other county senior centers who largely have had a monopoly on the offering of in-home personal care services for years. West Virginia courts have consistently declined to disrupt the WVHCA's interpretations of the certificate of need regulations and the certificate of need standards, recently holding that

> where the State Health Plan Home Health Services Standards were promulgated by the West Virginia Health Care Authority (formerly the West Virginia Health Care Cost Review Authority) pursuant to a legislative grant of authority, West Virginia Code §§ 16-2D-1 to -20 (2016 & Supp. 2020), authorized by the Governor, and formally adopted and given full force and effect by the Legislature, *see id.* § 16-2D-6(g), the longstanding, consistent interpretation of those Standards by the West Virginia Health Care Authority, being neither arbitrary nor capricious, is entitled to judicial deference pursuant to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

Amedisys W. Va., LLC v. Pers. Touch Home Care of W. Va., Inc., 245 W. Va. 398, 414-15, 859 S.E.2d 341, 357-58 (2021). More recently, the Court stated that

> [a]dministrative agencies arere a prominent feature of the modern state, allowing the state's executive branch to interpret, apply, and enforce the legislature's broadly worded and generalized statutes to highly specialized and technical aspects of society. To perform this role, agencies are delegated some of the legislature's power to govern and regulate certain subject areas and to enforce certain statutes . . . Agencies are typically the state's repository of technical expertise and knowledge on a given subject, and because agency employees usually serve for much longer periods than elected officials, often have a significant amount of experience to

> complement their subject matter expertise. In recognition of this purpose and expertise, courts often give deference to an agency's interpretation of an ambiguous statute within their regulatory purview. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984)."[11]

St. Joseph's Hosp. of Buckhannon, Inc. v. Stonewall Jackson Mem'l Hosp. Co., No. 23-ICA-265, 2024 WL 2350160, at *4 (W. Va. Ct. App. May 23, 2024). This Court should decline Petitioners' invitation to substitute its judgment for that of the Agency and should uphold the WVHCA's decision.

A. The WVHCA thoughtfully considered the amendments to the In-Home Personal Care Standards and provided a reasonable rationale.

The record contains substantial evidence that the amendments to the Standards were the result of rational considerations and concerns of the WVHCA. Timothy E. Adkins, the WVHCA's Certificate of Need Director, was extensively deposed[12] regarding the WVHCA's process for amending standards promulgated under the State Health Plan, and the record includes substantial evidence regarding the WVHCA's process. (*See generally* D.R. 336-469 (Adkins Transcript)). Over multiple hours of testimony, Mr. Adkins provided a detailed, first-hand account of the process undertaken by the WVHCA to amend the Standards in 2023, from assignment to an analyst (D.R. 358-60 (Adkins Tr. 23:5-25:3)), to a national comparison (D.R. 360-61 (Adkins Tr. 25:13-

[11] The Court footnoted, "[a]lthough Chevron has been called into question, as of this decision Chevron and its state law progeny are good law. *See Appalachian Power Co. v. State Tax Dep't of W. Va.,* 195 W. Va. 573, 466 S.E.2d 424 (1995); *see also Caleb B. Childers, The Major Question Left for the Roberts Court, Will Chevron Survive?*, 112 KY. L.J. 373, 391–92 (2024)." *Id.* at n.5. Although *Chevron* has very recently been overruled (*Loper Bright Enterprises v. Raimondo*, 603 U.S. __ (2024)), West Virginia's state law remains unchanged.

[12] The testimony of Mr. Timothy E. Adkins was sought in the following matters: Elder Aide Services LLC dba Right at Home, CON File #23-2/3/4-12697-PC, Special Touch Nursing Service, Inc., CON File #23-2/3-12707-PC, A Special Touch In Home Care, LLC, CON File #23-2/3/4-12702-PC, Village Caregiving, LLC, CON File #23-12-12717-PC, Southern Home Care Services, CON File #23-2/3/4/5-12699-PC, Panhandle Support Services, Inc., CON File #23-2/3-12869-PC, and Panhandle Support Services, Inc. CON File #23-1/4-12694-PC. Mr. Adkins was deposed on October 13, 2023, in all of the aforementioned CON matters, and this deposition was expressly included in the record in this case. (D.R. 1408 (Hearing Tr. 22:16-21)).

