IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

ICA EFiled: Aug 26 2024
05:30PM EDT
Transaction ID 74155626

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' 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 A Special Touch In Home Care, LLC* and *Brief of Respondent West Virginia Health Care Authority*.

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STATEMENT REGARDING ORAL ARGUMENT AND DECISION

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

ARGUMENT

I. Respondents' arguments fail despite any deference.

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

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

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

pre-*Loper* standards, when "reviewing the decision of an administrative agency's factfinder . . . the [appellate] court is required to accord deference to the hearing examiner's findings of fact unless they are '[c]learly wrong in view of the reliable, probative, and substantial evidence on the whole record[.]'" *Minnie Hamilton Health Care Ctr., Inc. v. Hosp. Dev. Co.*, 2023 W. Va. App. LEXIS 92, 5 (W. Va. App. 2023). Respondent A Special Touch In Home Care, LLC, ("A Special Touch") cites case law for the premise that "[t]he only circumstance where West Virginia Courts will not defer to an Agency's interpretation is where 'the legislature has directly spoken to the precise question at issue. If the intention of the Legislature is clear, that is the end of the matter, and the agency's position only can be upheld if it **conforms to the Legislature's intent**.'" (Resp't WVHCA's Br. at 14) (*Citing Amedisys W. Va., LLC v. Pers. Touch Home Care of W. Va., Inc.,* 245 W. Va. 398). As Petitioners explained in its initial Appellate Brief, and as further explained below, the WVHCA's underlying decision is in direct contradiction of W. Va. Code § 16-2D *et. al.* A finding of unmet need is both required by statute, and necessary to comply with the legislative findings of the CON statute: preventing duplication of services and unnecessary waste of resources. (W. Va. Code § 16-2D-1; § 16-2D-12(a)(1)).

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

Respondent A Special Touch is insufficient to meet this burden. The evidence and arguments proffered by Petitioners in regard to unmet need is provided by Petitioners to highlight that not only did Respondent A Special Touch fail to establish its burden, but Petitioner's evidence displays the exact opposite of what it claims.

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

Respondents argues "A Special Touch demonstrated unmet need not only through the Need Methodology itself but also through testimony of Tim Adkins." (*See* Resp't A Special Touch's Br. at 17). Respondents attempt to support this finding by arguing that the Need Methodology was proper to rely on, other applicants have utilized the Need Methodology, that Tim Adkins testified to phone calls he received regarding personal care services, and that a lack of a waitlist or any identifiable individuals who were unable to receive services is "misdirection." (*Id*. at 17-18) These arguments lack merit and fail to meet the burden A Special Touch was statutorily required to carry. However, Respondents' attempts fail to justify how an unmet need exists in these two counties, even under the authority's own standards.

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

First, Respondent A Special Touch claims to have independent evidence of an unmet need, relying on Mr. Adkins' testimony that he "continually" receives calls regarding personal care services. (*See* Resp't A Special Touch's Br. at 18). A Special Touch also argues that it provided evidence through its interrogatories and testimony of its director Julian Irving to show unmet need existed. (*See* Resp't A Special Touch's Br. at

20). Both of these independent pieces of evidence have the same issue, neither make any kind of showing of unmet need and are just merely calls from individuals seeking a service that they could receive from one of the other service providers in the county. Respondents provided no evidence that these individuals were unable to receive services or that they were even eligible for services.

As to the calls received by Mr. Adkins, the WVHCA argued that "the calls from individuals seeking these services were common enough he could explain the Authority's ordinary process to 'send a call like that to one of the analysts,' who know 'that we refer everything to the Bureau of Senior Services to say who are and who are not providers in their county." (Resp't WVHCA' Br. at 10-11). This "independent evidence" is nothing more than a showing that individuals were attempting to contact current service providers. In fact, Mr. Adkins was asked "[s]o the fact that you have people calling…and questioning, asking questions about services didn't provide you with any evidence that there's actually a need out there?" (*See* D.R. at 905:15-19). To which Mr. Adkins answered "No." *Id.*

The calls proffered by A Special Touch similarly show nothing more than individuals attempting to contact an approved service provider. A Special Touch relies on its Interrogatories and testimony of its director, Julian Irving, to show it "received a multitude of calls from Medicaid-qualified individuals who are not currently receiving personal care services regarding the need for those services." (*See* Resp't A Special Touch's Br. at 20). However, like Mr. Adkins, Respondent is unable to identify if any of these individuals were unable to be served by another provider. As Respondents have already mentioned, there are already eleven (11) providers in Putnam County alone.

