

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-97

A Special Touch In Home Care, LLC,
Applicant Below, Respondent

And

West Virginia Health Care Authority,
Respondent

PETITIONERS' BRIEF IN SUPPORT OF APPEAL

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ASSIGNMENTS OF ERROR

1. The decision of the West Virginia Health Care Authority improperly finds that an unmet need exists in the proposed service area. The West Virginia Code requires unmet need to be demonstrated prior to a CON application approval. (W. Va. Code § 16-2D-12(a)). A finding of unmet need is both required 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). A Special Touch was unable to provide any evidence of an unmet need in Putnam or Fayette County, as well as other counties in its proposed service area. Moreover, the record is riddled with evidence that there is no unmet need in these counties. In fact, the Authority's own expert, Tim Adkins, testified that there is no unmet need in Putnam and Fayette County.
2. The Authority improperly relied on the West Virginia Health Care Need Methodology implemented in 2023. The Petitioners provided ample evidence that the calculations under this Need Methodology are arbitrary and capricious, and as such should not be relied on when making its determination of unmet need. The Authority not only relies on this arbitrary and capricious calculation, but it is also the only evidence it relies on. Absent its reliance on this improper method, the Authority lacks statutory power to grant this Application.
3. The decision improperly found that granting the Application will not have a negative effect on the community by significantly limiting the availability and viability of other services or providers pursuant to the 2023 In-Home Personal Care services standards. (See ICA Transaction ID 72341461 at pg. 14)¹. The Petitioners provided ample evidence of the negative effects that approving this Application would have on PCAP and FCAP services. The Authority improperly disregarded this evidence or erroneously identified it as speculative.
4. The West Virginia Health Care Authority's present and obvious bias toward granting Medicaid In-Home Personal Care Certificate of Needs is a clear abuse of its discretion and is in plain error.
5. The West Virginia Health Care Authority improperly, and in contradiction to West Virginia law, promulgated an arbitrary and capricious Need Methodology in 2023 for the purpose of determining need of services in each county. State law demands that this Need Methodology be abolished.

¹ Upon review of the designated record, the WVHCA's decision granting the underlying application is absent. However, the decision was filed with the Intermediary Court on March 7th, 2024, under Transaction ID 72341461. For purposes of this brief, this filing will be identified as "Application Decision."

STATEMENT OF THE CASE

I. PROCEDURAL BACKGROUND

On June 12th, 2023, the West Virginia Health Care Authority (“WVHCA”) received an application from Respondent, A Special Touch In Home Care, LLC, (“A Special Touch”) for a Certificate of Need requesting permission to start providing Medicaid In-Home Personal Care Services within a proposed service area. (See D. R. 20-95). The proposed service area includes Fayette, Kanawha, Putnam, Cabell, and Wayne County. (See D. R. 39).

On June 7th, 2023, the WVHCA received Putnam County Aging Program, Inc.’s letter setting forth reasons why A Special Touch’s application should not be granted. (See D.R. 18). A similar letter was received by the WVHCA from Fayette County Senior Programs on June 16th, 2023. (See D. R. 98). On July 16th, 2023, Fayette County Senior Programs filed for affected party status and requested a hearing. (See D. R. 108). On July 13th, 2023, the WVHCA received Putnam County Aging Program, Inc.’s filing for affected party status contesting that the requirements of a CON were not met by A Special Touch and requested an evidentiary hearing. (D. R. 106).

Prior to the hearing on this matter, the parties exchanged discovery, and all relevant documentation was made part of the record. (See D.R. 174-634; D.R. 635-800). On September 25th, 2023, a pre-hearing conference was held before the WVHCA, and was presided over by Heather Connolly in the capacity of the Hearing examiner. (See D.R. 1515-1529). On October 4th, 2023, a hearing was held in a separate Certificate of Need matter; *In re: Elder Aide Services LLC dba Right at Home* CON File #23-2/3/4-12697-PC. (See D.R. 1252-1409). Due to the similarity of issues in CON File #23-2/3/4-12697-PC and this CON application, the parties agreed to use the prior testimony of Jennifer

Sutherland, Executive Director for Putnam County Aging Program, in this matter to avoid unnecessary duplication. An evidentiary hearing was held on October 5th, 2023, where testimony was entered into the record by both parties, the hearing was again presided over by hearing examiner, Heather Connolly. (*See* D.R. 1534-1589). On October 13th, 2023, an evidentiary deposition was taken of Timothy Adkins, the Director of the Certificate of Need Program within the West Virginia Health Care Authority. (*See* D.R. 862-995). Mr. Adkins deposition was taken as part of the record in four separate CON proceedings, including this one currently on appeal.

The Respondent, A Special Touch, filed a brief in support of its application on November 21st, 2023. (*See* 1024-1043). On December 21st, 2023, Putnam County Aging Program, Inc., and Fayette County Senior Programs (together referred to as “Petitioners”) filed a Response Brief contesting A Special Touch’s application. (*See* D.R. 1044-1064). On January 8th, 2024, A Special Touch filed a Reply to Petitioner’s Response, and a proposed order granting its application. (*See* D.R. 1169-1180; 1143-1167). Also on January 8th, 2024, Petitioner’s filed its Findings of Fact and Conclusions of Law Denying Applicant’s Request for a Certificate of Need. (*See* D.R. 1128-1141). On February 21st, 2024, the WVHCA issued a decision granting A Special Touch’s application for a Certificate of Need. (*See* Application Decision). On March 5th, 2024, Petitioners were notified of the Health Care Authority’s decision

On March 7th, 2024, Petitioners noticed its appeal of the underlying decision made by the WVHCA. The WVHCA filed the Designated Record for this Appeal on April 10th, 2024. Petitioners now file this Brief for the purpose of perfecting their appeal, and to

highlight portions of the record which show the WVHCA erred in its decision to grant a Certificate of Need to A Special Touch.

