IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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Putnam County Aging Program, Inc.,
and Fayette County Senior Programs,
Affected Parties Below, *Petitioners*,

vs. CASE NO: 24-ICA-100

Village Caregiving, LLC,
Applicant Below, *Respondent*

And

West Virginia Health Care Authority,
Respondent

PETITIONERS' REPLY BRIEF[1]

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[1] Pursuant to West Virginia Rule of Appellate Procedure 10(g), this Brief is a consolidated Reply to *Brief of Respondent Village Caregiving, LLC*, and *Brief of Respondent West Virginia Health Care Authority*.

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STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners maintain their request for oral arguments in this matter under West Virginia Rule of Appellate Procedure 19.

ARGUMENT

I. Respondents' arguments fail despite any deference.

Any Deference that may be imputed to an agency does not permit it to directly contradict its legislative authority. Nor does any assumed expertise force a Court to ignore common sense.

Respondents primarily rely on a 2021 West Virginia Supreme Court case to argue the high level of deference attributed to agencies, including the West Virginia Health Care Authority ("WVHCA"). *Amedisys W. Va., LLC v. Pers. Touch Home Care of W. Va., Inc.,* 245 W. Va. 398 (W. Va. 2021). In *Amedisys*, the court entitled the WVHCA to deference pursuant to *Chevron U.SA., Inc. V. Natural Resources Defense Council, Inc.*, 467 U.S. 837, (U. S. 1984). *See Amedisys* at syl. p. 5. Very recently, the United States Supreme Court overruled *Chevron*. *Loper Bright Enters. V. Raimondo*, 144 S. Ct. 2244 (U. S. 2024). As such, Courts are required to "exercise their independent judgment in deciding whether an agency has acted within its statutory authority…" *Id* at 2247. Provided that *Chevron* was the underpinning basis for *Amedisys*, amongst other West Virginia cases analyzing deference, a question arises as to what level of deference does a West Virginia agency maintain, if any, following the overturning of *Chevron*.

In the absence of *Chevron*, The Respondents should not be permitted the deference it is requesting. However, even under the pre-*Loper* analysis, Respondents are not permitted to its high level of deference for the reasons argued below. Operating under

pre-*Loper* standards, when "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[.]'" *Minnie Hamilton Health Care Ctr., Inc. v. Hosp. Dev. Co.*, 2023 W. Va. App. LEXIS 92, 5 (W. Va. App. 2023). Respondent Village Caregiving cites case law for the premise that "[t]he 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**.'" (Resp't WVHCA's Br. at 15) (*Citing Amedisys W. Va., LLC v. Pers. Touch Home Care of W. Va., Inc.,* 245 W. Va. 398). As Petitioners explained in its initial Appellate Brief, and as further explained below, the WVHCA's underlying decision is in direct contradiction of W. Va. Code § 16-2D *et. al.* A finding of unmet need is both required by statute, and necessary to comply with the legislative findings of the CON statute: preventing duplication of services and unnecessary waste of resources. (W. Va. Code § 16-2D-1; § 16-2D-12(a)(1)).

A common theme through the Respondents' briefs is that Petitioner's factual arguments are not sufficient to strip the WVHCA of its deference. Respondent WVHCA argues "it's not enough that 'Petitioners have actually proffered evidence' going the other way." (Resp't WVHCA Br. 1). Significantly, Respondents misframe the issue. It is the Respondents' burden to prove the mandatory requirements of a Medicaid In-Home Personal Care Certificate of Need ("CON") application. The evidence provided by Respondent Village Caregiving, LLC, ("Village Caregiving") is insufficient to meet this

burden. The evidence and arguments proffered by Petitioners in regard to unmet need is provided by Petitioner to highlight that not only did Respondent Village Caregiving fail to establish its burden, but Petitioner's evidence displays the exact opposite of Village Caregiving claims.

II. The Respondents fail to show that the burden of unmet need was satisfied and the WVHCA's finding of unmet need was clearly wrong.

Respondents argue in support of The WVHCA finding that an unmet need exists based on "the authority's own Need Methodology and independently, based on the testimony of Tim Adkins." (*See* D.R. 22; Resp't WVHCA Br. at 17; Resp't WVHCA Br. at 6). Respondents attempt to support this finding by arguing that the Need Methodology was proper to rely on, other applicants have utilized the Need Methodology, that Tim Adkins testified to phone calls he received regarding personal care services, and that a lack of a waitlist or any identifiable individuals who were unable to receive services is "misdirection." *Id*. These arguments lack merit and fail to meet the burden Village Caregiving was statutorily required to carry. In addition, Respondents attempt to attack Petitioners' arguments regarding Brooke County and Doddridge County. However, Respondents' attempts fail to justify how an unmet need exists in these two counties, even under the authority's own standards.

i.) The record clearly shows there is no actual unmet need for In-Home Personal Care Services in Putnam or Fayette County.

As argued in Petitioners' initial brief, and as further refuted below, the WVHCA was clearly wrong to rely on the flawed 2023 Need Methodology as it is directly contradicted by West Virginia Code § 16-2D-1 and § 16-2D-12.

