IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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

vs.) NO: 24-ICA-98

Panhandle Support Services, Inc.,
Applicant Below, *Respondent*

And

West Virginia Health Care Authority,
Respondent

PETITIONER'S REPLY BRIEF[1]

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The petitioner maintains its request for oral arguments in this matter under West Virginia Rule of Appellate Procedure 19.

ARGUMENT

As an initial matter, Respondent Panhandle Support Services, Inc., ("Panhandle") grossly oversimplifies, misstates, and mischaracterizes Petitioner's arguments. Panhandle asserts that that Petitioner's arguments "distill" down to two points: (1) that the 2023 PC Standards and Need Methodology were improperly promulgated, and (2) that there "might" be a negative effect on the community because Petitioner will lose its ability to fund its Meals on Wheels program. (*See* Resp't Panhandle's Brief at 3). The petitioner does assert that the Need Methodology Standards were improperly promulgated. However, the Petitioner presented clear evidence, or would have through a complete record, that the granting of additional service providers in Putnam County will not only negatively affect its Meals on Wheels service, but also other services including transportation services for the elderly. More significantly however, Petitioner also argues: (1) Panhandle failed to make a showing of unmet need, and the WVHCA erred in finding it did; (2) The WVHCA was clearly wrong when it prematurely, and without authority, granted Panhandle's Motion for Summary Judgment; and (3) The WVHCA was clearly wrong when it relied on the 2023 Need Methodology.

Additionally, Respondent Panhandle erroneously claims that Petitioner would be unable to provide Medicaid In-Home Personal Care services absent its relationship with Loved Ones In Home Care ("Loved Ones"). (*See* Resp't Panhandle's Brief at 4). However, Jenni Sutherland, executive director for Petitioner, would have testified to the contrary had the WVHCA not prematurely granted Summary Judgment before the evidentiary

hearing. More specifically, Ms. Sutherland would have testified that Petitioner already provides Medicaid In-Home Personal Care services independently of Loved Ones. Additionally, if Loved Ones stopped providing services within Putnam County, Petitioner would have absorbed the workload.

I. Respondents' arguments fail despite any deference that may be given to the WVHCA.

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.

Respondent WVHCA relies 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"). (*See* Resp't WVHCA's Br. at 10). *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). West Virginia Courts will not defer to an Agency's interpretation 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**." *See Amedisys W. Va., LLC v. Pers. Touch Home Care of W. Va., Inc.,* 245 W. Va. 398, 408. As Petitioner explained in its initial Appellate Brief, and as further explained below, the WVHCA's underlying decision is in direct contradiction of W. Va. Code § 16-2D *et. al.* A finding of unmet need is both required by statute, and necessary to comply with the CON statute's legislative findings of preventing duplication of services and unnecessary waste of resources. (W. Va. Code § 16-2D-1; § 16-2D-12(a)(1)). Furthermore, the WVHCA is not permitted to benefit from any alleged deference when it acts outside of its authority.

When Heather Connolly granted Panhandle's Motion for Summary Judgment, she was relying on nothing more than Panhandle's Application and the short twenty-five (25) minute pre-hearing. (*See* D.R. 972-997). This is because prior to the pre-hearing, not only was Ms. Connolly not in possession of the record, but the record was also incomplete as relevant testimony had not yet been taken. It is the Respondents' burden to prove that its application meets the mandatory requirements of a Medicaid In-Home Personal Care Certificate of Need ("CON") application. The evidence provided by Respondent

Panhandle is insufficient to meet this burden. The evidence offered, or that would have been offered, by Petitioners in regard to unmet need and other services is provided by Petitioner to highlight that not only did Respondent Panhandle fail to establish its burden, but Petitioner's evidence displays the exact opposite of Panhandle's claims.

II. WVHCA Hearing Examiner, Heather Connolly, lacked authorization to grant a Motion for Summary Judgment.

On October 6th, 2023, the WVHCA's attorney, acting in capacity as a hearing examiner, and in this matter, as the adjudicator, dismissed Petitioner's challenge to Panhandle's CON Application. (*See* D.R. 995). Respondents can point to no West Virginia statute or case law that provides the WVHCA's hearing examiner the authority to make such a ruling.