II. FACTUAL BACKGROUND

On April 27th, 2023, the West Virginia Health Care Authority promulgated new Medicaid Personal Care standards regarding CONs and the requirements that must be met for an application to be granted. (*See* D.R. 625-630). Within these standards, the WVHCA maintains a need methodology that “[a]ll CON applicants must demonstrate with **specificity**.” (*See* D.R. 627). More specifically, the applicant must demonstrate with specificity that: “(1) there is an unmet need for the proposed service; (2) the proposed service will not have a negative effect on the community by significantly limiting the availability and viability of other services or providers; and (3) the proposed services are the most cost-effective alternative.” (*Id.*)

Petitioners provide services in Putnam County and Fayette County. These include Medicaid In-Home Personal Care services, nutrition services, transportation services, and various other services provided by the organizations. (*See* D.R. 1333:10-19). The Petitioners currently not only provide In-Home Personal Care services, but also a slew of other services for the benefit of the elderly population that are not funded by Medicaid. Jennifer Sutherland is the Executive Director for Putnam County Aging Program. (*See* D.R. 1332:23-24). Putnam County Aging Program is a “nonprofit organization that administers the Title [III] programs for the State of West Virginia and Putnam and Fayette Counties.” (*See* D.R. 1333:3-5). Putnam County is also authorized through the Bureau of Medical Services (BMS) to be a Medicaid In-Home Personal Care provider, as

well as an Aged and Disabled Waiver provider. (*See* D.R. 1333:5-8). Putnam County provides a variety of services, Ms. Sutherland testified:

We operate senior centers. So we have the county aging senior centers in both Putnam and Fayette County. I have six centers. We do Meals on Wheels or home-delivered meals through all areas of both counties. I operate county-wide transportation systems in both counties. We do in-home services that are funded by the state lottery programs such as FAIR and Lighthouse. And we provide Department of Agriculture programs such as the senior food commodity boxes and the senior farmers market vouchers.

(*See* D.R. 1333:10-19).

The Petitioners provide Medicaid personal care directly, as well as subcontract the same services through a relationship with Loved Ones In-Home Care (Loved Ones). (*See* D.R. 1342:6-10). Ms. Sutherland testified at the hearing in this matter that “as a nonprofit organization, the revenues that we make through any Medicaid program or a subcontractual relationship with Loved Ones is then reinvested into our Title [III] budgets and other service programs and services that we provide throughout the county.” (*See* D.R. 1345:10-15).

Ms. Sutherland testified her organizations anticipate receiving \$423,214 from their contractual agreement with Loved Ones. (*See* D.R. 1362:1-2). Additionally, the Petitioners receive close to two-million dollars of their own revenue in Medicaid Dollars through services they directly provide. (*See* D.R. 1362:5-10). However, despite the high revenue, the Petitioner’s projected net income is only \$61,526. (*See* D.R. 1362:15-16). The large difference between revenue and net income is the result of a significant portion of their profit being redirected into other services that are underfunded in Putnam and Fayette County. (*See* D.R. 1362:17-24; 1363:1-12.) In essence, any profit made by the Petitioners goes directly back to the senior programs that are either underfunded, or not funded at

all in Putnam and Fayette County. Meals on Wheels is the primary underfunded program that these additional funds go towards, and this allows Petitioner to supply elderly persons in Putnam and Fayette County with meals. (See D.R. 1333:9-19). This service is crucial to the elderly population in these counties as many elderly struggle with or are unable to leave their house.

SUMMARY OF ARGUMENT

Petitioner's first assignment of error: the West Virginia Health Care Authority's decision granting A Special Touch Certificate of Need application was in error as there is no evidence in the record supporting a need for Medicaid In-Home Personal Care services in its proposed service area. The WVHCA relied nearly entirely on the 2023 Need Methodology calculation, which as discussed below, was relied on in error. A Special Touch was unable to provide any evidence of an unmet need in Putnam or Fayette County, as well as other counties in its proposed service area. Moreover, the record is riddled with evidence that there is no unmet need in these counties. As argued below, the WVHCA's own expert, Tim Adkins, testified that there is no unmet need in Putnam and Fayette County. Additionally, the executive director of Putnam County on Aging testified that she has never had to turn away an eligible participant from Medicaid In-Home Personal Care services in either County. Significantly, A Special Touch is unable to legitimately identify any eligible participant that has been denied Medicaid In-Home Personal Care services. The evidence of no unmet need is overwhelming.