26:9)), to correcting issues with the prior 2016-era standards (D.R. 361-64 (Adkins Tr. 26:10-29:10)), to comparing against other standards (D.R. 364-65 (Adkins Tr. 29:12-30:23)), to evaluating against Medicaid data (D.R. 366-68 (Adkins Tr. 31:3-33:6)), before ultimately determining to consider increasing the percentage used to determine unmet need (D.R. 368-72 (Adkins Tr. 33:7-37:16)). Each of these reasons independently, and even more so collectively, constitute a rational basis for the WVHCA's decision to increase the threshold in the Standards from 1.25% to 3.00%.

Mr. Adkins directly addressed the fact that the increased threshold in the Standards (from 1.25% to 3.00%) was at least partially intended to guard against Medicaid's expected move to eliminate the use of subcontractors for providing primary care services. (D.R. 368-72 (Adkins Tr. 33:7-37:16)). However, this was one of many rational bases to support the increase of the threshold to 3.00%. The increased threshold was also grounded in the WVHCA's prior experience revising the Standards in 2016, when the WVHCA had considered a rate of 2.5% based on research at that time but then halved the rate to 1.25% because Medicaid was suffering through a crisis. (D.R. 1664 (*Transcript In re: Certificate of Need Standards; In-Home Personal Care and Home Health Standards*, 32:5-19. Sept. 29, 2022)). This time, the rate in the Standards is only incrementally different than the 2.5% rate considered in 2016. And, importantly, West Virginia's Bureau for Medical Services ("BMS") did not protest or oppose the use of a 3.0% rate in the Standards. (D.R. 371 (Adkins Tr. 36:15-24)).

The need methodology under the In-Home Personal Care Standards are health planning projections, which by their nature require some measure of speculation based on a reasonable understanding of foreseeable changes that would impact the health needs in the service area. (D.R. 359 (Adkins Tr. 24:13-22)). As Mr. Adkins testified, the WVHCA was aware that BMS has made

clear that it wants to do away with subcontracting. (D.R. 372 (Adkins Tr. 37:1-3)). However, the fact that the use of subcontractors has not been prohibited (yet), *does not invalidate the Standards*. Petitioners do not cite any precedent for their bold claim otherwise, before simply arguing that "there are much better ways to address this change while still complying with the Certificate of Need statute." (Petitioners' Br. 22). But this Court's role is not to determine whether there were "much better ways to address this change"; even where the Court may have reached a different conclusion, so long as the WVHCA's conclusion had some rational basis, it is accepted. *See Martin*, 195 W. Va. at 304, 465 S.E.2d at 406; *Bd. of Educ. of Cnty. of Mercer v. Wirt*, 192 W. Va. 568, 579, 453 S.E.2d 402, 413 (1994) ("Indeed, if the lower tribunal's conclusion is plausible when viewing the evidence in its entirety, the appellate court may not reverse even if it would have weighed the evidence differently if it had been the trier of fact.").

The Supreme Court of Appeals of West Virginia recently addressed a similar argument in *Amedisys*, wherein the petitioner argued many factual issues, including that there was "(a) a 'precipitous expansion of services by new providers in twenty-five counties' in West Virginia, and (b) a disconnect between the WVHCA's standard for unmet need in home health services and its standard for unmet need in other areas of health care." *Amedisys*, 245 W. Va. at 414, 859 S.E.2d at 357. After noting that there was no empirical data to support petitioner's claim, the Court determined that these factual disputes raised in an appellate brief were not evidence, and more importantly that "the Legislature has delegated matters involving public health to the Authority, *see id.* § 16-2D-1 to -20, which has the institutional expertise needed to resolve difficult issues of public health and citizens' access to public health services." *Id.* at 414, 859 S.E.2d at 357. This Court should hold the same here. As this dispute demonstrates, the amendment of the Standards and the various viewpoints on what adjustment is appropriate is a "difficult issue of public health

and citizens' access to public health services" that the WVHCA is uniquely suited to address. The question of whether BMS intends to eliminate subcontracting, the impact that would have on in-home personal care services in West Virginia, and the risk to the public's access to those services if an adjustment is not made now are all issues that are within the ambit of the WVHCA's delegated authority. Petitioners' differing views do not make the WVHCA's determination arbitrary or capricious, and this Court should decline to revise the Standards based on Petitioners' view of the facts.