Respondent Panhandle claims that "Petitioner points to no authority that suggests the consideration of such a motion was improper." (*See* Resp't Panhandle's Br. at 9). However, in Petitioner's initial brief, it was explained that the explicit powers of a hearing examiner do not permit the hearing examiner to rule on summary judgment. W. Va. Code § 29A-5-1(d). Panhandle responds by saying that this list does not specifically prohibit the hearing examiner from doing the same. (*See* Resp't Panhandle's Br. at 9). However, the hearing examiner is limited to the power granted to it through statute, not the other way around.

Respondent WVHCA takes it one step further and improperly interprets the express authorities granted to a hearing examiner. WVHCA relies on three of the hearing examiners' powers in an attempt to argue that Ms. Connolly had authority to grant Summary Judgment in this matter. (*See* Resp't WVHCA's Br. at 11). More specifically, WVHCA relies on the hearing examiner's power to "' (3) regulate the course of the

hearing,…(5) dispose of procedural requests or similar matters, and (6) take other action authorized by a rule adopted by the agency.'" (*Id.*; W. Va. Code 29A-5-1(d)).

However, these powers do not have the effect argued by Respondent based on the plain language of the powers, and the lack of any mandatory authority. First, a hearing examiner is permitted to regulate the course of a hearing. This power anticipates that a hearing actually occurs so that it can be regulated. Whereas here, Ms. Connolly made the issue of a hearing moot as Petitioner was outright dismissed as an affected party. Second, the hearing examiner is permitted to dispose of procedural requests, not dispose of a case. As the hearing examiner is meant to be an impartial administrator whose purpose it is to collect evidence for the Boards consideration, this power is clearly speaking to the way evidence is collected. Third, WVHCA argues that the power under W. Va. Code 29A-5-1(d)(6) incorporates the power of W. Va. Code R. § 65-32-8.17: "[t]he Authority or its designee may consider motions at the prehearing conference." Again, the Hearing Examiner is an impartial evidence collector, and the motions are limited to evidential requests.

Significantly, the WVHCA admits that there is no mandatory authority to support its premises under the West Virginia Administrative Procedures Act ("APA"). Instead, Respondent turns to the federal APA relying entirely on dicta to argue that the West Virginia APA can be interpreted in tandem with the federal APA. (*See* Resp't WVHCA's Br. at 11-12). Even in the occasional event that a West Virginia Court has looked towards the federal APA for guidance, it has not done so for the premature disposition of an agency matter, and it is clear to see why. The federal APA is significantly different than the state APA. (*See* 5 U.S.C.S §551 *et. al.*). The Federal APA allows for an employee, or more aptly

described as the administrative law judge, presiding over a hearing to "make or recommend decisions in accordance with section 557 of this title." (*See* 5 U.S.C.S §556). In fact, "an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision." (*See* 5 U.S.C.S §556). Significantly here, as opposed to the federal APA, West Viginia does not explicitly provide for the hearing examiner to make ultimate decisions on the matter. Instead, the hearing examiner is simply the collector of evidence for consideration by the Board. (*See* W. Va. Code §29A-5-1).

Furthermore, the federal APA provides safeguards for their "hearing examiners" that do not exist at the state level:

> When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.

The Federal APA permits a direct appeal to the Board after a decision has been made by the hearing examiner. This is a protection that is not afforded by the West Virginia APA. Additionally, The West Virginia Certificate of Need statute provides that the "**final decision…shall be based solely on**…**the authority's review… and [t]he record established in the administrative hearing…**" (*See* W. Va. Code §16-2D-15). However, Ms. Connolly took it upon herself to make a final decision and stripped the Authority of the ability to review the record. As discussed below, she also made a final decision based off evidence from outside the record.

The Federal APA also provides that:

> An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title [5 USCS § 557], except as witness or counsel in public proceedings.