Respondent also argues that "Putnam's only evidence offered to counter A Special Touch's evidence is their own self-serving statement that they 'strive to serve all Medicaid participants,' which is itself pure speculation and simply does not demonstrate that the WVHCA's finding of unmet need in Putnam and Fayette Counties was clearly wrong." (Resp't A Special Touch's Br. at 20). However, this ignores the remainder of Mrs. Sutherlands' testimony that she has never had to reject a Kepro Medicaid In-Home Personal Care referral due to the fact that Petitioner did not have the capacity to handle them. (*See* D.R. at 1110:2-8). Petitioner has provided personal knowledge to the lack of unmet need, yet all Respondent can do is speculate about the nature of the calls it relies on.

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 were improperly relied on.

Second, A Special Touch argues that "[s]everal other applicants have availed themselves of the same calculation and have successfully applied for approval and the issuance of certificate of need under identical circumstances." (Resp't A Special Touch's Br. at 16-17). This argument is also flawed. The WVHCA's improper use of the 2023 Need Calculations in other applications does not justify their improper use here. Additionally, entertaining the thought that the use of the 2023 Need Calculations is proper, then there would be an even lesser need than when A Special Touch initially filed its application. In

fact, Respondent A Special Touch provides a list of seven (7) other applicants that have already been granted Certificate of Needs in counties that A Special Touch is seeking to provide services within. Significantly, the incorporation of these additional service providers was not taken into consideration by the WVHCA when determining the need in the proposed service areas. Highlighting yet another error when finding the Applicant met its burden of showing unmet need.

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

Next, Respondents attempt to attack an email from the Bureau of Medical Services ("BMS"), Teresa McDonough, Program Manager for TBI Waiver and Personal Care Services. The email provides: "never has been or ever will be a 'wait list' for the Personal Care Services program." (*See* D.R. 756 – BMS e-mail). Respondent A Special Touch takes the position that Petitioner has misinterpreted this e-mail, and that the non-existence of a waitlist is not because there is not a provider of those services available, but that a "waitlist" is "a term to represent a certain number of designated slots for the service under the waiver program." (Resp't A Special Touch's Br. at 18-19). Although Respondent A Special Touch's argument is unsupported by the record, even assuming its interpretation is correct, the lack of need for any waitlist is still evidence of no unmet need. In Addition to Mr. Adkins testimony showing that individuals were not calling WVHCA with issues of not being able to receive services, BMS evidently had no need to create any sort of waitlist for individuals who were unable to receive personal care services. Again, this evidence of unmet need is unnecessary as Respondents have already failed to meet its burden of showing an unmet need, however, Petitioners' evidence of an actual unmet need highlights why Respondents were unable to satisfy this burden.

Interestingly, Respondent A Special Touch argues, contradictory to the record, that "the full transcript from Mr. Adkins' deposition makes abundantly clear that Mr. Adkins was never asked about is personal knowledge of the unmet need in Putnam and Fayette County." (Resp't A Special Touch's Br. at 19). 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. 904:23-24; 905:1-6). While testifying under oath, Mr. Adkins admitted that there was no data to support a finding of actual unmet need. Mr. Adkins testified "no" to any personal knowledge, because as discussed above, Mr. Adkins had no reason to believe that the calls he received, the calls that Respondents rely so heavily on, were from individuals unable to attain services.

