IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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Putnam County Aging Program, Inc.,
Affected Party Below, Petitioner,

vs.

CASE NO: 24-ICA-123

Southern Home Care Services, Inc.,
d/b/a All Ways Caring HomeCare
Applicant Below, Respondent

And

West Virginia Health Care Authority,
Respondent

PETITIONER'S 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 Southern Home Care Services, Inc.*, 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 rely on a 2021 West Virginia Supreme Court case, amongst others with similar premises, to argue the high level of deference attributed to agencies, including the West Virginia Health Care Authority ("WVHCA"). (*See* Resp't WVHCA Br. at 1 and 9; Resp't Southern Home Br. at 8). *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 West Virginia Health Care Authority ("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). The United States supreme Court has held that "[i]f 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**.'" (*See Amedisys W. Va., LLC v. Pers. Touch Home Care of W. Va., Inc.,* 245 W. Va. 398). As Petitioner 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 Southern Home Care Services, Inc., d/b/a All Ways Caring HomeCare ("Southern Home") is insufficient to meet this burden. The evidence and arguments proffered by Petitioner in regard to unmet need is provided by Petitioner to highlight that not only did Respondent Southern Home fail to establish its burden, but Petitioner's evidence displays the exact opposite of what Southern Home 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.

As argued in Petitioner's 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. Southern Home was unable to show any actual unmet need in its proposed service area.

First, Respondents argue they have independent evidence of an unmet need, relying on Mr. Adkins' testimony that he "continually" receives calls regarding personal care services. (See Resp't WVHCA Br. At 10; Resp't Southern Home Br. At 23). However, this independent evidence fails to make any kind of showing of unmet need and are 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.

Mr. Adkins and 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). 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 1785 15-19). To which Mr. Adkins answered "No." *Id.*

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.

Respondents next argue that Mr. Adkins lack of knowledge regarding a waitlist for interested individuals to receive Medicaid In-Home Personal Care services is somehow not evidence of a lack of need. (*See* Resp't Southern Home Br. At 23; Resp't WVHCA Br. At 10). 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. If an unmet need did in fact exist for Medicaid In-Home Personal Care services within West Virginia, individuals unable to receive these services would need to be placed on a list so that they may be provided for when services became available. The absence of such a list, or even the ability to identify any individual unable to receive services, is at the very least relevant in showing the lack of an unmet need in the proposed service area.

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. 887 – BMS e-mail). Respondent Southern Home takes the position that Petitioner has misinterpreted this e-mail, and "that the writer was correcting a misapprehension that BMS kept a waiting list, not that no one in West Virginia was waiting for care" (Resp't Southern Care's Br. at 11). Although Respondent Southern Care'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, Petitioner's evidence of an actual unmet need highlights why Respondents were unable to satisfy this burden.

Interestingly, Respondent Southern Care argues, contradictory to the record, that "Mr. Adkins never testified that 'he was unaware of any unmet need.'" (*See* Resp't Southern Home Br. At 23). 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 Petitioner's 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.

Lastly, Respondent Southern Care raises the following argument: "PCAP contends that the Authority "incorrectly found that '[p]atients will continue to experience serious problems in obtaining care of the type proposed in the absence of the proposed project.' PCAP did not make this argument below, and therefore it has been waived." (See Resp't Southern Home Br. At 22-23). Despite Southern Homes attempts to create technicalities for the purpose of evading arguments, this argument on splitting hairs is irrelevant. This requirement is couched in the question of determining unmet need (of which Southern Home does not dispute is at issue here). If there is unmet need, individuals will experience problems with obtaining services; to the contrary, if there is no unmet need, then individuals will not go without these same services in the absence of the proposed services.