(*See* 5 U.S.C.S §554). Ms. Connolly was adverse council in Petitioner's attempt to challenge the 2023 Need Methodology in Circuit Court. There is an argument that under the federal APA, she would be prohibited all together from participating as hearing examiner because she functions in a prosecutorial manner on a factually related case.

It is clear that West Virginia APA does not anticipate a hearing examiner having as much power as the Respondents would like to think. West Virginia Courts have even found a hearing examiner to act only in a "quasi-judicial capacity" and "is not the same as a judge acting in a judicial capacity." *Varney v. Hechler*, 189 W. Va. 655, 660 (W. Va. 1993).

Let this be clear, Heather Connolly, the attorney for the WVHCA, acting in a capacity as Hearing Examiner, was the sole individual responsible for dismissing Petitioner's from the underlying matter. (*See* D.R. 1004-1009). However, the West Virginia law requires that "[t]he authority shall render a final decision on an application for a certificate of need…," not the hearing examiner. W. Va. Code § 16-2D-15(a). Additionally, a hearing examiner is "any member of the body which comprises the agency, or any hearing examiner or other person permitted by statute to hold any such hearing for such agency, and duly authorized by such agency so to do." W. Va. Code. §29A-5-1. The West Virginia APA allows a broad range of individuals to play the part of Hearing Examiner. In many situations, the hearing examiner, whose role is to facilitate the

collection of evidence, may not have the expertise that the Board is presumed to have. That is the case here, Ms. Connolly is not a WVHCA Board member, she is the WVHCA's attorney.

The Federal APA, however, only permits the agency itself, members that comprise the agency, and specially appointed administrative law judges to oversee hearings. (*See* 5 U.S.C.S §556). Unlike the West Virginia APA, the Federal APA ensures that an individual with the authorities presumed expertise is in the position of initial decision making.

In a desperate attempt to justify this improper Summary Judgment ruling, Respondents rely on the language of the Hearing Order issued by the WVHCA for the premise that dispositive motions were contemplated for the prehearing conference. (*See* D.R. 178-179; *See also* Resp't WVHCA's Br. at 6; Resp't Panhandle's Br. at 6). However, the language included in the WVHCA's scheduling order does not supersede the West Virginia APA. Additionally, Panhandle argues that the prehearing conference was "set for the express purpose of addressing dispositive motions." (*See* Resp't Panhandle's Br. at 8-9). Yet, it cites no authority for this premise, and the WVHCA's Scheduling Order does not create an authority outside of the agency's powers.

Respondents do not cite, nor is Petitioner aware of, any instance in which the WVHCA has ever granted a Motion for Summary Judgment, much less, an instance where Summary judgment was filed in a CON proceeding. This is because Summary Judgment is not a mechanism that is utilized in CON proceeding, and it is clear why given the lack of powers and safeguards compared to the Federal APA

III. Respondents' arguments attempting to justify the Hearing Examiners premature granting of Summary Judgment are without merit.

To reiterate from Petitioner's initial Brief, West Virginia Supreme Court precedent holds:

> Summary judgment is appropriate only after the non-moving party has enjoyed "adequate time for discovery." *Celotex Corp. [v. Catrett]*, 477 U.S. [317] at 322, 106 S.Ct. [2548] at 2552, 91 L. Ed. 2d 265 [1986]; *Anderson [v. Liberty Lobby Inc.]*, 477 U.S. [242] at 250 n. 5, 106 S.Ct. [2505] at 2511 n. 5, 91 L. Ed. 2d 202 [1986]. As this Court has recognized, summary judgment prior to the completion of discovery is "precipitous." *Williams [v. Precision Coil, Inc.]*, 194 W.Va. [52] at 61, 459 S.E.2d [329] at 338 [1995], quoting *Board of Educ. of the County of Ohio v. Van Buren and Firestone, Arch., Inc.*, 165 W.Va. 140, 144, 267 S.E.2d 440, 443 (1980).