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

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

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." (*See* Application Decision pg. 25). 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 A Special Touch relies on *Chevron*, 467 U.S. 837, to argue for judicial deference in the promulgation of the 2023 Need Methodology. (*See* Resp't A Special Touch's Br. at 21). A Special Touch does drop a footnote claiming that although *Chevron* has been overturned, "West Virginia's state law remains unchanged. (*Id* at f.n. 9). However, the decision to overturn *Chevron* is still new, and West Virginia Courts are just now getting the opportunity to reevaluate what this means for state agency deference. Now that the core pillar for these cases has been stripped away, Courts will now have to determine to what 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's Br. at 13). 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 A Special Touch's Br. at 22; Resp't WVHCA's Br. at 14-17). However, through Mr. Adkins testimony, and the evidence in the record, it is clear that the steps taken had no bearing on the final 2023 Need Calculation, and ultimately, **it was only the expectation that subcontracting would be eliminated that drove the decision to arbitrarily modify the Standards.** The list included by the Respondents include: (1) that the assignment was transferred to an analyst; (2) that a national comparison was conducted; (3) that there was some pre-existing issue with the standards; (4) that the standards were compared against other standards; (5) that the WVHCA contemplated changing the percentage to 2.5% in 2016; and (6) an evaluation of Medicaid data. (*See* Resp't A Special Touch's Br. at 22). These "steps" relied on by the Respondents' do nothing to justify the arbitrary implementation of the Need Methodology Standards for the following reasons:

(1) Mr. Adkins testified that an analyst will typically be assigned to a service that is set to be changed, and that analyst will collect data for the upcoming changes. (*See* D.R. 1068:8-17). For the 2023 Need Methodology changes that are the subject of this appeal, Mr. Adkin's testified that he assigned himself as the analyst. (*See* D.R. 1069). Therefore, it is accurate to claim that Mr. Adkins' testimony is the most accurate representation of the process, methodology, and purpose behind the 2023 Need Methodology changes.

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

> Q. And as your review of the personal care standards, did you look at other states and see what they're doing?
>
> **A. Unfortunately, no other state reviews in home personal care. Now, I believe it's Mississippi in 2020, this past year, they did pass a bill that was going to --- it looked to me it was going to require some regulation. But the others, to my knowledge, there's 35 states that have CON, and to my knowledge, none of the rest have, review CON.**
>
> **...**
>
> Q. ...So when you're doing --- the comparison you talked about that's typically done with reviewing standards, it's fair to say what --- a state by state comparison wasn't possible?
>
> **A. It was not possible.**

(*See* D.R. 886:13-22; 887:2-6).

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

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

(*See* D.R. 888:24-889:1-8). To clarify, the issue was that eligible individuals were calculated based off an average, while surveys sent to existing providers were a snapshot of data, not an average. (*See* D.R. 889-891). It is unclear why Respondents rely on this

prior error to support their claim. The new standards do not involve a survey and have little relevance to the standards being discussed in this matter. In fact, the only premise this prior error shows is that the WVHCA made the decision to forgo obtaining this additional type of data in its new standards.

(4) As for the comparison to other standards, Mr. Adkins testified that he looked at three other standards. (*See* D.R. 890:16-17). However, Mr. Adkins further testified that the standards he reviewed did not equate to Medicaid In-Home Personal Care standards in any way other than they were still "community based." (*See* D.R. 891:24-892:1-3).

(5) A Special Touch argued that "[t]he increased threshold was also grounded in the WVHCA's prior experience revising the standards in 2016, when the WVHCA's had considered a rate of 2.5% based on **research at that time** but then halved the rate to 1.25% because Medicaid was suffering through a crisis." (*See* Resp't A Special Touch's Br. at 23). Respondents' argument fails for two main reasons. First, neither Respondent provides any justification for the proposed 2.5% change in 2016. Not only could the reasons for the proposed 2.5% change be on improper grounds like the 2023 standards, but there is no way to know what all the considerations were to ultimately not increase the threshold. Second, and more importantly, the 2016 standards were seven years before the Standards being discussed in this matter. Respondents want this Court to blindly accept its assertion that there is more need today than there was in 2016. Respondents provided no evidence for this assertion. It is just as likely that the need has dropped.