First, Respondent Village Caregiving claims to have independent evidence of an unmet need, relying on Mr. Adkins' testimony that he "continually" receives calls regarding personal care services. Village Caregiving also argues that an affidavit produced by it shows a multitude of calls from "individuals interested in receiving Medicaid personal care services." (Resp't Village Caregiving's Br. at 17). Both of these independent pieces of evidence have the same issue, neither make any kind of showing of unmet need and are just merely calls from individuals seeking a service that they could receive from one of the other service providers in the county. Respondents provided no evidence that these individuals were unable to receive services or that they were even eligible for services.

As to the calls received by Mr. Adkins, the WVHCA argued that "the calls from individuals seeking these services were common enough he could explain the Authority's ordinary process to 'send a call like that to one of the analysts,' who know 'that we refer everything to the Bureau of Senior Services to say who are and who are not providers in their county." (Resp't WVHCA' Br. at 10-11). This "independent evidence" is nothing more than a showing that individuals were attempting to contact current service providers. In fact, Mr. Adkins was asked "[s]o the fact that you have people calling…and questioning, asking questions about services didn't provide you with any evidence that there's actually a need out there?" (*See* D.R. at 379 15-19). To which Mr. Adkins answered "No." *Id.*

Village Care giving's affidavit fails for the same reason. Village Caregiving argues that it "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…" (Resp't Village Caregiving's Br. at 20). However, Respondent

failed to address Petitioners' argument that "Village Caregiving failed to provide any evidence that even one of these phone calls were from an eligible patient who was unable to receive Medicaid In-Home Personal Care services in Putnam or Fayette County. (*See* Pet'r Br. at 14; D.R. 1131; *See also* D.R. 610-611). Village Caregiving provides no evidence that these calls are due to an inability to find services. Furthermore, Village Caregiving admits that it "cannot be certain whether these individuals were eligible for Medicaid Personal Care Services." (*See* D.R. 1131 – Interrogatory No. 9). Additionally, Village Caregiving incorrectly represents to this Court that the only evidence put forth to combat this affidavit was a self-serving statement that Petitioners "strive to serve all Medicaid participants." Conveniently, Respondent left out the portion where Ms. Sutherland affirmatively stated that Petitioners have never had to reject an eligible participant due to an inability to provide those services. (*See* D.R. 1576:6-9).

The only "independent" evidence relied on by Respondents are phone calls of individuals seeking services. Respondents were unable to produce an ounce of evidence that any of these individuals were unable to receive services from other providers. Therefore, this argument fails to even support the necessary finding of unmet need, and the only remaining argument is the validity of the 2023 Need Calculations, which for the reasons discussed below was improperly relied on.

Second, Village Caregiving argues that "[s]everal other applicants have availed themselves of the same calculation and have successfully applied for approval and the issuance of certificate of need under identical circumstances." (Resp't Village Caregiving's Br. at 17). This argument is also flawed. The WVHCA's improper use of the 2023 Need Calculations in other applications does not justify their improper use here. Additionally,

entertaining the thought that the use of the 2023 Need Calculations is proper, then there would be an even lesser need than when Village Caregiving initially filed its application. In fact, Respondent Village Caregiving provides a list of seven (7) other applicants that have already been granted Certificate of Needs in counties that Village Caregiving is seeking to provide services within. Significantly, the incorporation of these additional service providers was not taken into consideration by the WVHCA when determining need in the proposed service areas. Highlighting yet another error when finding the Applicant met its burden of showing unmet need.

Lastly, Respondents argue that the lack of a waitlist for interested individuals to receive Medicaid In-Home Personal Care services is somehow not evidence of a lack of need. Again, the burden is not on the Petitioner to show lack of need, but on the Respondents to show an unmet need exists. Regardless, the lack of any sort of waitlist for these services is undeniably reliable evidence for a lack of need. For this premise, Respondent Village Caregiving first argues that "[t]he 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." (*See* Resp't Village Caregiving's Br. At 18). However, other than the flawed reliance on the potential elimination of subcontracting as discussed below, there is no "data" or use of a "growth metric" in the record showing an increased need for services. No evidence was entered into the record to show an increase in the elderly population within West Virginia. In fact, common sense would lead one to believe that the elderly population has only decreased in previous years due to the consistent drop in West Virginia's population, and unfortunately the effects of Covid-19.

However, the burden is not on the Petitioners to show a decrease in need, only that Respondents have failed to show any reliable evidence of unmet need.

Next, Respondents attempt to attack an email from the Bureau of Medical Services ("BMS"), Teresa McDonough, Program Manager for TBI Waiver and Personal Care Services. The email provides: "never has been or ever will be a 'wait list' for the Personal Care Services program." (*See* D.R. 1571 – BMS e-mail). Respondent Village Caregiving takes the position that Petitioner has misinterpreted this e-mail, and that the non-existence of a waitlist is not because there is not a provider of those services available, but that a "waitlist" is "a term to represent a certain number of designated slots for the service under the waiver program." (Resp't Village Caregiving's Br. at 19). Although Respondent Village Caregiving's argument is unsupported by the record, even assuming its interpretation is correct, the lack of need for any waitlist is still evidence of no unmet need. In Addition to Mr. Adkins testimony showing that individuals were not calling WVHCA with issues of not being able to receive services, BMS evidently had no need to create any sort of waitlist for individuals who were unable to receive personal care services. Again, this evidence of unmet need is unnecessary as Respondents have already failed to meet its burden of showing an unmet need, however, Petitioners' evidence of an actual unmet need highlights why Respondents were unable to satisfy this burden.