Petitioner's second assignment of error: The WVHCA erred when it relied on its 2023 Need Methodology calculations to find an unmet need existed because it exceeded its statutory limitations when it arbitrarily and capriciously changed the Medicaid In-

Home Personal Care Certificate of Need Standards. When promulgating these new standards in 2023, the WVHCA failed to comply with statutory requirements. First, the WVHCA is required to rely on relevant criteria and apply it in such a manner that there is no duplication of services. However, in promulgating these standards, the WVHCA did not rely on the existence of any actual unmet need. Instead, the WVHCA admits that it increased the unmet need in all fifty-five counties because it was aware of rumors that subcontracting for these services was going to be prohibited by the legislature in the future, thus, potentially creating unmet need. To this date, subcontracting is still permitted in West Virginia and the WVHCA has not provided any evidence of actual unmet need to support its change of the Need Methodology calculations.

Second, WVHCA arbitrarily changed the Need Methodology calculations to allow additional unneeded providers to start providing services within almost every county in West Virginia. Because the WVHCA was unable to make any findings of unmet need, these new services are purely duplicative and therefore in violation of the public policy goals and legislative findings of the Certificate of Need statute. (W. Va. Code § 16-2D-1). Third, West Virginia Code § 16-2D-6(c) requires the Authority to form a task force comprised of representatives of consumers, businesses, providers, payers, and state agencies to assist in the review of any proposed standard modifications. As discussed below, the WVHCA failed to meet this requirement as it never actually formed a task force and merely held a short meeting where the issue of the Need Calculation was not even properly addressed. Lastly, the WVHCA failed to consider the public comments on the Need Methodology calculation changes as many organizations informed the WVHCA that there was in fact no unmet need.

Petitioner's third assignment of error: The WVHCA erred in finding that granting the application would have no negative effect on the community by significantly limiting the availability and viability of other services or providers. Allowing additional Medicaid In-Home Personal Care providers into the proposed service areas negatively affects Petitioners by limiting already scarce resources. As discussed below, A Special Touch's own admissions display its intent to poach clients and employees from other providers in the area. Not only will Petitioners be negatively affected by the granting of this application, but so will the elderly population as well. As described below, Petitioners take the surplus funds from the Medicaid In-Home Personal Care program and redistribute them into other services for elders, like delivering meals to elderly who cannot leave their home and transportation services. At the very least, this new competition is expected to cut these surplus funds, preventing Petitioners from providing these additional services to elderly people.

Petitioner's fourth assignment of error: 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. Heather Connolly, the "unbiased hearing examiner" that presided over the hearings in this matter was anything other than unbiased. It was clear from the beginning that no matter what evidence the Petitioners proffered throughout this process, the decision was already made to grant A Special Touch'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 in the underlying matter.

Petitioner's fifth assignment of error: The 2023 Need Methodology promulgated by the WVHCA, as discussed thoroughly throughout this brief, is arbitrary and capricious. 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.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners believe that this Court will benefit from oral arguments on the assignments of error addressed in this brief. This matter involves: (1) "...assignments of error in the application of settled law..."; (2) claims of "...unsustainable exercise of discretion where the law governing that discretion is settled..."; and (3) a claim of "...insufficient evidence or a result against the weight of the evidence..." (*See* W. Va. R. App. P. 19). For these reasons, Petitioners request oral arguments in this matter under West Virginia Rule of Appellate Procedure 19.

ARGUMENT

I. Applicable Standard of Review.

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). If this Court finds that the WVHCA was clearly wrong under the applicable law and relevant facts, it has the option of various remedies:

The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate, or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision, or order are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency;
- (3) Made upon unlawful procedures;
- (4) Affected by other error of law;
- (5) Clearly wrong in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Id.

II. The WVHCA improperly found that there was an unmet need in the proposed service area provided in A Special Touch’s application because the evidence in the record shows that no unmet need exists.

The WVHCA found “that the evidence in the record supports a determination that an unmet need exists under the Authority’s own Need Methodology that was properly promulgated and signed into law by the Governor.” (Application Decision at pg. 9). For the Reasons below, this finding is clearly incorrect.

West Virginia code establishes a minimum criterion for Certificate of Need reviews. More specifically, “[a] certificate of need may only be issued if the proposed health service is...[f]ound to be needed; and [c]onsistent with the state health plan, unless there are emergency circumstances that pose a threat to public health.” W. Va. Code § 16-2D-12(a). As discussed above, the WVHCA promulgated a rule consistent with the statute requiring an applicant to show with **specificity** that there is an unmet need for the proposed service in the proposed service area. The WVHCA was clearly wrong in its finding that there was an unmet need in A Special Touch’s proposed service area. In fact, not only does the evidence not support this finding, but the evidence in the record shows the complete opposite. The record is riddled with documentation and testimonials clearly showing that no unmet need existed in multiple counties of the proposed service area.²

A finding of unmet need is both required 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). On April 27th, 2023, the WVHCA promulgated the following calculation for determining the need in any given county:

1. Total Number of Residents receiving Medicaid per county.
2. Total Number of Residents receiving Medicaid per county multiplied by 3% (this will give the total number of residents who may be receiving In-Home Personal Care services or who may benefit from receiving services).
3. The total Number of Residents, as reported by BMS, who are receiving In-Home Services is subtracted from the Total Number of residents in step two.

² A Special Touch must show an unmet need in each of the five counties, failure to meet the criteria in even one of these counties mandates that the application be denied.

4. If there is an unmet need of 25 or more then the County is considered open to additional providers.

5. If a new provider has been approved within the previous 12 months, the Authority will subtract 25 from each applicable county proposed.