(6) The Medicaid data relied on by Mr. Adkins were merely individuals on Medicaid, not individuals who were, or could be, eligible for Medicaid In-home Personal Care services. (*See* D.R. 893:14-24). Therefore, this "data" provides nothing more than

speculation. Additionally, there is no evidence in the record to show that the existing service providers could not provide the "unmet need" claimed by the Respondents.

Respondent A Special Touch asserts that all these previous steps were taken before "ultimately determining to consider increasing the percentage used to determine unmet need." (*See* Resp't A Special Touch's Br. at 22). 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. 894:7-9). Mr. Adkins testified that it was when "[w]e were informed that BMS was wanting to eliminate subcontractors." (*See* D.R. 894:12-13). It is clear that the potential elimination of subcontracting was the one and only reason that the WVHCA decided to modify the standards.

Respondents poorly attempt to justify the WVHCA's reliance on the potential elimination of subcontracting for its decision to modify the standards. Respondents argue that Petitioners do not cite any laws or precedent supporting their argument that prematurely increasing the unmet need is improper. (*See* Resp't A Special Touch's Br. at 23; Resp't WVHCA's Br. at 17). However, Respondents continue to ignore the fact that the WVHCA's actions were in direct contradiction of the Certificate of Need's legislative intent. First, if BMS does actually eliminate subcontracting, the period of time between granting applications, and the elimination creates duplication of services in violation of West Virginia Code § 16-2D-1. Second, there is a severe lack of evidence to support the premise that subcontracting will be eliminated. Mr. Adkins, the one who relied on subcontracting being eliminated referenced the information he received as "hearsay" and testified that there was nothing in writing, but an employee from BMS "stated that they

were working on the plan and that that was still in process, the eliminating the subcontractors." (*See* D.R. 894:11-12; 896:14-24; 897:21-23).[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 A Special Touch's Br. at 22-23; Resp't WVHCA's Br. at 18-19). In essence, the Respondents are asking this Court to give deference to the WVHCA for a prediction of what another agency may do. This, however, makes no sense. The WVHCA has no control over the actions of BMS and cannot reasonably predict what BMS will do, nor should they be permitted to, especially 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 A Special Touch argues that the purpose of the CON process is not to prevent duplication, but "avoid unnecessary duplication of health services" (*See* Resp't Br. at 26). A Special Touch then attempts to persuade this Court that Competition is

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

expected within the counties as the Standards anticipate multiple providers within a county. However, A Special Touch is failing to make a crucial connection. When there is an unmet need in a county, the addition of a service provider would not be an unnecessary duplication of services. However, in the instance where there is no unmet need in a county, like in this matter, the addition of a service provider does create an unnecessary duplication of services.[2]

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

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

Respondents attempt to justify the "task force meeting" that occurred on September 29th, 2022, as sufficient to meet the statutory requirement, it does not. Respondent WVHCA argues that Petitioners overstated its position that more than one meeting would be required to sufficiently discuss the proposed changes. (*See* Resp't WVHCA Br. at 16). As the record reflects, no additional meetings were held. Respondents argue that the decision not to have another meeting does not illegitimize the initial

[2] A Special Touch also argues that Petitioners argument does nothing more than to shield the already existing "monopoly." (*See* Resp't A Special Touch's Br. at 27). However, there were already eleven providers in Putnam County prior to this application.

meeting. However, as discussed in Petitioners initial Brief, the initial meeting falls significantly short of the statutory requirement because not only were the discussions cut short with no follow-up, but only a few topics were covered on this complex topic, leaving many undiscussed.