Conley v. Stollings 679 S.E.2d 594, 599 (W. Va. 2009) (Citing *Payne's Hardware & Bldg. Supply, Inc. v. Apple Valley Trading Co. of W. Va.*, 200 W. Va. 685, 690, 490 S.E.2d 772, 777 (1997)). Respondents attempt to create a distinction that does not exist. Merely relying on a "discovery deadline" to claim that any discovery that is conducted after that date does not qualify as discovery does not hold muster. The discovery deadline relied on so heavily by Respondents is nothing more than a written discovery deadline. A deadline that needs to be met prior to the taking of evidentiary testimony. Testimony that was already scheduled to take place at the time of Summary Judgment being granted.

Furthermore, The West Virginia Supreme Court of Appeals stated, "a motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." *Aetna*, 148 W. Va. at 171 (emphasis added). "A party is not entitled to summary judgment unless the facts established show a right to judgment with such clarity **as to leave no room for controversy and show affirmatively that the adverse party**

cannot prevail under any circumstances." *Id.* at 172 (emphasis added). "A motion for summary judgment must be denied if varying inferences may be drawn from evidence accepted as true." *Id.* This is a high standard that must be met by Panhandle for the granting of a Summary Judgment. Provided that the evidence was still developing, WVHCA had to rely on the argument that there is not a single fact that exists or could exist that would create a genuine dispute of material fact. If this were the case, why even have hearings? If there is no fact that could ever alter the granting of an application, a hearing in any case would be moot. This is clearly not the intent.

Respondent Panhandle argues that the discovery deadline in the order had passed and therefore the Summary Judgment was ripe for ruling. (*See* Resp't Panhandle's Br. at 8-9). However, as much as Respondents attempt to argue that the scheduled hearing in this matter was "trial like," that is not the case. West Virginia State Code provides that "[a]ffected parties shall have the right to bring relevant evidence before the board and **testify thereon**." W. Va. Code §16-29B-12. The Certificate of Need process anticipates testimony to build a record. This makes sense as otherwise; attorneys and hearing examiners would be merely guessing as to what the documents in the record mean. Although written discovery had been exchanged in the matter, no testimony had yet been collected. This is the civil litigation equivalent of moving for summary judgment while multiple depositions are scheduled to take place. The purpose of the hearing is to collect evidence through the testimony of witnesses. discovery was far from complete, in fact, it had hardly begun. In addition, the written record was presented to Ms. Connolly at the hearing. This written record included multiple volumes of written discovery. Yet, Ms. Connolly did not so much as even look at the record, or Petitioner's Response to Summary

Judgment, before making her ruling. So, in essence, she granted the Motion for Summary Judgment on a completely barren record.

Significantly,

> The final decision with respect to a certificate of need shall be based solely on:
>
> > **(1)** The authority's review conducted in accordance with procedures and criteria in this article and the certificate of need standards; and
> >
> > **(2)** The record established in the administrative hearing held with respect to the certificate of need.

W. Va. Code §16-2D-15. Therefore, the Respondents, nor the WVHCA in its ruling, are permitted to rely on evidence from other matters or hearings. The petitioner is conscious of the fact that it has cited testimony in this brief that is from outside the record. However, this is done merely to show what could have been in the record had Summary Judgment not been prematurely granted and purely to show the type of evidence that was lost due to this premature Summary Judgment.

Next, Panhandle confusingly argues that "Mr. Adkins was deposed" and "[t]he only actual impact of the WVHCA's action in this case was that counsel for Panhandle was barred from asking Mr. Adkins any questions at the deposition." (*See* Resp't Panhandle's Br. at 11). This is similarly not true. As a result of the granting of Summary Judgment, Mr. Adkins testimony was not even considered. Ms. Conolly ruled on Panhandles Motion for Summary Judgment on October 6, 2023. (*See* D. R. 995). However, at the time of the granting of Panhandle's Motion for Summary Judgment, the hearing for Mr. Adkins was scheduled for four days later on October 10th, 2023. (*See* D.R. 271-272). As such, the testimony of Mr. Adkins, and any additional testimony that would have been elicited had Panhandle been in the matter still, is not part of this record. More importantly, this

testimony was not taken into consideration when the WVHCA's attorney, in a capacity as hearing examiner, dismissed Petitioner from contesting Panhandle's application.