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

The WVHCA erred in finding "the PC Standards' need methodology is not arbitrary and capricious…." (*See* D.R. 2538). The WVHCA further found "[t]he 2023 PC Standards are valid and provide an accurate methodology for determining the need for PC services in the Service Area" (*See* D.R. 2570). 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 Southern Care relies on *Amedisys W. Va., LLC* 245 W. Va. 398, to argue for judicial deference in the promulgation of the 2023 Need Methodology. (*See* Resp't Southern Care's Br. at 9). As discussed above, the Court in *Amedisys* relied heavily on *Chevron*, 467 U.S. 837. Also discussed above, 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 have 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 "relied on very similar standards before…" referring to the standards discussed in

Amedisys 245 W. Va. 398. (See Resp't WVHCA Br. at 12). 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 Southern Care's Br. at 10-12; Resp't WVHCA's Br. at 10). 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.** Respondents attempt to argue a number of steps taken by Mr. Adkins to justify the manner in which the 2023 Need Methodology Standards were promulgated. First, Respondents attempt to justify the change to 3% because the WVHCA contemplated changing the percentage to 2.5% in 2016. (*See* Resp't WVHCA Br. At 14; Resp't Southern Home Br. At 10). Second, Southern Home argues that Mr. Adkins relied on his evaluation of certain Medicaid data. (*See* Resp't Southern Care's Br. at 11). Lastly, Southern Home argues that there is more of a need for these services because the elderly population increased from 18.8% in 2016 to 21.2% in 2022. (*See* Resp't Southern Care's Br. at 11). These arguments relied on by the Respondents do nothing to justify the arbitrary

implementation of the Need Methodology Standards.

First, Southern Care argued that "CON Program Timothy Adkins explained, the previous multiplier, 1.25%, was selected due to the budgetary constraints of the Medicaid program at the time, not the actual need for PC Services." (See Resp't Southern Home Br. At 10). Respondent WVHCA argued "[t]he Authority knew that 1.25% was already too low when it started the revision process because it had decided not to increase the percentage to 2.5% several years prior in response to a reported Medicaid funding crisis." (See Resp't WVHCA Br. At 4). 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.

Second, Respondent Southern Home argued that "Mr. Adkins further testified that he reviewed enrollment numbers from BMS and determined that approximately 2% of West Virginia's Medicaid recipients are already receiving PC Services." (*See* Resp't Southern Care's Br. at 25). However, 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. 1233:32). Additionally, even in the event that every person was eligible for Medicaid PC services, there is no evidence in the

record that the existing providers are unable to provide the services.

Lastly, Respondents argue that "West Virginia's population has continued to age since 2016, and the need for PC Services has therefore increased over time." (*See* Resp't Southern Care's Br. at 11). However, according to the data relied on by Southern Home, the increase in the 65+ age group went from 345,230 to 376,099.[1] This marginal increase is hardly enough to justify such a drastic change in estimated unmet need. Especially when paired with the fact that there was a relatively equal decrease in 50- to 64-year-old residents in West Virginia. *Id*. Furthermore, Mr. Adkins testified that "as of in January of this year, it was 609,000 residents were on Medicaid in West Virginia. As of June 30th, that number had decreased down to 575,000." (*See* D.R. 1233:33). Therefore, despite the Respondents' speculative arguments that an older population will directly lead to more need, the most recent data has actually shown a decrease in individuals on Medicaid.

Respondent Southern Care asserts that these factors were taken into consideration by Mr. Adkins when creating the 2023 Need Methodology. However, 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. 1233 33:7-9). Mr. Adkins testified that it was when "[w]e were informed that BMS was wanting to eliminate subcontractors." (*See* D.R. 1233 33:12-13). It is clear that the potential elimination of subcontracting was the one and only reason that the WVHCA decided to modify the standards.

[1] West Virginia population by year, county, race, & more | USAFacts

Respondents poorly attempt to justify the WVHCA's reliance on the potential elimination of subcontracting for its decision to modify the standards. The WVHCA argues that "Petitioner has once again failed to provide any law explaining how the policy the Authority settled on was an illegal choice." (See Resp't WVHCA Br. At 18). However, Respondents continue to ignore the fact that the WVHCA's actions were in direct contradiction of the Certificate of Need's legislative intent. 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.

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 Southern Care's Br. at 12-13; Resp't WVHCA's Br. at 17-18). Southern Home argues that "BMS clearly conveyed its intent to eliminate subcontractors to Mr. Adkins." (See Resp't Southern Home Br. At 12). However, 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. 1233 - 33:11-12; 35:14-24; 36:21-23).[2] Respondents believe these phone calls that Mr. Adkins himself referred to as hearsay are sufficient evidence to designate 51 of the 55 counties as having unmet need. This is despite the fact that Mr. Adkins had no information about when this elimination of subcontracting would occur, how it would happen, and what the final result would look like, if any. Clearly this hearsay

[2] 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.

was not as clear as Respondents would like to argue given that subcontracting to this date has still not been eliminated.