(See D.R. 628). The previous standards that were promulgated in 2016 are similar, with the primary difference being that the multiplier in the second step was 1.25% in 2016 and was increased to 3% in April of 2023. chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://hca.wv.gov/certificateofneed/Documents/IN_HOME_PER_C.pdf. As discussed below, this change was based upon a rumor and represents a need that simply does not exist.

A Special Touch is unable to demonstrate any **actual unmet need** for Medicaid In-Home Personal Care services within Putnam or Fayette County. Throughout its application and its discovery, A Special Touch was unable to enter any legitimate evidence of unmet need into the record and relies entirely on the flawed Need Methodology calculation. (See D.R. 20-95); (See D.R. 792-794). This erred reliance on the Need Methodology calculation is discussed thoroughly below in Petitioners second assignment of error. Significantly, not only does the record clearly reflect that A Special Touch failed to meet its burden of showing an unmet need, but the Petitioners developed evidence and testimony within the record showing that there is in fact no unmet need in Putnam or Fayette County, as well as other counties in its proposed service area.

The WVHCA 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.” (Application Decision at pg. 25). 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 his 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. 904:23-24; 905:1-6). Furthermore, in an email from the Bureau of Medical Services ("BMS"), Teresa McDonough, Program Manager for TBI Waiver and Personal Care Services, adamantly takes the position that there "never has been or ever will be a 'wait list' for the Personal Care Services program." (See D.R. 756 – BMS e-mail).

The WVHCA relied on A Special Touch's assertion that Petitioners "completely ignores the testimony of Mr. Irving, Director of A Special Touch, who testified about the phone calls that his agency receives." (Application Decision at pg. 9). However, A Special Touch 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 D.R. 792-794). A Special Touch provides no evidence that these calls are due to an inability to find services and cannot prove that these calls are not from individuals who are ineligible or may just want to transfer. Furthermore, A Special Touch admits that it "does not know whether these callers were eligible for Medicaid personal care services." (See D.R. 793 – Interrogatory No. 10).

In addition to A Special Touch failing to show any evidence of unmet need, when asked if the Petitioners have ever had to reject an eligible participant, Jennifer Sutherland

testified “[n]ot in Putnam or Fayette County. We strive to serve all Medicaid participants in those counties.” (*See* D.R. 1110:8-9).³ Therefore, any argument of unmet need based on these alleged calls are nothing more than pure speculation and are clearly wrong when combined with Ms. Sutherland’s testimony, Tim Adkins testimony that he was unaware of any unmet need, and BMS’s clear statement that there is no waitlist for these services, and there never will be.

Not only has A Special Touch failed to meet its burden, but the Petitioners have actually proffered evidence in direct contradiction. Therefore, the WVHCA erred in approving A Special Touch’s application because the record is absent of any independent evidence of an unmet need, and A Special Touch failed to establish an unmet need as statutorily and regulatorily required.

III.) The In-Home Personal Care 2023 Need Methodology standards were improperly promulgated, and the WVHCA erred by relying on the arbitrary and capricious methodology.

The WVHCA erred in finding “[t]he standards under which A Special Touch’s application is being reviewed were lawfully promulgated and appropriately applied by the authority.” (Application Decision at pg. 13). 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 A Special Touch’s CON application.” (Application Decision at pg. 25).

The WVHCA relied solely on the 2023 Need Methodology referenced above in an attempt to show unmet need. However, as discussed below, the standards were

³ Due to the similarity of issues in CON File #23-2/3/4-12697-PC and this CON application, the parties agreed to use the prior testimony of Jenni Sutherland in this matter to avoid unnecessary duplication.

improperly promulgated by the WVHCA and as such, unmet need is being artificially inflated, thus, the WVHCA erred when it relied on such calculation.⁴ Most significantly, the WVHCA has admitted that it increased the percentage for unmet need based on a rumor that the West Virginia Bureau for Medical Services (BMS) was going to eliminate subcontracting for Medicaid In-Home Personal Care services. *Infra*.⁵ This was in addition to admitting that it has no actual knowledge of unmet need in Putnam or Fayette County. (See D.R. 904:23-24; 905:1-6). Not only does this invalidate the 2023 standards relied on by the WVHCA, but it also highlights that there is, in fact, no actual unmet need.

West Virginia Code §16-2D-6 sets forth the statutory requirements the WVHCA was required to follow when making any changes to the certificate of need standards. The WVHCA failed to meet the following requirements:

(b) When changing the certificate of need standards, the authority shall identify relevant criteria contained in section twelve and apply those relevant criteria to the proposed health service in a manner that promotes the public policy goals and legislative findings contained in section one.

(c) The authority shall form task forces to assist it in satisfying its review and reporting requirements. The task force shall be comprised of representatives of consumers, business, providers, payers and state agencies.

(d) The authority shall coordinate the collection of information needed to allow the authority to develop recommended modifications to certificate of need standards.

(e) The authority may consult with or rely upon learned treatises in health planning, recommendations and practices of other health planning agencies and organizations, recommendations from consumers, recommendations from

⁴ Not only were the Standards improperly promulgated, but they have also been improperly maintained since its promulgation. Section III of the state Health Plan Standards provides that the Need Methodology will be revised at least twice a year annually. (See D.R. 19; See D.R. 1557). The Standards were approved over a year ago and have yet to be revised.