Interestingly, Respondent Village Caregiving argues, contradictory to the record, that "the full transcript from Mr. Adkins' deposition makes abundantly clear that Mr. Adkins was never asked about is personal knowledge of the unmet need in Putnam and Fayette County." However, the record shows that when Timothy Adkins, the Director of

the Certificate of Need Program within the West Virginia Health Care Authority was asked about is personal knowledge on unmet need he testified that he was unaware of any:

> Q: ...presenting this change to three percent, was there any data that you have that showed that there was eligible --- eligible individuals out there who could not receive services?
>
> A: No.
>
> Q: Were you aware of any waiting lists for any in-home personal care services?
>
> A: I don't know that there's a waiting list...

(*See* D.R. 1547:23-24; 1548:1-6). While testifying under oath, Mr. Adkins admitted that there was no data to support a finding of actual unmet need. Mr. Adkins testified "no" to any personal knowledge, because as discussed above, Mr. Adkins had no reason to believe that the calls he received, the calls that Respondents rely so heavily on, were from individuals unable to attain services.

Respondents' arguments that a lack of a waitlist is not evidence of unmet need is not only incorrect, but a play of misdirection as well. Respondents continually attack Petitioners' evidence that affirmatively shows there is no unmet need. Yet the focus must be on the Respondents to first supply some sort of evidence that an unmet need even exists. Respondents have failed to meet this burden.

ii.) Respondents' explanation for the error in Brooke County need calculation does not satisfy Village Caregiving's burden.

Even under the WVHCA's improper standard, Village Caregiving's application fails. Village Caregiving's proposed service area includes Brooke County which has a Negative twenty-six (-26) need for personal care services. (*See* D.R. 1561). The 2023 Need Methodology standards explicitly require an unmet need of twenty-five (25) or more in a

proposed county before an application can be granted. (*See* D.R. 1558). Respondents argue that The WVHCA relied on Village Caregiving's assertion that Tim Adkins' testimony showed the data used for Brooke County "was inadvertently included with the Hancock County data, which caused it to appear as though Brook County had a negative need" (*See* D.R. 21). Based on this, the WVHCA found "[t]here is an unmet need for Medicaid personal care services in Brooke County, West Virginia." (*See* D.R. 40).

Respondents' attempts to justify this error fail. Respondents' justification is hearsay from Mr. Adkins stating that, although confusing, "[a]ccording to the folks in data, the numbers for Brooke and Hancock are so small they add them together." (*See* Resp't Village Caregiving's Br. at 21; D.R. 582). Mr. Adkins was informed of this combination of numbers through a call. (*See* D.R. at 390:19-24; 391:1-3). However, Mr. Adkins testified "I really don't understand what she said. She said it's a combination, and---and they've been doing this---they've been doing this for a couple, at least a year or more." (*See* D.R. at 439:19-24; 440:1). Mr. Adkins further testified "I have no idea how they get their numbers." (*See* D.R. 440:5). Respondents claim the error has been corrected, but the testimony of Mr. Adkins does nothing more than create more questions about the alleged error.

The Respondents both argue that correcting for the error, the unmet need in Brooke and Hancock counties is collectively 348. (*See* Resp't Village Caregiving's Br. at 21; Resp't WVHCA at 5). Respondents' alleged correction would show nothing more than if these two counties were one, there would be an alleged need under the Need Calculation. However, you cannot reach the same conclusion for both counties independently based off this "correction." For example, if one county is to have a greater

need than the other, the average could improperly raise the county with less need above the threshold. Simply identifying an issue in the methodology does not achieve Respondents' burden. Therefore, Respondents have failed to meet their burden of showing need in Brooke County.

WVHCA argued "[b]ut whether a reporting error happened is a factual question- and Petitioners cannot show the Authority was clearly wrong answering it." (*See* Resp't WVHCA's Br. at 12). Respondent WVHCA once again misplaces the burden, the burden is on Respondent Village Caregiving to show that there is an unmet need. Simply saying an error exists in the calculation is not sufficient to meet the burden. The explanation argued by the Respondents, if true, does nothing more than to confirm that an error was made. Any argument that this error shows a need is erroneous.

iii.) Respondents' arguments regarding Doddridge County lack merit.

Village Caregiving listed Doddridge County as one of the counties it is seeking CON status within. Doddridge County was calculated to have an unmet need of thirty-five. (*See* D.R. 1561). On July 26th, 2023, a CON application for Medicaid In-Home Personal Care services was approved in Doddridge County. (*See* D.R. 1591-1615). The Need Methodology provides "[i]f a new provider has been approved within the previous 12 months; the Authority will subtract 25 from each applicable county proposed." (*See* D.R. 1558). As such, the Need Methodology calculation for Doddridge County is now ten (10). Therefore, there is no unmet need in Doddridge County because the calculated need is under twenty-five (25), and this application should therefore be denied.