In short, Petitioners claim that the WVHCA's methods and process *must* have been wrong because they disagree with the results of the WVHCA's process to revise the In-Home Personal Care Standards along with the outcome, including allowing additional in-home personal care providers to develop and offer services, to provide the public with greater access to these important services, allowing health consumers more freedom of choice in selecting an in-home personal care provider, and ultimately introducing competition with the Petitioners and other county senior centers offering the services. The evidence of record demonstrates otherwise, however, and the WVHCA properly and lawfully promulgated the Standards. (D.R. 358-72 (Adkins Tr. 23:5-37:1)).

B. The In-Home Personal Care Standards promote public policy and the legislative findings of the certificate of need law.

The certificate of need law exists principally to promote the health of West Virginians by ensuring "orderly" and "economical" development of healthcare assets. W. Va. Code § 16-2D-1. Petitioner reads the legislative findings of the certificate of need law to mean that there shall be no duplication of healthcare services—a convenient position for an existing provider to take, as it shields them from competition by default. (Petitioners' Br. 23-24). But the certificate of need law does not exist to eliminate potentially duplicative services, but rather to only "avoid unnecessary duplication of health services". *See* W. Va. Code § 16-2D-1. Contrary to Petitioners' preference,

the certificate of need law envisions competition and a balancing of competing interests, and the WVHCA is well-aware of the fact that multiple providers will end up competing to provide services within a given service area. *See*, *e.g.*, *id.* § 16-2D-2(1)(E) and (F) (defining "affected person" to include both existing and intended providers of similar services in the service area). The purpose of the certificate of need law is not to *eliminate* competition, but to *regulate* it to ensure the "orderly, economical," and effective development of healthcare assets while avoiding "**unnecessary** duplication"—i.e., to ensure that there is not an oversupply of services by providing a determinative limit on the services that can be developed. *See id.* § 16-2D-1(1) (emphasis added). This does not mean that the certificate of need law operates to provide existing providers a perpetual monopoly in their service area. Rather, the certificate of need law envisions a balancing test in which duplicative services are *but one* of many considerations that the WVHCA must weigh. Although 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 WVHCA is also charged by the Legislature with considering other factors such as cost, quality, and access. *Id.* § 16-2D-1 *et seq*. Petitioners' proposed tunnel vision review would eliminate the WVHCA's consideration of these other policy goals set by the Legislature. Although Petitioners dismiss competition as a "waste of resources" and desire to be permanently protected from additional competition, their protectionist motivation contradicts both the law and the personal care needs of West Virginia residents who reside in the service area. As a practical point, one only needs to look at the health and financial statistics of West Virginia to recognize that there will never be enough personal care providers to address all the needs of the State's population. A population that is one of the oldest, most unhealthy, and financially challenged in the country. In approving Respondent's application, the WVHCA appropriately weighed the relevant factors and determined that any risk

of unnecessary duplication is far outweighed by increased access to these vital in-home personal care services in the proposed service area.

C. The WVHCA followed proper procedure in promulgating the In-Home Personal Care Standards, including a task force.

The WVHCA complied with its obligations under West Virginia Code § 16-2D-6 in making changes to the Standards. The West Virginia certificate of need program exists by virtue of W. Va. Code § 16-2D-1 *et seq.,* and jurisdiction over this program is vested in the WVHCA. *See* W. Va. Code § 16-2D-3(a)(l). West Virginia Code § 16-2D-6 governs changes to the certificate of need standards and sets forth certain requirements for such changes to be made. West Virginia Code § 16-2D-6(c) states that the WVHCA "shall form task forces to assist it in satisfying its review and reporting requirements." Additionally, West Virginia Code § 16-2D-6(f) requires that "[a]ll proposed changes to the certificate of need standards, with a record of the public hearing or written statements and documents received pursuant to a public comment period, shall be presented to the Governor." It is undisputed that the WVHCA convened a task force that met and discussed the Standards and that public comments were solicited prior to submission of the Standards to Governor Justice for approval.