⁵ To this date, subcontracting Medicaid In-Home Health Personal Care services is still permitted.

health care providers, recommendations from third-party payors, materials reflecting the standard of care, the authority's own developed expertise in health planning, data accumulated by the authority or other local, state or federal agency or organization and any other source deemed relevant to the certificate of need standards proposed for change.

West Virginia Code § 16-2D-6(b)-(e). For the reasons stated below, the WVHCA fell short of meeting these statutory requirements.

i.) The 2023 Need Methodology is Arbitrary and Capricious.

Tim Adkins, Director of the Certificate of Need Program at the WVHCA, provided his understanding of what occurs when the WVHCA does a formal review of its standards. (*See* D.R. 884). Mr. Adkins has been responsible for reviewing standards at the WVHCA since 2000. Mr. Adkins testified that he would start the review process by assigning an analyst to review the standards, then he “will assign the analyst a service, tell them to look at the service, tell them to see what’s going on nationwide in other CON states, to see how they’re handling the same service.” (*See* D.R. 884:5-17). Next the WVHCA will “compile the information, we look at what our current standards are saying, and then we will make a recommendation...” (*See* D.R. 884:18-23). In determining what changes should be made to the Medicaid In-Home Personal Care standards, Mr. Adkins assigned himself as the analyst. (*See* D.R. 885).

Mr. Adkins testified that a standard is only “an educated projection of what we think is going to be needed currently and for the next two to three years.” (*See* D.R. 885:13-22). Mr. Adkins testified “I did extensive research on what other --- what other states, what they’re projection.” (*See* D.R. 885:13-15). However, Mr. Adkins went on to aver that the state-to-state comparison was not possible for In-Home Personal Care standards, and therefore, was not utilized in modifying the standards. (*See* D.R. 887:1-9).

Mr. Adkins was then asked what he actually relied on in making modifications to the standards. (See D.R. 887:10-12). He responded that “there was a mistake in the 2016 standards,” more specifically, there was a calculation error in determining the difference between people who were eligible for the services and those who were actually being served. (See D.R. 887:13-24; 888; 28:1-5). This identified an issue with how the WVHCA arrived at 1.25%, but not how it reached a conclusion of 3%. With regard to the 3% he testified that the increase was pure conjecture based upon a rumor.

Tim Adkins, the same person relied on for these actions, testified that the reason for the increase was a suspicion that subcontracting was going to be prohibited in the future. Mr. Adkins was asked “[w]hen did you make the decision that you were going to increase the percentage used to determine unmet need?” (See D.R. 894:7-9). Mr. Adkins answered it was in early 2022 when “[w]e were informed that BMS was wanting to eliminate subcontractors.” (See D.R. 894:10-13). He went on to state “either the agencies who are --- are doing the subcontracting is going to have to pick up that additional, those additional patients, or there’s going to be individuals that go without services.” (See D.R. 895:2-6). Essentially, it was the WVHCA’s position that the percent of anticipated need had to be increased, not necessarily because there was additional unmet need, but because there would be unmet need if the Bureau of Medical Services eliminated subcontracting in West Virginia. To be clear, subcontracting has not been eliminated.

Prematurely modifying standards for the sole purpose of reacting to regulations that may or may not be implemented come with various issues that invalidate the standard itself. 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. This duplication of services comes with a

competition for resources, workers, and patients. A Special Touch argues that competition should be encouraged and that providing options for patients to pick from would result in better services.⁶ However, A Special Touch's argument fails to take into consideration the legislative intent behind the Certificate of Need Program as discussed *infra*.

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. 894:11-12; 896:14-24; 897:21-23). Like all rules that are promulgated, there is no guarantee that the rule will be the same at the inception of the idea to the implementation of the same. Additionally, there is no guarantee that the rule will pass legal muster and actually be enacted. Also, the WVHCA is relying on a phone call and not the actual language of any potential rule. The end language of the rule has the potential of affecting sub-contracting without actually eliminating it. Additionally, it is entirely possible that any elimination of subcontracting would have a delayed implementation for an unknown number of years. In any of these situations, the end result is likely to lead to an extreme duplication of services because the premise relied on by the WVHCA did not happen and harm is sustained as a result of this premature modification of the standard.

Third, increasing the number to 3% percent continues to be arbitrary and capricious because, as discussed above, there is no legitimate basis for the increase, and

⁶ It is worth noting here that Putnam already has ten (10) Medicaid In-Home Health Personal Care service providers that patients can choose from.

even in the event that subcontracting is to be eliminated, there are much better ways to address this change while still complying with the Certificate of Need statute. One way to better address this change is to wait and see what the actual language of the rule is, then react accordingly to comply with statutory requirements. Secondly, instead of arbitrarily increasing the need in anticipation of subcontracting being eliminated, simply implement a standard with contingencies in the event of the elimination. For example, the WVHCA could have promulgated a standard that implements the 3% only after subcontracting has been eliminated, or alternatively, grandfather in the current subcontractors.

The promulgation of this 2023 need methodology is arbitrary and capricious as the WVHCA had no evidence that more need was required. The best-case scenario is that the WVHCA relied on the fact that subcontracting might be eliminated in the future, which is still arbitrary and capricious for the reasons stated above.