Additionally, as mentioned in Petitioners' Brief, the decision to make the modification was made prior to this meeting, and the incomplete discussion at the "task force meeting" was nothing more than a failed attempt to meet the statutory requirement. The decision to increase from 1.25% to 3% was made prior to the task force meeting. Mr. Adkins was asked "had the decision already been made by you to increase the percentage, the multiplier for unmet need?" and Mr. Adkins responded "[i]n the standards, the revised standards did have the three percent. Yes." (*See* D.R. 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. 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 available information as required by statute.

Respondents argue that there is no authority relied on in Petitioners' Brief to support the premise that the WVHCA failed to rely on available information. (*See* Resp't A Special Touch's Br. at 29). 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 does not satisfy A Special Touch's burden.

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 13-14).

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 12-13; D.R. 916-917). Mr. Adkins was informed of this combination of numbers through a call. 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 916:19-24; 917:1). Mr. Adkins further testified "I have no idea how they get their numbers." (*See* D.R. 966:5).

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. 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. "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 A Special Touch's Br. at 30-31; Resp't WVHCA's Br. at 20). 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; 933:1-11).

A Special Touch attempts to argue that "other services" do not pertain to services like transportation and Meals on Wheels. (*See* Resp't A Special Touch's Br. at 30-31). It does so by analyzing the way in which questions are asked on the Application. (*Id*). However, Respondents' tortured interpretation of drawing a connection between the meaning of "other services" and the questions on an Application is unnecessary as the intent is already known. Mr. Adkins, the individual responsible for the 2023 Need Methodology Standards, clearly states his concern regarding entities being able to continue providing other services with money obtained through Medicaid In-Home Personal Care services.

Respondents attempt to argue "Mr. Adkins does not specify what those 'other services' include…" (*See* Resp't A Special Touch's Br. at 31). Respondent is attempting to create doubt where there is no doubt to be had. The testimony of Mr. Adkins above shows him discussing the Medicaid In-Home Personal Care Standards. When discussing this requirement, he clearly states that he knows that providers use those dollars (the money received through Medicaid In-Home Personal Care Standards) for other services. It would make no sense for Mr. Adkins to refer to the same service he is discussing as an "other services." The intent of Mr. Adkins is clear, Respondents cannot create unfounded doubt or use secondary sources to contradict the clear intent behind the definition of "other services."

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

A Special Touch argues Petitioner misrepresents Interrogatory responses demonstrating A Special Touch's intent to steal PCAP workers and clients (*See* Resp't A Special Touch's Br. at 32). Petitioners have already argued that A Special Touch answered in its Interrogatories that its clients will "receive better continuity of care." (*See* D.R. 571 – Interrogatory No. 7). This was in regard to A Special Touch's Aged and Disabled Waiver Program ("ADW") clients who are currently receiving Medicaid In-Home Personal Care services from another provider. *Id.* Essentially, it is clear A Special Touch will attempt to take clients from other personal care providers if the client is already receiving a wraparound service from A Special Touch. A Special Touch's allegation of mischaracterizing its interrogatories is unfounded.

Respondents next argue that Petitioners did not proffer any evidence that the granting of this application would prevent Petitioners from continuing to provide the

services, or whether funds could be shifted to cover the loss in resources. (*See* Resp't A Special Touch's Br. at 30). First, Ms. Sutherland testified that the additional funds received from Medicaid In-Homer Personal Care go to providing underfunded or unfunded programs like transportation and Meals on Wheels. Without this supplemental funding, Petitioners could no longer supply these services. Ms. Sutherland also testified that she has already seen a decrease in revenue in counties where other applications have been granted. (*see* D.R. 1370:8-19). Second, Respondents claiming that Petitioners could shift their funds around to cover the loss in revenue makes no sense. Petitioners provide a multitude of services to elderly individuals and cannot afford to dump its safety net into just a couple of those services. Even if the Petitioner were to do that, this is not an infinite source of money, it would eventually run out, and the services would ultimately still come to an end.