The record reflects that the WVHCA complied with its obligation to form a task force to assist in its review and reporting requirements. The September 22, 2022, task force meeting was attended by nineteen "providers and key players" to solicit their input and to review the WVHCA's recommended amendments. (D.R. 372-76 (Adkins Tr., 37:17-41:10)). The meeting lasted sufficiently long for a meaningful discussion to occur regarding several topics, including the need methodology. (*See generally* D.R. 1633-1702 (September 29, 2022 Transcript In re: Certificate of Need Standards; In-Home Personal Care and Home Health Standards)). At the close of the

meeting, Mr. Adkins solicited "comments and proposed changes" for a period of two weeks prior to the Standards being posted to the West Virginia Secretary of State's website for comment. (*Id.*).

Oddly, Petitioner claims the WVHCA did not establish and utilize a task force, and then spends over two pages discussing the WVHCA's task force for in-home personal care services. WVHCA's argument is not actually that a task force was not established or utilized; rather, it is that Petitioners did not agree with the task force's determination. Although Petitioners seem to speculate that the Standards would have been different had the task force deliberated for a year like an example Mr. Adkins provided (Petitioners' Br. 24-25), there is no evidence in the record to support that assumption. Likewise, Petitioners' statement that the task force meeting held on September 29, 2022 "fails to meet the statutory requirement" is conclusory and contrary to the plain language of the statute, which simply states that the WVHCA "shall form task forces to assist it in satisfying its review and reporting requirements." A task force *was* formed, and the task force *did* assist in the WVHCA's review and reporting requirements. Petitioners' argument that the WVHCA failed to meet its requirement to form and utilize a task force is unavailing.

D. The WVHCA received and considered public comments prior to adopting the 2023 In-Home Personal Care Standards.

In another instance of confusing disagreement with an outcome for procedural error, Petitioners argue that the WVHCA failed to consider information it received through public comment (without citing to any authority that would permit overturning the Standards due to alleged failure to sufficiently consider public comments). In particular, Petitioners argue that this "process was nothing more than a formality as the comments, and accompanying logic, fell on deaf ears." (Petitioners' Br. 26). This argument is similarly unavailing to Petitioners' other procedure-based arguments. First, there is no evidence to support Petitioners' claim that their comments "fell on deaf ears." A party's comments need not be adopted to be heard. Second, Mr.

Adkins testified that the standards that were presented to the task force were "greatly revised" from the standards that were submitted to the West Virginia Secretary of State's website for comment. (D.R. 383 (Adkins Tr., 48:1-13)). In addition, Petitioners ignore the wealth of evidence in the record in the form of letters and notes surrounding the amendment process.

IV. The WVHCA's determination that Village Caregiving's application would not negatively impact services was rational and based on substantial evidence.

The WVHCA correctly found that the Village Caregiving application would not negatively impact the community by significantly limiting the availability and viability of other services or providers, as required by the In-Home Personal Care Standards. (D.R. 26-27). In particular, the WVHCA properly determined that the scope of its review was limited to the effect on other in-home personal care services, and that Petitioners had not presented any evidence of negative impacts beyond sheer speculation and that the evidence in the record demonstrated that Petitioners had other sources of funds that could supplement their nutrition and transportation services if any negative impacts did occur. (*Id.*).

A. The WVHCA appropriately considered the scope of its review limited to the services at issue in this review.

Even if Petitioners had provided evidence of negative impacts to other services they provide besides in-home personal care services (they did not), the WVHCA was correct to determine that the negative effects on meals and transportation that Petitioners speculated would occur was not within the ambit of its review. Petitioners' additional services, such as transportation and meal delivery, are not the "other services" to which the Standards refer. Instead, "other services" means other personal care services. In addition to the plain meaning of that language as interpreted by the WVHCA, the CON application itself demonstrates that "other services" means personal care services. The CON Application specifically asks applicants to "Describe the impact