To this same point, Panhandle improperly argues, without reference, that the only evidence Petitioner "would have had to provide is the same testimony that it previously presented, including the testimony of Petitioner['s] Executive Director." (*See* Resp't Panhandle's Br. at 12). However, Panhandle cannot cite to what this testimony is, nor could it have because, as far as this record is concerned, Ms. Sutherland had not testified, and the testimony she would have provided is not tied to any other proceeding. In essence, the WVHCA found, and the Respondents are arguing, that there is no fact that can possibly exist in this world that would even create a genuine dispute of material fact. That is an incredible finding. **Not a single potential fact would matter**. Not based on the record, but based on what could have been added to the record. It is clear that Ms. Connolly made the decision to dismiss far before October 6th, 2023.

Respondent Panhandle also argues against Petitioner's argument that the record was insufficiently developed. (*See* Resp't Panhandle's Br. at 12). Claiming that Petitioner had the opportunity to develop the record through discovery. Although untrue as the testimony of multiple individuals had yet to happen, Ms. Connolly granted Panhandle's Motion for Summary Judgment without even reading Petitioner's Response. Although bad, even more egregious is the finding that Petitioner was permitted to build its record, yet Ms. Connolly received the "record" right before the Prehearing. (D.R 977; D.R. 1007). Ms. Connolly never reviewed the record that she claims Petitioner was permitted sufficient time to build. (*See* D.R. 1006).

Panhandle also attempts to argue that "[h]ad [Petitioner] had any other relevant evidence or arguments to present; the Petitioner surely would have raised them at the prehearing conference faced with Panhandle's dispositive motion." (*See* Resp't Panhandle's Br. at 12). In essence, Panhandle argues that Petitioner's counsel, when asked on the spot, was meant to give every conceivable argument and fact that could create a genuine dispute of material fact from **facts that have not yet been developed**. And that Counsel's failure to conjure up every conceivable fact and argument means that there are none. This is clearly an absurd position and an attempt to deceive this Court into believing that no material fact of genuine dispute exists or could from the remaining discovery that was not conducted.

Furthermore, it should not be lost on this Court that Ms. Connolly made the above finding for every burden Panhandle had to show, this is a broad ruling. For example, although Ms. Connolly argued that she disagreed with the Petitioner's interpretation of "other services," she also made the finding that Petitioner was not permitted to offer evidence even under her own improper interpretation. The petitioner was prevented from supplying evidence that granting this application would affect other providers' abilities to provide Medicaid In-Home Personal Care, an argument that even Ms. Connolly cannot disagree is relevant. In fact, as discussed below, Panhandle fails to assert how its application will not negatively affect the provider it is currently subcontracting through.

Another argument from Panhandle is that Petitioner was limited in what testimony it could provide because it failed to subpoena any witnesses from Panhandle. First, the Petitioner is in no way limited in the testimony that could have been provided by Jennifer Sutherland, Tim Adkins, or any other witness as the opportunity to develop the testimony

in this record was barred. Secondly, the Petitioner listed Evan Worrell, Executive Director of Operations for Panhandle, and Heath Sampson, Chief Executive Officer for Panhandle, on its Witness List. (*See* D.R. 784). If present at the hearing, Petitioner had a right to call them.

Panhandle implies that it would intentionally exclude the applicant's attendance at the hearing in order to prevent their testimony from being taken. While this tactic was at their disposal, it would not have prevented the development of the record and would have prevented panhandle from further supporting its application. Additionally, Panhandles Application as it stands is barebones, and fails to meet the burden it is required to meet. If Panhandle intended to provide no testimony at all to support its application, then the Application itself would have to stand solely by its text, and withstand the challenges of Ms. Sutherland's and Mr. Adkins' testimony. Surely in this situation, there is a high expectation, if not a guarantee, that a genuine dispute of material fact would exist at the close of discovery at a minimum. If, however, one or more of Panhandles employees made an appearance at the hearing, it is difficult for the Petitioner even to anticipate the broad range of answers that would have been supplied. Any answer could have added additional disputes of material fact. Nonetheless, Petitioner did anticipate that the testimony of these individuals would show a lack of unmet need and negative affect on other providers and/or services.