Respondent Village Caregiving relies on case law for the premises that "an applicant is permitted to rely on the most current need methodology." *Amedisys W. Va.,*

LLC v. Pers. Touch Home Care of W. Va., Inc., 245 W. Va. 398, 415, (W. Va. 2021); (*See* Resp't Village Caregiving's Br. at 22). Village Caregiving argues that "the most current need methodology to Village Caregiving's application was the In-Home Personal Care FY 2023 Need Methodology dated June 1, 2023." (*See* Resp't Village Caregiving's Br. at 22). In *Amedisys*, the Court found that an applicant could rely on the data at the time of filing an application, even if later data availed itself. *Amedisys* 245 W. Va. 398, 415. Respondents are improperly applying *Amedisys* by only acknowledging part of the Need Methodology. Although ultimately improper, the 2023 Need Methodology explicitly requires twenty-five to be subtracted from the available data whenever a service provider is approved in the county. This was the Methodology put in place by the WVHCA at the time Village Caregiving filed its application. The requirement to subtract twenty-five individuals when a new service provider is added to a county is part of the "data" that Respondents are relying on to show its unmet need. The Respondents want to utilize the unmet need original determination, while at the same time, refusing to acknowledge the second portion of that same data requiring the unmet need calculation to be subtracted by twenty-five. The Respondents are not permitted to cherry pick which portions of the Need Methodology it wants to use to show unmet need.

Interestingly, Respondent WVHCA argues that any Applicant has an absolute right to rely on the numbers provided by the WVHCA at the time of its application. (*See* Resp't Village Caregiving's Br. at 22). However, later in its brief, WVHCA addressed Petitioners' point that the Need Methodology had not been updated, despite the standards claiming the standards would be continually updated. The WVHCA merely argued that it did not have a statutory requirement to do so, and therefore, it should not be penalized for failing

to meet its own standards. (*See* Resp't WVHCA's Br. at 16). Since the standards have still not been updated, and as the Respondents argue, many applications have since been approved through these standards, new applicants are relying on false numbers when applying due to the WVHCA's failure to update the Need Methodology.

Respondents failed to proffer any evidence of an unmet need; this fact alone is mandatory grounds to deny this Application, and the WVHCA erred in not doing so. Not only has Village Caregiving failed to meet its burden, but the Petitioners have actually proffered evidence in direct contradiction. Therefore, the WVHCA erred in approving Village Caregiving's application because the record is absent of any independent evidence of an unmet need, and Village Caregiving failed to establish an unmet need as statutorily and regulatorily required.

III.) Respondents fail to justify the WVHCA's reliance on the 2023 Need Methodology calculations.

The WVHCA erred in finding "no issue with the lawfulness and appropriateness of the Standards under which Village Caregiving's application is being reviewed." (*See* D.R. 26). The WVHCA further found "[t]he In-Home Personal Care Services Standards approved by the governor on April 27, 2023, were promulgated in accordance with the West Virginia Code § 16-2D-6, *et. seq* and are applicable to Village Caregiving's CON application." (*See* D.R. 39). The Respondents attempt to argue that the 2023 Need Methodology was properly promulgated. However, for the reasons discussed below, the manner in which the Standards were promulgated violated the Certificate of Need statute and contradicts the legislative purpose. (*See* W. Va. Code §16-2D-6; §16-2D-1).

Furthermore, Respondent Village Caregiving relies on *Chevron*, 467 U.S. 837, to argue for judicial deference in the promulgation of the 2023 Need Methodology. (*See*

Resp't Village Caregiving's Br. at 23-24). Village Caregiving does drop a footnote claiming that although *Chevron* has been overturned, "West Virginia's state law remains unchanged. (*Id* at f.n. 11). However, the decision to overturn *Chevron* is still new, and West Virginia Courts are just now getting the opportunity to reevaluate what this means for state agency deference. Now that the core pillar for these cases has been stripped away, Courts will now have to determine to which lesser degree agencies are entitled to deference. Nonetheless, even if the WVHCA was still potentially entitled to full deference, it is not entitled to deference in this matter. Not only did the WVHCA fail to comply with W. Va. Code 16-2D-6 when promulgating the 2023 Need Standards, but it also contradicted the legislative intent by artificially increasing need. (*See* W. Va. Code § 16-2D-1.

As an initial matter, the WVHCA attempts to convince this Court that this standard as promulgated is somehow more valid because the West Virginia Supreme Court has "greenlit the Authority to rely on very similar standards before," referring to the standards discussed in *Amedisys* 245 W. Va. 398. This argument lacks any merit at all given that not only is the standard in *Amedisys* for a completely separate service, but there is no evidence of how the rule was promulgated, nor would it matter if there were because we are here to discuss the appropriate implementation of the Medicaid In-Home Personal Care standards. (The Court in *Amedisys* analyzed the Home Health Care Standards).

i.) Respondents' arguments fail to justify the methods used in developing the 2023 Need Methodology calculations.

Both Respondents attempt to argue that the steps Mr. Adkins testified to in the implementation of the Medicaid In-Home Personal Care Standards satisfied the WVHCA's statutory obligations. (*See* Resp't Village Caregiving's Br. at 24-25; Resp't

WVHCA's Br. at 16). However, through Mr. Adkins testimony, and the evidence in the record, it is clear that the steps taken had no bearing on the final 2023 Need Calculation, and ultimately, **it was only the expectation that subcontracting would be eliminated that drove the decision to arbitrarily modify the Standards.** The list included by the Respondents include: (1) that the assignment was transferred to an analyst; (2) that a national comparison was conducted; (3) that there was some pre-existing issue with the standards; (4) that the standards were compared against other standards; (5) that the WVHCA contemplated changing the percentage to 2.5% in 2016; and (6) an evaluation of Medicaid data. (*See* Resp't Village Caregiving's Br. at 24-25). These "steps" relied on by the Respondents' do nothing to justify the arbitrary implementation of the Need Methodology Standards for the following reasons:

(1) Mr. Adkins testified that an analyst will typically be assigned to a service that is set to be changed, and that analyst will collect data for the upcoming changes. (*See* D.R. 358:8-17). For the 2023 Need Methodology changes that are the subject of this appeal, Mr. Adkin's testified that he assigned himself as the analyst. (*See* D.R. 359). Therefore, it is accurate to claim that Mr. Adkins' testimony is the most accurate representation of the process, methodology, and purpose behind the 2023 Need Methodology changes.