the proposal may have upon the utilization and operation of similar services offered by existing providers in the service area." (D.R. 192). Village Caregiving responded by noting that there would be "limited impact on the utilization and operations of similar services offered by existing providers in the service area because a clear unmet need has been identified by the [WVHCA]." (*Id.*). Likewise, the CON Application asks applicants to discuss "the potential impact the proposal will have upon the cost of available services to consumers in the area; provide a comparison of charges for similar services in the proposed service area." (*Id.*). Village Caregiving responded by noting that the reimbursement rates for personal care services "are set statewide across all providers" by Medicaid. (*Id.*). If the WVHCA interpreted "other services" to mean anything other than personal care services, they could have asked applicants to explain the impact on services other than personal care services in the application. But they did not. It would be unreasonable for the WVHCA to deny an applicant based on the impact on separately-funded, unrelated services like transportation and Meals on Wheels when there is a clear need for Medicaid personal care services in the proposed service area—especially where there is no evidence to support there being a negative impact on those services. Further, even if "other services" contemplated services other than the in-home personal care services under review here, the scope of the WVHCA's review should only be on other services under its jurisdiction (e.g., home health services) or at the very least "health services" defined as "clinically related preventive, diagnostic, treatment or rehabilitative services." The Meals on Wheels program and other programs cited by Petitioners are not services regulated under the certificate of need program. (D.R. 454 (Adkins Tr. 119:9-17) (testifying that Meals on Wheels, transportation, and nutrition programs provided by Petitioners are not reviewable CON services)).

Petitioners rely on the testimony of Tim Adkins to support that "other services" includes meals on transportation and nutrition services; yet Mr. Adkins does not specify what those "other services" include, or even whether they are services different from those under review. (Petitioners' Br. 29-30 (quoting D.R. 406:9-407:11). Interestingly, Petitioners admit that Mr. Adkins "is the proper person to interpret these standards"—the same standards that Mr. Adkins was responsible for preparing and the same standards that Petitioners challenge here. (Petitioners' Br. 30). It should not be lost on the Court that Petitioners themselves find Mr. Adkins quite credible with respect to the Standards he was responsible for preparing.

B. Petitioners presented no evidence of negative impacts that Respondent's proposal would have on the community.

Petitioner now argues that the WVHCA's finding that Petitioners' "worries" regarding potential negative effects "are unprovable and speculative" was clearly wrong based on the evidence in the record, relying on the same record and making the same arguments as below. This same evidence Petitioners claim demonstrate evidence of negative impacts remains speculative on its face. Petitioners first cite to Village Caregiving's interrogatory response as supposed evidence of "its intent to poach clients from existing providers." (Petitioners' Br. 27).[13] But the cited interrogatory response simply states that Village Caregiving's proposed project would "increase its clients' continuity of care" and was actually a response to an interrogatory asking why Village Caregiving's proposal was the most cost-effective alternative. (D.R. 524). Likewise, the next interrogatory response that Petitioner mischaracterizes as evidence of an intent to "steal employees and potential employees away" was responding to an interrogatory asking how Village Caregiving would use its profits, including additional benefits to senior citizens in the service area.

[13] Petitioners' Brief cites to Village Caregiving's Response to Interrogatory 11 as D.R. 389, but the correct cite is D.R. 524.

(Petitioners' Br. 28 (citing Interrogatory 12 – D.R. 524). Petitioners do not even attempt to cite to evidence that would support their argument that they would be prevented from providing transportation and nutrition services, and there is none. (*Id.* 28-29). The only evidence Petitioners relied upon at the hearing was the testimony of Petitioners' Executive Director who speculated that Petitioners would be negatively affected because they would lose resources, but she could not say whether other funding could be shifted to fund the transportation and nutrition programs Petitioners claim would be negatively affected. (D.R. 26-27; *see also* D.R. 1817-19 (Elder Aide Hearing Tr. 114:7-116:6)). Moreover, Petitioners have significant cash reserves that would mitigate any negative impacts. (D.R. 945-48). At the end of the September 30, 2022, fiscal year, Petitioner, a nonprofit organization, had total net assets of $8,910,752 and had increased its net assets during the 2022 fiscal year by $1,529,443. (*Id.*).