Furthermore, clearly identifiable, and unexplainable flaws in the Need Methodology highlight the fact that the promulgated standards are arbitrary and capricious. More specifically, the calculations resulted in an unmet need of negative 25 (-25) in Brooke County. Obviously, it is not possible to have a negative need in a county and Mr. Adkins was asked about this error. He testified that “...there’s a problem with Brooke’s numbers...I’ve pointed it out...that the numbers just don’t jive for Brooke...[a]nd I don’t know the problem.” (*See* D.R. 916:19-23). A Special Touch proffers the argument that Brooke and Hancock counties were combined due to their position and size. However, Mr. Adkins testified that was just “one of the rumors they gave me.” (*See* D.R. 967:15). This highlights yet again that the WVHCA is relying on flawed logic to reach its conclusion of an unmet need. Additionally, this argument does nothing to address the fact the calculation resulted in an impossible unmet need. In fact, if the need methodology

requires the combination of counties to correct errors, that is just additional evidence that the numbers are flawed as a result of an arbitrary and capricious standard.

ii.) WVHCA failed to establish a need methodology that promotes public policy and the legislative findings of this Act.

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.

As is a common theme through this brief, and as discussed more in-depth above, there is no unmet need in Putnam or Fayette County, and the WVHCA erred in granting this application because it has resulted in a duplication of services. As discussed more thoroughly below, adding more service providers to a county with no unmet need will result in competition for resources, clients, and workers. Competition by its very definition creates duplication of services and a waste of resources. This is a direct contradiction of the legislative intent of the CON program. Therefore, the “competition” A Special Touch is asking for would result in duplicative services, a waste of resources, and therefore, a violation of the legislative intent of the CON program.

In the lower proceedings, A Special Touch contended that “the law envisions a balancing test in which duplicative services are but one of many considerations that the Authority must weigh.” (Application Decision at pg. 14-15). The WVHCA relied on this argument in finding “Although the Authority is charged with avoiding the unnecessary duplication of services, it must do so considering other factors such as cost, quality, and

access.” (Application Decision at pg. 15). Neither A Special Touch nor the WVHCA cite any authority for this premise. Additionally, both attempt to downplay the significance of the requirement despite it being the primary purpose of requiring Certificate of Needs.

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

Of course, the WVHCA found that it met the requirements of utilizing a task force, however, this was in error. The WVHCA is legislatively required to form a task force for the purpose of aiding in the review of the CON standards. The WVHCA held a task force meeting, or provider, meeting on September 29th, 2022. The September 29th meeting was the only “task force meeting” held by the task force. (*See* D.R. 902:11-14). When asked what a task force meeting is, Mr. Adkins provided an example: “[t]he task force, we had a task force...that was ordered by the legislation that was for hospice...the purpose of that task force was to develop new hospice standards...we had meetings that --- **that lasted a year.**” (*See* D.R. 899:17-24; 900:1-4). Mr. Adkins was then asked about the task force for the in-home personal care providers, Mr. Adkins responded “In-home --- in home personal care, it can be called a task force, **but it wasn’t to that extent.** It was mainly with the key players that worked with and that are providing the services. We had 19 people here.” (*See* D.R. 900:5-21).

The WVHCA relied on A Special Touch’s assertion that the “[task force] meeting lasted sufficiently long for meaningful discussion to occur regarding several topics, including the need methodology.” (Application Decision at pg. 11). However, the short one and a half hour “task force meeting” that was held on September 29th, 2022, fails to meet

the statutory requirement.⁷ The Petitioners in this matter were informed about the “task force meeting” just one day prior. Clearly the efforts to meet this task force requirement falls significantly short compared to the efforts made when modifying its hospice standards. Not only are these efforts significantly less, but no reasonable person could find that this short meeting could have any effective impact on a major decision as modifying the CON standards. In fact, Mr. Adkins noted at the end of the discussion of the CON standards, there was obviously a lot to cover, and more than one meeting was going to be needed. (*See* D.R. 1228:14-24). However, another meeting was never held.

Significantly, 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. 901:18-23). 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. However, it is also clear that this statutory requirement was not met in this instance. 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 A Special Touch and its application should be denied.

iv. WVHCA failed to consider the information it received through public comment and the information it had the ability to collect.

A Special Touch argues comments were received by multiple entities during the comment period for this new standard. (*See* D.R 1033). However, upon inspection of

⁷ The need methodology was only one of the topics covered in this hour and a half meeting and did not take up the full time of the meeting.

these comments, one would see that the majority of these comments were criticizing the increase from 1.25% to 3%. Putnam County Aging Program, Inc. was one of the many current service providers that contested the claim of an unmet need. (*See* D.R. 18-19). Despite these comments, the WVHCA continued with its plan to open up fifty-one (51) of the fifty-five counties in West Virginia. WVHCA was required to hold a comment period, but it is clear that the process was nothing more than a formality as the comments, and accompanying logic, fell on deaf ears.

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 WVHCA erred in finding that granting the application would have no negative effect on the community by significantly limiting the availability and viability of other services or providers.

The WVHCA erred when it found no evidence of a negative effect on Petitioners, and that the Petitioners worries are unprovable and speculative. (Application Decision at pg. 14). Petitioners provided ample evidence showing that the WVHCA's finding is clearly wrong.

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. 627). 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. Petitioners provided evidence that granting this CON would Negatively Affect the Petitioner's services by taking clients and employees away from the Petitioners.