Additionally, Panhandle argues that the WVHCA would not "suddenly agree that all its work in establishing the 2023 PC Standards was improper and thus invalid." (*See* Resp't Panhandle's Br. at 11-12). First, the standards do not need to be overturned to entertain relevant evidence that no unmet need exists. Second, surely Panhandle is not

insinuating that the WVHCA would ignore newly presented and clearly relevant evidence showing no actual unmet need merely because it had put work into the previous standards. If the WVHCA was convinced that an unmet need did not exist, granting the CON application purely on the standards would be in violation of the CON statute. (*See* W. Va. Code § 16-2D *et. al.*). Not to mention the fact that the WVHCA was never given the opportunity to make this decision as the hearing examiner decided for them.

IV. Summary Judgment was improper as there was evidence in the record, as well as evidence that would have been added to the record, creating a genuine dispute of material fact regarding unmet need.

The WVHCA Hearing Examiner, Heather Connolly, did not have the authority to grant Summary Judgment in this matter, and granting such a motion was improper as discovery was not complete. Although either of these previous arguments justify a ruling in Petitioners favor, so does the fact that genuine disputes of material facts existed, and more would have been availed through the scheduled testimony.

There is no doubt that a genuine dispute of material fact existed, or would have existed, regarding the existence of unmet need. Respondent Panhandle argues that Petitioners barring of Tim Adkins testimony in this matter is a "red herring." (*See* Resp't Panhandle's Br. at 11). Respondent claims that the only use for such testimony would be to attack the Need Methodology. *Id*. Although his testimony could have been used in this regard to create a genuine dispute of material fact, this is surely not the only use. In fact, as previously mentioned Mr. Adkins would have testified:

> 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...[1]

This testimony goes directly to the question of unmet need. Also, as discussed below, Mr. Adkins also provided highly relevant evidence to "other services." Respondents of course argue against this testimony, attempting to cast doubt on the meaning of it, as well as other testimony he would have given. However, to be clear, the standard is whether a genuine dispute of material fact exists, or in this case, would have. Respondents' arguments against the potential testimony, even if persuasive (although Petitioner thinks not), do not show the Summary Judgment ruling proper, but creates a genuine dispute of material fact. The standard is not that Petitioner has to show that the WVHCA would rule in its favor, only that a reasonable person could find in favor of Petitioner. (*See* Resp't WVHCA's Br. at 9).

In addition, Respondents argue that Panhandle was already providing services within Putnam County as a subcontractor, and therefore, Panhandle will not be adding any additional services. (*See* Resp't Panhandle's Br. at 15; *See also* Resp't WVHCA's Br. at 28). Further arguing that "panhandle has long provided the PC Services at issue in this case. The only change is that, by gaining its own CON, it has freed itself of the subcontractor relationship." (*See* Resp't Panhandle's Br. at 15). Further asserting that "its very presence as a PC services provider affirmatively establishes that need." (*See* Resp't Panhandle's Br. at 15). However, what Panhandle fails to consider is that it is being added as a provider, not replacing the current provider. This raises a slew of questions: Will the

[1] Mr. Adkins deposition was not included in this record because it was taken after Ms. Connolly granted Panhandle's Motion for Summary Judgment. However, had the Motion not been granted, Mr. Adkins' testimony would have been a part of this record. Mr. Adkins' testimony is being included in this brief to show examples of just some of the evidence that would have been put in the record had Ms. Connolly not granted the Motion for Summary Judgment.

current provider contract with another subcontractor?; How many services will the current provider continue to serve?; Will the current provider hire more employees to cover more potential clients?; As well as other questions that have gone unanswered by the Respondents. At the very least, this displays that Panhandle has failed to meet its burden to this question for unmet need, and for negative affect on other providers and services as discussed below. Of Course, Panhandle now claims that it was not going to present any testimony, thus, the questions would have gone unanswered, at least by Panhandle, further supporting Petitioner's position that the CON Application fails to carry its burden.