WCHCA argued that there are already ten other providers "competing" against the Petitioners and "Petitioners do 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 24). First, the difference between the current service providers and any additional providers is that the current providers fill an unmet need, whereas any additional would have to pull from the existing market. Second, although even one will have the negative effect absent unmet need, five other applications have since been granted to provide services in Petitioners' counties, each decision has been appealed by Petitioners.

Respondent A Special Touch argues that Petitioner will not lose revenue because additional competition is being introduced to meet unmet needs. (*See* Resp't A Special

Touch's Br. at 30). However, as argued above, there is no unmet need in Putnam and Fayette County and the additional services providers will simply lead to unnecessary duplication. This duplication of services comes with a loss of revenue as Petitioners will now have to compete for a limited clientele. A Special Touch also asserts that "competitors are not necessarily fighting over existing market share, but rather population growth and aging." (*See* Resp't A Special Touch's Br. at 33). However, Respondent provides no evidence that West Virginia, or even Putnam and Fayette County, have a growing Medicaid eligible elderly population.

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

Respondents argue that there is no inherent bias with the hearing examiner being the WVHCA's attorney. (*See* Resp't A Special Touch's Br. at 34). Petitioners agree with that point. The issue in the underlying matter is not her position, but her conduct throughout the underlying hearings. Although Ms. Connolly's position is most certainly a motivating factor for her hostility towards the Petitioner's, that is not the alleged misconduct. West Virginia Code requires that "[a]ll hearings shall be conducted in an impartial manner." (*See* W. Va. Code §29A-5-1(d)). The examples provided by the Petitioner in their Brief show that Ms. Connolly's conduct created 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 A Special Touch's Br. at 37-38; Resp't WVHCA's Br. at 26). Ms. Connolly made many decisions, including improperly granting summary judgments and preventing the admission of relevant evidence. Although Respondents point out that some of these decisions were in other, but similar, matters, Ms. Connolly's hostility through the hearing in this matter undoubtedly

influenced the record. Respondents attempt to downplay the hostility and argue that any hostility that did occur would not influence the ultimate decision. However, the statute requires an impartial hearing for a reason. If it is clear that the underlying hearing examiner was biased through her actions, it does not put a burden on a party to show that the outcome of the decision would have been different. The statute mandates an impartial hearing because it is assumed that a party will be disadvantaged in a biased hearing.

Respondents attempt to diminish the significance of the examples provided by the Petitioners. Essentially, Respondents argue that that Ms. Connolly's actions are permissible and were for the purpose of "managing the conduct of the hearing." (*See* Resp't A Special Touch's Br. at 35-37; Resp't WVHCA's Br. at 27-30). Although Respondents attempt to downplay the hostility, upon review of the testimony cited by Petitioners, it is clear to see the bias of Ms. Connolly.

The West Virginia Health Care Authority's bias throughout the administrative proceedings is clear evidence that the relevant facts and law were not taken into consideration. It was clear from the beginning that no matter what evidence the Petitioners proffered throughout this process, the decision was already made to grant 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. This Court need not overrule the 2023 Need Methodology to grant Petitioners' requested relief.

As discussed above, the 2023 Need Methodology as promulgated by the WVHCA is arbitrary and capricious. Although the 2023 Need Methodology is improper, and therefore cannot be relied on by the WVHCA to support a finding of unmet need, this Court need only find an improper reliance on the Methodology and does not need to overrule the same. Petitioners filed a Verified Complaint Seeking a Preliminary Injunction, Permanent Injunction, and Declaratory Judgment in the Circuit Court of Kanawha County against the promulgated standards. (*See* D.R. 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. To be clear, Petitioners do not believe WVHCA's perceived administrative exhaustion is required.

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

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

(*See* Pet'r Br. at 31). Petitioners made this request solely for the purpose of resolving any concern by the WVHCA in regard to exhausting administrative remedies.

CONCLUSION

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

Petitioners ask that the WVHCA's decision granting 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*,**

By Counsel

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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 26th day of August 2024, I filed the forgoing "*Petitioners' Reply Brief*" to be served on counsel of record via File & Serve Express.

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