(2) Respondents claim that a national comparison was conducted as part of the data collection process. However, Mr. Adkins testified that it was impossible to conduct such a comparison:

> Q. And as your review of the personal care standards, did you look at other states and see what they're doing?
>
> **A. Unfortunately, no other state reviews in home personal care. Now, I believe it's Mississippi in 2020,**

> **this past year, they did pass a bill that was going to -- - it looked to me it was going to require some regulation. But the others, to my knowledge, there's 35 states that have CON, and to my knowledge, none of the rest have, review CON.**
>
> **...**
>
> Q. ...So when you're doing --- the comparison you talked about that's typically done with reviewing standards, it's fair to say what --- a state by state comparison wasn't possible?
>
> **A. It was not possible.**

(*See* D.R. 360:13-22; 361:2-6).

(3) During Mr. Adkins deposition, he testified about an issue that occurred back in 2016 regarding the calculation of eligible participants who were already being served:

> Q. So the mistake you're --- you're referencing wasn't in the calculation of those individuals that were eligible for Medicaid. It was in the calculation or the comparison of those who were eligible with those who are currently being served?
>
> **A. Yes. And the former --- former standards were, we found that the survey was very cumbersome. And we also found that the providers, the other in home providers, were reluctant to give their numbers.**

(*See* D.R. 362:24-363:1-8). To clarify, the issue was that eligible individuals were calculated based off an average, while surveys sent to existing providers were a snapshot of data, not an average. (*See* D.R. 361-362). It is unclear why Respondents rely on this prior error to support their claim. The new standards do not involve a survey and have little relevance to the standards being discussed in this matter. In fact, the only premise this prior error shows is that the WVHCA made the decision to forgo obtaining this additional type of data in its new standards.

(4) As for the comparison to other standards, Mr. Adkins testified that he looked at three other standards. (*See* D.R. 364:16-17). However, Mr. Adkins further testified that the standards he reviewed did not equate to Medicaid In-Home Personal Care standards in any way other than they were still "community based." (*See* D.R. 365:24-366:1-3).

(5) Village Caregiving argued that "[t]he increased threshold was also grounded in the WVHCA's prior experience revising the standards in 2016, when the WVHCA's 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." (*See* Resp't Village Caregiving's Br. at 25). Respondents' argument fails for two main reasons. First, neither Respondent provides any justification for the proposed 2.5% change in 2016. Not only could the reasons for the proposed 2.5% change be on improper grounds like the 2023 standards, but there is no way to know what all the considerations were to ultimately not increase the threshold. Second, and more importantly, the 2016 standards were seven years before the Standards being discussed in this matter. Respondents want this Court to blindly accept its assertion that there is more need today than there was in 2016. Respondents provided no evidence for this assertion. It is just as likely that the need has dropped.

(6) The Medicaid data relied on by Mr. Adkins were merely individuals on Medicaid, not individuals who were, or could be, eligible for Medicaid In-home Personal Care services. (*See* D.R. 367:14-24).

Respondent Village Caregiving asserts that all these previous steps were taken before Mr. Adkins "ultimately determined to consider increasing the percentage used to determine unmet need." (*See* Resp't Village Caregiving's Br. at 25). The only true reason Mr. Adkins gave for the change from 1.25% to 3% is an "expectation" that BMS was going

to eliminate subcontracting for Medicaid In-Home Personal Care Services. Mr. Adkins was asked in his deposition "[w]hen did you make the decision that you were going to increase the percentage used to determine the unmet need?" (*See* D.R. 368:7-9). Mr. Adkins testified that it was when "[w]e were informed that BMS was wanting to eliminate subcontractors." (*See* D.R. 368:12-13). It is clear that the potential elimination of subcontracting was the one and only reason that the WVHCA decided to modify the standards.

Respondents poorly attempt to justify the WVHCA's reliance on the potential elimination of subcontracting for its decision to modify the standards. Respondents argue that Petitioners do not cite any laws or precedent supporting their argument that prematurely increasing the unmet need is improper. (*See* Resp't Village Caregiving's Br. at 26; Resp't WVHCA's Br. at 20). However, Respondents continue to ignore the fact that the WVHCA's actions were in direct contradiction of the Certificate of Need's legislative intent. First, if BMS does actually eliminate subcontracting, the period of time between granting applications, and the elimination creates duplication of services in violation of West Virginia Code § 16-2D-1. Second, there is a severe lack of evidence to support the premise that subcontracting will be eliminated. Mr. Adkins, the one who relied on subcontracting being eliminated referenced the information he received as "hearsay" and testified that there was nothing in writing, but an employee from BMS "stated that they were working on the plan and that that was still in process, the eliminating the subcontractors." (*See* D.R. 368:11-12; 370:14-24; 371:21-23).[1]

[1] As of the submission of this Brief, subcontracting has still not been eliminated. Thus, the WVHCA's only reason for implementing the 3% standard has to not come to fruition.