It is an inherent principle that additional competition in an area of business will result in the competitors fighting over employees in the workforce, clients, and resources. This premise is exaggerated in the realm of West Virginia Medicaid In-Home Personal Care services where it is clear no need exists. Furthermore, in its interrogatories, A Special Touch stated “[g]ranteeing A Special Touch CON approval will provide Level D AWD clients in Kanawha, Putnam, Cabell, Wayne and Fayette County with greater continuity of care.” (See D. R. 792 Interrogatory No. 7). During the hearing in this matter, A Special Touch explained that it has clients receiving services who are also receiving Medicaid Personal Care services from Putnam County Aging Program, Inc. (See D.R. 1564:2-8). It is clear from A Special Touch's answers and testimony that, if this CON is granted, it intends to provide In-Home Personal Care services to clients that are already receiving these services by the Petitioners. This is only one group of clients that are at threat of being poached by new competition. Not to mention the new clients that will opt to do business with A Special Touch, which will also result in loss of service for the Petitioners. Clearly, the Petitioners will lose clients if this Application is to be granted.

As discussed above, the Petitioners are currently able to provide services to every person in need. However, if A Special Touch begins to steal employees and potential employees away, it will become more difficult to provide services in Putnam and Fayette County. Potentially to the point the Petitioners are ousted from providing services in these Counties. In A Special Touch's answers to interrogatories, it stated that it intends to use its profits to “employ more West Virginians.” (See D. R. 794 - Interrogatory No. 13). In an already limited employee market, this means the Applicant will ultimately end up

depriving the Affected Parties from being able to keep employees, and to hire new ones. Therefore, this application should be denied as it will negatively affect the services to the elderly by the Affected Parties.

ii. WVHVA erred in finding that Petitioners will not be Negatively Affected by Preventing them from Providing Transportation and Nutrition Services.

The Petitioners use the income gained from their Medicaid In-Home Personal Care services to provide additional services in Putnam and Fayette County. As discussed above, the addition of more service providers in counties which have no unmet need will foster additional competition over limited resources, clients, and employees to the already ten (10) providers in Putnam County alone. This is the exact duplication of services that the CON statute is attempting to prevent, and it is clear why. The more these for-profits expand, the less and less the Petitioners will be able to invest back into the community. Additionally, A Special Touch has already argued that it intends to use its profits to expand its business and acquire more employees within the proposed service area. (*See* D.R. 793-794). Essentially, it will be difficult for a non-profit that is putting its surplus income back into the community to compete with a for-profit company that has already expressed its intent to use its profits to take from the existing providers.

iii. Other Services Includes Other Services to Elders such as Transportation and Nutrition Services.

The WVHCA found that “[t]hese services such as meal delivery and transportation are not services covered by A Special Touch’s application, nor are they services the Authority exercise jurisdiction over whatsoever.” (Application Decision at pg. 14). However, 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. 932:9-24; 932:1-11).

Mr. Adkins heads the Certificate of Need program and is the proper person to interpret these standards. There is zero doubt that Mr. Adkins interprets other services to

include those underfunded transportation and nutrition services provided by the Petitioners. Therefore, A Special Touch's argument that these other services do not fall under "other services" is incorrect WVHCA erred in making that finding.

V. The WVHCA's clear bias throughout the underlying administrative proceedings is a clear abuse of power, and therefore its discretion should not be considered, or at least diminished.

The Petitioners challenged a total of six (6) Certificate of Need applications that were filed with the WVHCA. (CON File No. 23-2/3/4-12697-PC; CON File No. 23-12/3/4-12702-PC; CON File No. 23-12-12717-PC; CON File No. 23-2/3/4/5-12699-PC; CON File No. 23-1/4-12694-PC; CON File No. 23-2/3-12689-PC; CON File No. 23-1/4-12694-PC). All six applications were granted against Petitioners objections. In each challenge, the Petitioner's appeared before the WVHCA for in person hearings. Each hearing was presided over by the same "unbiased hearing examiner" – Heather Connolly. Ms. Connolly, however, was adverse to the Petitioners from the very beginning. She is the counsel of record for the WVHCA. In fact, Ms. Connolly was the attorney that argued against the Petitioners circuit court filing challenging the legitimacy of the Health Care Standards discussed above. She took on the role of arguing against the Petitioners, then subsequently took on the role of judge, jury, and executioner in determining the validity and applicability of those same standards.

It is difficult to pick up on the constant hostility, and the one-sided treatment through transcript testimony alone. However, there were multiple instances in this record alone that are examples of Ms. Connolly's biased conduct. For example, when petitioners were questioning another applicant about being sued by the DHHR for Medicaid Fraud, opposing counsel made a general objection, and Ms. Connolly sustained the objection

without any opportunity to respond. (*See* D.R. 1305:15-19). Petitioners were then required to ask on what basis, to which Ms. Connolly then went on to argue that the information is not relevant. (*See* D.R. 1305-1309). However, one would find it difficult to believe that an entity being sued for Medicaid Fraud is not a relevant fact in a procedure to determine if the same entity should be permitted to provide **Medicaid** In-Home Personal Care services.