Petitioners claim, without support, that it is "an inherent principle that additional competition in an area of business will result in the competitors fighting over employees in the workforce, clients, and resources." (Petitioners' Br. 27). Yet that is not necessarily the case, in particular where, as here, additional competition is being introduced to meet an unmet need based on growth in the area. In such a circumstance, competitors are not necessarily fighting over existing market share, but rather on population growth and aging. Another "inherent principle" of competition is that increased competition is a benefit to consumers, as it incentivizes providers to lower costs and provide better services to patients. Even Petitioners' witness, Ms. Sutherland, the Executive Director of Petitioners, admits that choice (and thus, competition) is beneficial for patients. (D.R. 1445-46 (Hearing Tr. 59:23-60:13)). Moreover, Petitioners did not even attempt to project or quantify the extent of the alleged negative impact Village Caregiving's competition would have on Petitioners' existing services. Petitioners' unbridled assumptions based on the

existence of additional competition does not merit any evidentiary weight, and the WVHCA correctly considered and gave appropriate weight to those unsupported assumptions.

Ultimately, Petitioners have presented no evidence that other services would be negatively impacted, and the WVHCA's findings with respect to this aspect of the In-Home Personal Care Standards was reasonable and certainly not clearly wrong.

V. There is no evidence in the record of bias against Petitioners that would permit "diminished" deference to the WVHCA's decision.

Petitioners' argument regarding the hearing officer's alleged bias lacks support in the law and the facts.

First, there is no bias inherent in the hearing examiner being an attorney that works for the WVHCA. As the Supreme Court of Appeals of West Virginia held in *Varney v. Hechler*, 189 W. Va. 655, 434 S.E.2d 15 (1993), and reiterated in *Marfork Coal Co. v. Callaghan*, 215 W. Va. 735, 601 S.E.2d 55 (2004), W. Va. Code § 29A-5-1(d) "permits an administrative agency to designate any member within the agency to preside as a hearing examiner and requires that such a hearing be conducted in an impartial manner. No inherent conflict of interest is created simply because such agency member serves as a hearing examiner." *Varney*, 189 W. Va. at 660, 434 S.E.2d at 20; *see also Marfork*, 215 W. Va. at 740, 601 S.E.2d at 60. As the Court went on to say in *Varney*, "the hearing examiner was only acting in a quasi-judicial capacity, which as this Court noted [reviously], is not the same as a judge acting in a judicial capacity when it pertains to conflicts of interest." *Varney*, 189 W. Va. at 660, 434 S.E.2d at 20. Just as in *Varney* where the Deputy Secretary of State served as the hearing examiner in a hearing that affirmed a decision of the Secretary of State, and just as in *Marfork* where the director of the Department of Environmental Protection ("DEP") served as the hearing examiner in a hearing that affirmed the decision of the DEP, Ms. Connolly appropriately served as the hearing examiner for the WVHCA here.

Second, the fact that Ms. Connolly was counsel of record in the separate preliminary injunction action challenging the 2023 In-Home Personal Care Standards before the Kanawha County Circuit Court does not prevent her from serving as an impartial hearing officer, and Petitioners' suggestion to the contrary unfairly impugns the integrity of a public servant and officer of the court. "state administrators 'are assumed to be men [and women] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.'" *Marfork Coal Co. v. Callaghan*, 215 W. Va. at 745, 601 S.E.2d at 65 (quoting *United States v. Morgan*, 313 U.S. 409, 421 (1941)). Further, to suggest that Ms. Connolly had *personal* bias against Petitioners after representing the WVHCA in a separate action misconstrues her role under the West Virginia Code. Under West Virginia Code § 16-29B-12(b), "[g]eneral counsel for Department of Health or general counsel for the authority shall represent *the interest of the authority* at all hearings"—not her own personal interest. W. Va. Code § 16-29B-12(b) (emphasis added). Ms. Connolly could not have had some personal bias against the Petitioners as they describe it; she was acting in the interest of the WVHCA itself.

Third, though Petitioners strive mightily to conjure evidence of unreasonable bias by Ms. Connolly, the examples Petitioners provide do not support this argument. Instead, they are examples of Ms. Connolly considering and ruling on evidentiary issues and managing the conduct of the hearing.