Respondents also try to argue that the WVHCA's decision to proactively modify the standards is a permissible action within the agency's expertise. (*See* Resp't Village Caregiving's Br. at 27; Resp't WVHCA's Br. at 19). In essence, the Respondents are asking this Court to give deference to the WVHCA for a prediction of what another agency may do. This, however, makes no sense. The WVHCA has no control over the actions of BMS and cannot reasonably predict what BMS will do, nor should they be permitted to when it results in a violation of the Certificate of Need Statute. In fact, Respondents arguments regarding the WVHCA "expertise" on this matter are eroded by the fact that it has now been over a year, and subcontracting has still not been eliminated.

ii.) Approving additional service providers with no unmet need is directly contradictory to the legislative purpose.

The legislative findings in regard to the Certificate of Need program is as follows:

> 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.

W. Va. Code § 16-2D-1.

Respondent Village Caregiving argues that the purpose of the CON process is not to prevent duplication, but "avoid unnecessary duplication of health services" (*See* Resp't Br. at 27). Village Caregiving then attempts to persuade this Court that Competition is expected within the counties as the Standards anticipate multiple providers within a county. However, Village Caregiving is failing to make a crucial connection. When there is an unmet need in a county, the addition of a service provider would not be an unnecessary duplication of services. However, in the instance where there is no unmet

need in a county, like in this matter, the addition of a service provider does create an unnecessary duplication of services.[2]

The language of duplication of services is specifically targeted at not adding additional providers purely for competition, but only when a need can be shown. Respondents continuously preach that the WVHCA is supposed to balance duplication of services with other factors but provides no basis for such a claim when an unmet need is not shown. Although some level of competition does exist when you have multiple providers in an area, the addition of new "competition" turns into an unnecessary duplication of services without an unmet need. This is precisely what the CON statute intends to prevent as is clear in its legislative intent.

iii.) WVHCA failed to establish and utilize a task force.

Respondents attempt to justify the "task force meeting" that occurred on September 29th, 2022, as sufficient to meet the statutory requirement, it does not. Respondent WVHCA argues that Petitioners overstated its position that more than one meeting would be required to sufficiently discuss the proposed changes. (*See* Resp't WVHCA Br. at 17). As the record reflects, no additional meetings were held. Respondents argue that the decision not to have another meeting does not illegitimize the initial meeting. However, as discussed in Petitioners initial Brief, the initial meeting falls significantly short of the statutory requirement because not only were the discussions cut short with no follow-up, but only a few topics were covered on this complex topic, leaving many undiscussed.

[2] Village Caregiving also argues that Petitioners argument does nothing more than to shield the already existing "monopoly." (*See* Resp't Village Caregiving's Br. at 28). However, there were already eleven providers in Putnam County prior to this application.

Additionally, as mentioned in Petitioners' Brief, the decision to make the modification was made prior to this meeting, and the incomplete discussion at the "task force meeting" was nothing more than a failed attempt to meet the statutory requirement. The decision to increase from 1.25% to 3% was made prior to the task force meeting. Mr. Adkins was asked "had the decision already been made by you to increase the percentage, the multiplier for unmet need?" and Mr. Adkins responded "[i]n the standards, the revised standards did have the three percent. Yes." (*See* D.R. 375:18-23). It is clear from the course of events that the meeting that was held was nothing more than a formality held in a failed attempt to meet its statutory requirement. This failure to comply with the task force requirement further highlights the fact that this standard was arbitrarily and capriciously promulgated. Therefore, the unmet need calculations cannot be relied on by Village Caregiving and its application should be denied.

iv. WVHCA failed to consider available information as required by statute.

Respondents argue that there is no authority relied on in Petitioners' Brief to support the premise that the WVHCA failed to rely on available information. (*See* Resp't Br. at 30). The CON statute requires the WVHCA to solicit public comment. (*See* §16-2D-6(a). Like with the task force meeting, the public comment requirement was a failed attempt to meet a statutory requirement. As discussed above, the decision was made to increase the need threshold long before the Authority started to receive information on the matter. The WVHCA made the decision to modify the Standards based solely on the potential elimination of subcontracting. Failure to utilize the materials it had before it shows clearly that no unmet need existed is in contradiction of the CON statute. Given the overwhelming evidence supporting the position not to increase the unmet need

percentage, it is clear the WVHCA failed to utilize the information it had at hand in making this decision. Therefore, the unmet need calculations cannot be relied on in WVHCA's decision to grant this application.

IV. The Respondents' arguments regarding a finding of a negative effect on the community by significantly limiting the availability and viability of other services or providers is directly contradictory to the evidence in the record.

A CON application must show the proposed service will not have a negative effect on the community by significantly limiting the availability and viability of other services or providers. (*See* D.R. 1557). The WVHCA erred in finding that the services provided by the Petitioners will not be negatively affected. The Petitioners provided ample evidence that granting the application would result in lost resources, clients, and employees, and as a result, lose the ability to provide nutritional and transportation services to its clients.

i. "Other Services" includes other services for elders such as transportation and nutrition Services.