On other occasions, Ms. Connolly would restrict Ms. Sutherland from providing testimony of the services Petitioners provide in support of their argument that their services would be negatively affected if the application was granted. (*See* D.R. 1287; 1363:13-16). Ms. Connolly unilaterally determined that these services were not relevant, despite Tim Adkins explicitly testifying that these are the type of services that are relevant under the standards. (*See* D.R. 1287). However, when opposing counsel started questioning Petitioners about their financials to argue they would not be negatively affected, Ms. Connolly made a ruling that the topic that was previously irrelevant during the Petitioners questioning is now relevant for A Special Touch's questioning. (*See* D.R. 1391:9-15). Furthermore, Ms. Connolly even took on the role of cross examiner and questioned Ms. Sutherland extensively on this "irrelevant topic." (*See* D.R. 1365-1368).

Another example of the WVHCA's bias, although not on record in this case, is when Ms. Connolly unilaterally dismissed Petitioner from challenging two other applicant's Applications on separate Motions for Summary Judgment, **prior to the evidentiary hearings**. (CON File No. 23-2/3-12689-PC; CON File No. 23-1/4-12694-PC). Both of the cases have been appealed and are now pending before the West Virginia Intermediate Court. Ms. Connolly unilaterally determined that there was no evidence that the

Petitioners could offer that would change the WVHCA's mind about granting the application. Although this was in another matter, this is clear evidence that the WVHCA made its mind up about granting the applications far before any evidence was ever entered into the record.

One of the more hostile hearings that Petitioners had in front of Ms. Connolly was the hearing on October 13th, 2023, for the purpose of entering Tim Adkins testimony into the remaining CON procedures. (*See* D.R. 862). Ms. Connolly started off the hearing by essentially admitting that the WVHCA will take the improperly promulgated Need Methodology at face value, and not consider any information to the contrary. Ms. Connolly testified that “[t]he authority has decided to make [Tim Adkins] available to vouch the record and explain the actions of the Authority’s relating to the change in the standards.” (*See* D.R. 868:17-20). Ms. Connolly, as the hearing examiner, independently decided that the testimony of Tim Adkins would have no bearing on the WVHCA’s decision regarding the application. More specifically, she determined that “other services” do not encompass the meals and transportation services discussed above, despite Mr. Adkins later testifying that it does. (*See* D.R. 1287). This decision led to Ms. Connolly restricting relevant testimony from entering the record. This claim is especially improper as it is the WVHCA Board that weighs the facts and issues a finding, not Ms. Connolly in her capacity as a hearing examiner as the hearing examiner’s powers are limited through statute. W. Va. Code § 29A-5-1.

Another example of unfair treatment during Mr. Adkins evidentiary deposition was when Petitioners asked “[i]f subcontractors were able to manipulate this number by using, counting, and I don’t mean manipulate in a bad way. I mean change the need

methodology by adding or counting people they're serving in the county, shouldn't that be included in this section." (*See* D.R. 921:22-24; 922:1-2). Ms. Connolly prevented Mr. Adkins from answering and responded with "You know, I'm --- I've allowed an awful lot by now. But you're asking him hypothetical questions. He --- we're --- we're beyond where he's talking about it. You're asking him about development of methodology and hypothetical questions about things that aren't there..." (*See* D.R. 922:3-8). It is absurd to find a line of questioning regarding subcontracting improper when the WVHCA's primary reason for changing the standards in the first place was to address a hypothetical and speculative issue that may, but has yet to, happen with subcontracting of these services.

These are only a few examples of the manner in which Ms. Connolly and the WVHCA treated the Petitioners throughout various hearings. The egregiousness of Ms. Connolly's and the WVHCA's conduct cannot be exemplified through just a few examples. The severity of the misconduct comes more from the constant little acts throughout every interaction. And although it is difficult to read the hostility that was present during each encounter, Petitioners would implore this Court to read the transcripts and pay close attention to Ms. Connolly's input.

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. Heather Connolly, the "unbiased hearing examiner" that presided over the hearings in this matter was anything other than unbiased. It was clear from the beginning that no matter what evidence the Petitioners proffered throughout this process, the decision was already made to grant A Special Touch'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. The 2023 Need Methodology promulgated by the WVHCA is arbitrary and capricious and should therefore be found to be invalid.

As discussed above, the 2023 Need Methodology as promulgated by the WVHCA is arbitrary and capricious. As mentioned in A Special Touch's Brief, 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. 1031 n. 6). In response, the WVHCA made the argument that Petitioners "failed to exhaust [their] administrative remedies." (*See* D.R. 1278:22-24). More specifically, it argued that Petitioners had not exhausted their administrative remedies because they had not yet concluded the underlying WVHCA proceedings. 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.

CONCLUSION

First, the WVHCA erred in finding there is an unmet need for Medicaid Personal Care services in Putnam or Fayette County. Second, the WVHCA erred in finding that

granting this application would not result in duplicative services and a waste of resources. Lastly, the W VHCA erred in finding 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 West Virginia Code and the rules promulgated by the Health Care Authority. Furthermore, the W VHCA biased conduct in this matter should strip it of its discretion in this matter.

Petitioners ask that the W VHCA's decision granting A Special Touch'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-97

A Special Touch In Home Care, LLC,
Applicant Below, Respondent

And

West Virginia Health Care Authority,
Respondent

CERTIFICATE OF SERVICE

I, Ryan W. Walters, do hereby certify that on this 21st day of June, 2024, I filed the forgoing “*Petitioner’s Brief in Support of Appeal*” to be served on counsel of record via File & Serve Express.

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