Respondent Southern Home also argues "even if PCAP's suggestions were somehow 'better' than the methodology developed by the Authority (they are not), the Authority's methodology remains controlling: '[T]he agency need not employ the 'best' or 'most logical' methodology, but rather one which is rationally based on the enabling statute.'" (See Resp't Southern Home Br. At 12). In Petitioner's Brief, it provided examples not for the purpose of providing a "better" methodology, but examples of how the WVHCA could have dealt with the rumors regarding the elimination of subcontracting without violating its enabling statute. This proactive response to a change in subcontracting, as implemented, has created an unnecessary duplication of services and, therefore, is not "rationally based on the enabling statute."

Southern Home argues that it was proper for the WVHCA to rely upon BMS's "clear intent to eliminate subcontractors." (See Resp't Southern Home Br. At 12). Further arguing that the WVHCA was permitted to rely on "recommendations and practices of other health planning agencies and organizations" as well as "recommendations from third-party payors." Id. 12-13; W. Va. Code § 16-2D-6(e). This argument is flawed for multiple reasons. First, as discussed above, the intent to eliminate subcontracting is not as "clear" as respondents argue. Mr. Adkins was relying on nothing more than rumors and hearsay. Mr. Adkins was working off nothing more than an understanding that individuals at BMS wanted to eliminate subcontracting, but not if it would actually happen, how it would happen, or when it would happen. Not to mention that there is no evidence that elimination of subcontracting would actually create unmet need. Second, BMS communications are hardly a "recommendation." In fact, to this day, subcontracting

has still not been eliminated, so it is hard to believe that BMS was recommending that the WVHCA take the action it did. Lastly, as discussed above, prematurely and blindly, fabricating unmet need creates unnecessary duplication of services while hoping that BMS acts at some point in time. This is a direct violation of W. Va. Code § 16-2D-1 and W. Va. Code § 16-2D-12.

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 Southern Care argues that "[t]he CON law is not meant to be a bulwark against competition and does not proscribe any and all duplication of services, only "unnecessary" duplication." (See Resp't Southern Home Br. At 16). However, Southern Care 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.[3]

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. 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 Petitioner overstated its position that more than one meeting would be required to sufficiently discuss the proposed changes. (*See* Resp't WVHCA Br. at 15). 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 Petitioner's 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.

Respondent Southern Home argues that "PCAP's argument that the taskforce

[3] Southern Care also argues that the CON is not meant to bulwark against competition. (*See* Resp't Southern Care's Br. at 16). However, there were already eleven providers in Putnam County prior to this application.

meeting was merely a 'formality' that could not have had 'any effective impact' is therefore demonstrably false" because "the Authority reinserted the pre-existing grandfathering language and removed language requiring physician approvals in response to stakeholder comments." (See Resp't Southern Home Br. At 19-20). However, the Respondent's argument misses the point. The petitioner is challenging the rationale behind the change from 1.25% to 3%. The fact that Respondent can point to a singular change that was made completely unrelated to the change in percentage does not bolster its argument that a task force was effectively formed.

Additionally, as mentioned in Petitioner's 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. 1781:18-23). 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 Southern Care and its application should be denied.

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

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.

v.) Respondents' explanation for the error in Brooke County need calculation highlights the errors in the Need Methodology.

Clearly identifiable, and unexplainable flaws in the Need Methodology highlight the fact that the promulgated standards are arbitrary and capricious. Respondents argue that the WVHCA relied on Southern Care's assertion that Tim Adkins' testimony showed the data used for Brooke County was included with the Hancock County data, which caused it to appear as though Brook County had a negative need (See Resp't WVHCA Br. At 11-12).

Respondents' attempts to justify this error fail. Respondents' justification is hearsay from Mr. Adkins stating that, although confusing, a girl at Kepro told Mr. Adkins that the numbers for Brooke and Hancock were inadvertently added together, however, Mr. Adkin's admitted that this was an issue and wasn't really sure about it. (*See* Resp't Southern Care's Br. at 14; D.R. 1796-1797). Mr. Adkins was informed of this combination of numbers through a call. (*See* D.R. at 1796:19-24; 1797:1-3). 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 1845:19-24; 1846:1). Mr. Adkins further testified "I have no idea how they get their numbers." (*See* D.R. 1846:5). Respondents claim the error has been corrected, but the testimony of Mr. Adkins does nothing more than create more questions about the alleged error.