- Petitioners' first example is a disagreement regarding whether alleged Medicaid fraud is relevant. (Petitioners' Br. 31).[14] Petitioners incorrectly claim they were unable to respond

[14] Respondent would note that this reference to Medicaid fraud is not even relevant in its matter. Petitioner has confused the record by citing to an alleged Medicaid fraud issue involving Village Caregiving, when instead this was an issue that was raised by Petitioners in one of the other certificates of need matters that they challenged and now have appealed. *See In re: Elder Aide Services LLC dba Right at Home*, CON File #23-2/3/4-12697-PC; ICA Docket 24-ICA-122.

to the objection – the record reflects that Ms. Connolly heard Petitioners' argument on the objection, provided a well-reasoned basis for that objection, and noted Petitioners' objection to her ruling for the record. (D.R. 1756-60 (Hearing Tr. 53:18-57:15)). Further, as footnoted this alleged Medicaid fraud issue did not even involve the Respondent.

- Ms. Connolly did not prevent Petitioners from offering testimony about other services they provide; rather, the citation Petitioners provide was, if anything, an admonition to avoid wasting judicial resources with repetitive testimony. And, in any event, Petitioners were finished with their testimony on that point. (D.R. 1816 (Hearing Tr. 111:15-16 (Attorney Richard Walters: "we're done with the other services.")). Likewise, Petitioners twist the record regarding Respondent's questioning on this same topic—*Petitioners*, not Respondent, objected to this questioning as not relevant. (D.R. 1840-42 (Hearing Tr. 137:11-139:15)). And by questioning Petitioners' witness on this topic, Ms. Connolly gave Petitioners another opportunity to discuss this topic. This topic ultimately **was** irrelevant, as the WVHCA did not interpret "other services" to include the non-personal care services discussed by Petitioners at the hearing. (D.R. 27).
- Ms. Connolly's statements at the outset of Mr. Adkins's deposition were simply explaining the purpose of taking Mr. Adkins's deposition in multiple matters at once. Petitioners' claim that "Ms. Connolly started off the hearing by essentially admitting that the WVHCA will take the improperly promulgated 2023 In-Home Personal Care Standards at face value, and not consider any information to the contrary" is uncited and wholly unsupported. (Petitioners' Br. 32).
- Contrary to Petitioners' characterizations on page 33 of their brief, Ms. Connolly similarly did not prevent Petitioners from offering testimony regarding subcontracting during Mr.

Adkins's deposition, but she did take reasonable measures to keep the deposition focused on actual, probative, and admissible evidence rather than the speculation Petitioners asked Mr. Adkins to engage in. There was a lengthy exchange explaining Ms. Connolly's rationale for moving the deposition along to relevant topics. (D.R. 395-403 (Adkins Tr. 60:22-68:13)).

Contrary to Petitioners' characterizations, Respondent did not believe Ms. Connolly or the WVHCA's conduct to be "egregious" or "hostile" to any party. The record reflects Petitioners' hyperbole, not any misconduct (and certainly no unfairly prejudicial conduct) by Ms. Connolly. Further, Ms. Connolly had the authority to find Petitioners' evidence irrelevant and issue rulings unfavorable to them, as the West Virginia State Administrative Procedures Act sets forth Ms. Connolly's power to:

> (1) Administer oaths and affirmations, (2) rule upon offers of proof and receive relevant evidence, (3) regulate the course of the hearing, (4) hold conferences for the settlement or simplification of the issues by consent of the parties, (5) dispose of procedural requests or similar manners, and (6) take any other action authorized by a rule adopted by the agency in accordance with the provisions of article three of this chapter.

W. Va. Code § 29A-5-1. The fact that Ms. Connolly may "dispose of procedural requests" or "regulate the course of the hearing" in a manner that Petitioners disagreed with does not mean she was biased against them.

Finally, as Petitioners readily admit (Petitioners' Br. 33), Ms. Connolly did not make the ultimate decision in this matter; the WVHCA Board did. (D.R. 42 ("The Health Care Authority board of review voted during a scheduled board meeting on February 7, 2024, and the final decision in this certificate of need review was issued by the Health Care Authority on February 7, 2024.")). Petitioners identify no facts that Ms. Connolly prevented them from entering into the record, nor whether any such facts (if they did exist) would yield a different result. Thus, even if

Petitioners were correct that Ms. Connolly was improperly biased against them (she was not), the WVHCA Board independently reviewed the record and considered Petitioners' evidence and found it unpersuasive. Petitioners' arguments remain unpersuasive on appeal, and the WVHCA's decision should be upheld.