The Respondents both attempt to argue that transportation and nutrition services for the elderly are not "other services" under the 2023 Need Methodology Standards despite Mr. Adkins explicitly testifying otherwise. (*See* Resp't Village Caregiving's Br. at 31; Resp't WVHCA's Br. at 22). Tim Adkins, the Director of the Certificate of Need Program within the West Virginia Health Care Authority testified that the language "other services" does in fact anticipate these services:

> Q: **...So read that, and tell me what you're referring to.**
>
> A: Will the loss of revenue prevent other services from being provided? We know that --- that the providers use those dollars for other services.
>
> Q: **And that's, and obviously then it was concern of yours?**

A: It --- it's still a concern of mine.

Q: **And we don't have the transcript of it, bit when we were --- when you were in that meeting, you were walking through the --- three elements for a CON application. You talked about need, and then when you got to the second element and it's in the standards got there. On page three, post services will not have a negative effect on the community by significantly limiting the availability and viability of other services. You --- brought that up again, and I think your specific comment was you don't want to be in a situation where you're robbing Peter to pay Paul.**

A: That's exactly right.

Q: **And you're referring about the same thing. Those...fees that they're using to provide the other services?**

A: Right.

Q: **And --- and that applies to other services in number 2?**

A: That's exactly right.

(*See* D.R. 406:9-24; 407:1-11).

Village Caregiving attempts to argue that "other services" do not pertain to services like transportation and Meals on Wheels. (*See* Resp't Village Caregiving's Br. at 32). It does so by analyzing the way in which questions are asked on the Application. *Id.* However, Respondents' tortured interpretation of drawing a connection between the meaning of "other services" and the questions on an Application is unnecessary as the intent is already known. Mr. Adkins, the individual responsible for the 2023 Need Methodology Standards, clearly states his concern regarding entities being able to continue providing other services with money obtain through Medicaid In-Home Personal Care services.

Respondents attempt to argue "Mr. Adkins does not specify what those 'other services' include…" (*See* Resp't Village Caregiving's Br. at 33). Respondent is attempting to create doubt where there is no doubt to be had. The testimony of Mr. Adkins above shows him discussing the Medicaid In-Home Personal Care Standards. When discussing this requirement, he clearly states that he knows that providers use those dollars (the money received through Medicaid In-Home Personal Care Standards) for other services. It would make no sense for Mr. Adkins to refer to the same service he is discussing as an "other services." The intent of Mr. Adkins is clear, Respondents cannot create unfounded doubt or use secondary sources to contradict the clear intent behind the definition of "other services."

ii. Petitioners' evidence of a negative effect is not speculative.

Village Caregiving argues Petitioner misrepresents Interrogatory responses demonstrating Village Caregiving intent to steal PCAP workers and clients (*See* Resp't Village Caregiving's Br. at 33). Petitioners have already argued that Village Caregiving provided, "Village Caregiving's expansion into the Service Area will Increase its clients' continuity of care" (*See* D.R. 389 – Interrogatory No. 11). This was in regard to Village Caregiving's Aged and Disabled Waiver Program ("ADW") clients who are currently receiving Medicaid In-Home Personal Care services from another provider. *Id.* Essentially, it is clear Village Caregiving will attempt to take clients from other personal care providers if the client is already receiving a wraparound service from Village Caregiving. Village Caregiving's allegation of mischaracterizing its interrogatories is unfounded.

Respondents next argue that Petitioners did not proffer any evidence that the granting of this application would prevent Petitioners from continuing to provide the services, or whether funds could be shifted to cover the loss in resources. (*See* Resp't Village Caregiving's Br. at 34; Resp't WVHCA's Br. at 25). First, Ms. Sutherland testified that the additional funds received from Medicaid In-Homer Personal Care go to providing underfunded or unfunded programs like transportation and Meals on Wheels. Without this supplemental funding, Petitioners could no longer supply these services. Ms. Sutherland also testified that she has already seen a decrease in revenue in counties where other applications have been granted. (*see* D.R. 1821:8-19). Second, Respondents claiming that Petitioners could shift their funds around to cover the loss in revenue makes no sense. Petitioners provide a multitude of services to elderly individuals and cannot afford to dump its safety net into just a couple of those services. Even if the Petitioner were to do that, this is not an infinite source of money, it would eventually run out, and the services would ultimately still come to an end.

WCHCA argued that there are already ten other providers "competing" against the Petitioners and "[i]f any marginal loss in profits from those providers hadn't led to the dire consequences they predict, it is hard to see how one more would. (*See* Resp't WVHCA Br. at 25). First, the difference between the current service providers and any additional providers is that the current providers fill an unmet need, whereas any additional would have to pull from the existing market. Second, although even one will have the negative effect absent unmet need, five other applications have since been granted to provide services in Petitioners' counties, each decision has been appealed by Petitioners.

Respondent Caregiving argues that Petitioner will not lose revenue because additional competition is being introduced to meet unmet needs. (*See* Resp't Village Caregiving's Br. at 34). However, as argued above, there is no unmet need in Putnam and Fayette County and the additional services providers will simply lead to unnecessary duplication. This duplication of services comes with a loss of revenue as Petitioners will now have to compete for a limited clientele. Village Caregiving also asserts that "competitors are not necessarily fighting over existing market share, but rather population growth and aging." (*See* Resp't Village Caregiving's Br. at 34). However, Respondent provides no evidence that West Virginia, or even Putnam and Fayette County, has a growing elderly population.

V. The Hearing Examiner showed clear bias throughout the proceedings and affected Petitioners ability to put on evidence.