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. 50). The WVHCA erred in finding that the services provided by the Petitioner would not be negatively affected. The Petitioner 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 Southern Care's Br. at 25; Resp't WVHCA's Br. at 22-23). 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. 1812:9-24; 1813:1-11).

Southern Care attempts to argue that "other services" do not pertain to services like transportation and Meals on Wheels. (*See* Resp't Southern Care's Br. at 32). Further, Respondent Southern Care argues "Mr. Adkins never said that 'other services' includes nutrition and transportation services. Most importantly, Mr. Adkins testified that he 'has no power to make a decision and approve it without --- the Board has to be, the Board is the ultimate Authority.'" (*See* Resp't Southern Care's Br. at 27).

First, 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."

Second, Mr. Adkins was the key player in the drafting of the 2023 Need Methodology Standards. When it comes to the intent behind the meaning of "other services," Mr. Adkins is in fact the correct person to ask. When Mr. Adkin's intent behind the meaning of "other services" is clear and unambiguous as it is here, there is no interpretation needed by the Board.

ii. Petitioner's evidence of a negative effect is not speculative.

Respondents next argue that Petitioner did not proffer any evidence that the granting of this application would prevent Petitioner from continuing to provide the services, or whether funds could be shifted to cover the loss in resources. (*See* Resp't Southern Care's Br. at 24-25; Resp't WVHCA's Br. at 20-21). 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, Petitioner 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. 2138 118:8-19). Second, Respondents

claiming that Petitioner could shift their funds around to cover the loss in revenue makes no sense. (See Resp't Southern Home Br. At 28) Petitioner provides 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 Petitioner and Petitioner does not try to explain how adding an additional provider would lead to the dire consequences that has not come from the other ten providers already there." (*See* Resp't WVHCA Br. at 23). 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 Petitioner's County, each decision has been appealed by the Petitioner.

V. The Hearing Examiner showed clear bias throughout the proceedings and affected Petitioner's 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 Southern Care's Br. at 32). The Petitioner agrees 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, 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 a biased hearing.

Respondents further argue that Ms. Connolly was not the final decision maker, and therefore an impartial hearing is irrelevant. (*See* Resp't WVHCA's Br. at 24). 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 Petitioner. Essentially, Respondents argue that that Ms. Connolly's actions are permissible and were for the purpose of "regulat[ing] the course of the hearing." (*See* Resp't WVHCA's Br. at 24). Although Respondents attempt to downplay the hostility, upon review of the testimony cited by the Petitioner, 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 Petitioner proffered throughout this process, the decision was already made to grant Southern Care's application. Because of this, Petitioner's evidence and arguments fell on deaf ears.

Furthermore, many times throughout the process, Petitioner was 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 Petitioner's 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. Petitioner filed a Verified Complaint Seeking a Preliminary Injunction, Permanent Injunction, and Declaratory Judgment in the Circuit Court of Kanawha County against the promulgated standards. In response, the WVHCA made the argument that Petitioner failed to exhaust their administrative remedies. More specifically, it argued that Petitioner had not exhausted their administrative remedies because they had not yet concluded the underlying WVHCA proceedings. To be clear, Petitioner does not believe WVHCA's perceived administrative exhaustion is required.

CONCLUSION

Respondents' arguments fail to justify the WVHCA decision granting Southern Care'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.

Petitioner asks that the WVHCA's decision granting Southern Care's application be reversed, and that the CON application be denied.

PUTNAM COUNTY AGING PROGRAM, INC.,
***Petitioner*,**

By Counsel

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Putnam County Aging Program, Inc.,
Affected Party Below, Petitioner,

vs. CASE NO: 24-ICA-123

Southern Home Care Services, Inc.,
d/b/a All Ways Caring HomeCare
Applicant Below, Respondent

And

West Virginia Health Care Authority,
Respondent

CERTIFICATE OF SERVICE

I, Ryan W. Walters, do hereby certify that on this 26th day of August, 2024, I filed the forgoing "*Petitioner's Reply Brief*" to be served on counsel of record via File & Serve Express.

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