VI. The WVHCA's standards were not improperly promulgated.

Petitioners' final argument is the same as its principal argument—i.e., that the Standards are arbitrary and capricious and improperly promulgated—but they raise it again to indicate that they want to invalidate the Standards through this action, while also indicating that they "do not believe it to be proper for this Court to strike down the validity of the WVHCA standards at issue in this proceeding." (Petitioners' Br. 34-35). It is unclear what Petitioners are requesting the Court to do with respect to the Standards in this appeal, but what is clear is that this appeal is not the proper forum to invalidate the Standards. The subject of the review from which Petitioners appeal is WVHCA's review of the Village Caregiving application. *See* W. Va. Code § 29A-5-4. The Supreme Court of Appeals of West Virginia ruled on this issue in *State ex rel. Cicchirillo v. Alsop*, 218 W. Va. 674, 679, 629 S.E.2d 733, 738 (2006). Therein, the Petitioner sought to challenge the procedures used by the Division of Motor Vehicles in an appeal of the license revocations of two individuals. Though the circuit court ordered the DMV to cease using the alleged unconstitutional procedures, the Supreme Court reversed, holding that

> in a circuit court's final disposition of an administrative appeal pursuant to W. Va. Code § 29A–5–4 (1998) of the Administrative Procedures Act, the circuit court is not authorized to order a State administrative agency to cease the use of certain procedures and to direct the State agency to draft and implement new procedures which are subject to the circuit court's review.

Id. at 679, 629 S.E.2d at 738. Petitioners apparently ask that this Court do just that—order the WVHCA to cease using the Standards. Consistent with *Alsop*, this Court should decline Petitioners' request.

CONCLUSION

After considering the extensive evidence, testimony, and submissions of Petitioners and Respondent, the WVHCA correctly approved Respondent's application, which demonstrated that it would meet the unmet need in the fifty-one county service area while improving access for the communities it would serve. Petitioners' arguments amount to nothing more than factual disagreements, but they do not demonstrate that the WVHCA's approval of Respondent's application was clearly wrong or arbitrary and capricious. This Court should affirm the WVHCA's decision approving Respondent's application.

VILLAGE CAREGIVING, LLC,

Respondent,

By Counsel.

/ s / Robert L. Coffield

Robert L. Coffield (WV Bar # 6297)
Shaina D. Massie (WV Bar # 13018)
NELSON MULLINS RILEY & SCARBOROUGH LLP
949 Third Avenue, Suite 200
Huntington, West Virginia 25701
Telephone: (304) 526-3506
Facsimile: (304) 526-3599
bob.coffield@nelsonmullins.com
shaina.massie@nelsonmullins.com

Nathaniel J. Pencook (admitted pro hac vice)
NELSON MULLINS RILEY & SCARBOROUGH LLP
301 Hillsborough Street, Suite 1400
Raleigh, NC 27603
Telephone: (919) 329-3881
Facsimile: (919) 329-3799
Email: nate.pencook@nelsonmullins.com

Counsel for Respondent, Village Caregiving, LLC

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

PUTNAM COUNTY AGING PROGRAM, INC.,
and FAYETTE COUNTY SENIOR PROGRAMS,
Petitioners,

v. **Docket No. 24-ICA-100**

VILLAGE CAREGIVING, LLC,
Respondent,

and

WEST VIRGINIA HEALTH CARE AUTHORITY,
Respondent.
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CERTIFICATE OF SERVICE

I, Robert L. Coffield, counsel for Respondent, Village Caregiving, LLC, do hereby certify that on July 22, 2024, the foregoing "**BRIEF OF RESPONDENT, VILLAGE CAREGIVING**" was served upon counsel of record via the e-filing File & ServeXpress system maintained by the Intermediate Court of Appeals of West Virginia and the Supreme Court of Appeals of West Virginia.

/ s / Robert L. Coffield
Robert L. Coffield (WVSB #6297)