Respondents argue that there is no inherent bias with the hearing examiner being the WVHCA's attorney. (*See* Resp't Village Caregiving's Br. at 35). Petitioners agree with that point. The issue in the underlying matter is not her position, but her conduct throughout the underlying hearings. Although Ms. Connolly's position is most certainly a motivating factor for her hostility towards the Petitioner's, that is not the alleged misconduct. West Virginia Code requires that "[a]ll hearings shall be conducted in an impartial manner." (*See* W. Va. Code §29A-5-1(d)). The examples provided by the Petitioner in their Brief show that Ms. Connolly's conduct created an impartial hearing.

Respondents further argue that Ms. Connolly was not the final decision maker, and therefore an impartial hearing is irrelevant. (*See* Resp't Village Caregiving's Br. at 38; Resp't WVHCA's Br. at 28). Ms. Connolly made many decisions, including improperly granting summary judgments and preventing the admission of relevant evidence.

Although Respondents point out that some of these decisions were in other, but similar, matters, Ms. Connolly's hostility through the hearing in this matter undoubtedly influenced the record. Respondents attempt to downplay the hostility and argue that any hostility that did occur would not influence the ultimate decision. However, the statute requires an impartial hearing for a reason. If it is clear that the underlying hearing examiner was biased through her actions, it does not put a burden on a party to show that the outcome of the decision would have been different. The statute mandates an impartial hearing because it is assumed that a party will be disadvantaged in a biased hearing.

Respondents attempt to diminish the significance of the examples provided by the Petitioners. Essentially, Respondents argue that that Ms. Connolly's actions are permissible and were for the purpose of "managing the conduct of the hearing." (*See* Resp't Village Caregiving's Br. at 36-38; Resp't WVHCA's Br. at 28-30). Although Respondents attempt to downplay the hostility, upon review of the testimony cited by Petitioners, it is clear to see the bias of Ms. Connolly.

The West Virginia Health Care Authority's bias throughout the administrative proceedings is clear evidence that the relevant facts and law were not taken into consideration. It was clear from the beginning that no matter what evidence the Petitioners proffered throughout this process, the decision was already made to grant Village Caregiving's application. Because of this, Petitioners evidence and arguments fell on deaf ears. Furthermore, many times throughout the process, Petitioners were prevented from developing the record because Ms. Connolly had determined clearly relevant information as irrelevant. For these reasons, the WVHCA's discretion should be stripped, or at least diminished from the underlying matter.

VI. This Court need not overrule the 2023 Need Methodology to grant Petitioners' requested relief.

As discussed above, the 2023 Need Methodology as promulgated by the WVHCA is arbitrary and capricious. Although the 2023 Need Methodology is improper, and therefore cannot be relied on by the WVHCA to support a finding of unmet need, this Court need only find an improper reliance on the Methodology and does not need to overrule the same. Petitioners filed a Verified Complaint Seeking a Preliminary Injunction, Permanent Injunction, and Declaratory Judgment in the Circuit Court of Kanawha County against the promulgated standards. (*See* D.R. 1492 n. 9). In response, the WVHCA made the argument that Petitioners "failed to exhaust [their] administrative remedies." (*See* D.R. 1729:22-24). More specifically, it argued that Petitioners had not exhausted their administrative remedies because they had not yet concluded the underlying WVHCA proceedings. To be clear, Petitioners do not believe WVHCA's perceived administrative exhaustion is required.

Respondent Village Caregiving claims "[i]t is unclear what Petitioners are requesting the Court to do with respect to the Standards in this appeal…" (Resp't Village Caregiving's Br. at 39. However, Petitioners clearly explained the nature of their request:

> The Petitioners do not believe it to be proper for this Court to strike down the validity of the WVHCA standards at issue in this proceeding. However, the WVHCA has taken the position that Petitioners must exhaust their administrative remedies through this process prior to challenging the standard in Circuit or District Court. Therefore, Petitioners ask that this Court strike the 2023 Need Methodology Standards promulgated by the WVHCA as statutorily invalid.

(*See* Pet'r Br. at 35). Petitioners made this request solely for the purpose of resolving any concern by the WVHCA in regard to exhausting administrative remedies.

CONCLUSION

Respondents' arguments fail to justify the WVHCA decision granting Village Caregiving's application. First, Respondents do not gain the benefit from any deference, either because of the overturing of *Chevron* or because its actions are in direct contradiction to the Certificate of Need statute. Second, Respondents provided no actual evidence of unmet need and relied solely on the 2023 Need Methodology. Third, the Respondents failed to justify the WVHCA's reliance on the 2023 Need Methodology. Lastly, Respondents cannot show that a granting of this CON will not affect other services provided to elders in these counties. Granting this application is in direct contradiction to the requirements set forth in both the West Virginia Code and the rules promulgated by the Health Care Authority.

Petitioners ask that the WVHCA's decision granting Village Caregiving's application be reversed, and that the CON application be denied.

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

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Putnam County Aging Program, Inc.,
and Fayette County Senior Programs,
Affected Parties Below, *Petitioners*,

vs. CASE NO: 24-ICA-100

Village Caregiving, LLC,
Applicant Below, *Respondent*

And

West Virginia Health Care Authority,
Respondent

CERTIFICATE OF SERVICE

I, Ryan W. Walters, do hereby certify that on this 12th day of August 2024, I filed the forgoing "*Petitioners' Reply Brief*" to be served on counsel of record via File & Serve Express.

/s/ Ryan W. Walters
Ryan W. Walters (WVSB#14113)