In addition, Respondent WVHCA argued that "Petitioner seems to agree that if the Authority can rely on the Need Methodology, that's enough to show unmet need." (*See* Resp't WVHCA's Br. at 21). This is incorrect. Although Petitioner does argue that Panhandle should not be able to rely on the improperly promulgated standards, even if valid, actual evidence of unmet need in contradiction of the standards is grounds for denial of an application. (*See* W. Va. Code 16-2D-1; 16-2D-12). Respondents appear to be confused by this premise, or perhaps just wish not to address it. Essentially, in the instance that affirmative evidence is shown that no individual in a county is unable to receive services, this evidence would trump the Need Calculation. Not only is this required by statute, but it makes sense as well. (*See* 16-2D-1; 16-2D-12). As Respondents like to mention so frequently when arguing for the premature modification of the Need Calculation in anticipation of the elimination of subcontracting, these standards are

nothing more than a guess.[2] As such, direct evidence contradicting this "guess" should hold much more weight.

Panhandle also tries to argue that "[i]f Panhandle is denied its application and rendered unable to provide the PC services it currently provides, then there would instantly be a population with unmet need for PC services." (*See* Resp't Panhandle's Br. at 15). This argument lacks any merit as it would presumably continue to provide whatever services it was providing prior to the CON Application.

Finally, Respondents attempt to attack an email from the Bureau of Medical Services ("BMS"), Teresa McDonough, Program Manager for TBI Waiver and Personal Care Services. The email provides: "never has been or ever will be a 'wait list' for the Personal Care Services program." (*See* D.R. 1571 – BMS e-mail). Respondents take 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." (*See* Resp't WVHCA's Br. at 22; *See also* Resp't Panhandle's Br. at 16). Although Respondents' 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

[2] Mr. Adkins testimony would have shown that the change in standards was nothing more than a guess at what the future need would be.

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.

V.) Summary Judgment was improper as there was evidence in the record, as well as evidence that would have been added to the record, creating a genuine dispute of material fact regarding improper reliance on the WVHCA's 2023 Need Methodology calculations.

The WVHCA erred in finding that there was no issue with the validity of the 2023 Need Methodology Standards (*See* D.R. 1004-1008). The Respondents attempt to argue that the 2023 Need Methodology was properly promulgated. Albeit, in a speculative nature as this matter was discussed prior to any testimony. 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).

Curiously, Respondent WVHCA makes the argument that "Petitioner makes no effort to show that the Authority's unmet need findings under the Need Methodology are incorrect." (*See* Resp't WVHCA's Br. at 20). However, Petitioner extensively argues that the reliance on the Need Methodology was flawed in its initial brief. (*See* Pet'r Br. at 22-28).

As an initial matter, the WVHCA attempts to convince this Court that this standard as promulgated is somehow more valid because the West Virginia Supreme Court has "greenlit the Authority to rely on very similar standards before," referring to the standards discussed in *Amedisys* 245 W. Va. 398. (*See* Resp't WVHCA's Br. at 21). 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.

Panhandle argues that "CON Director Adkins gave a detailed account of the process undertaken by the WVHCA to amend the PC standards." (*See* Resp't Panhandle's Br. at 18). However, Panhandle did not cite what this detailed list was, nor could it, as Mr. Adkins' testimony was erroneously barred from this record.

To the same effect, Panhandle argues that "CON Director Adkins testified that the WVHCA knew the 1.25% multiplier was artificially low and planned to raise it to 2.5% in 2016. (*See* Resp't Panhandle's Br. at 19). 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.

Regardless, Mr. Adkins' testimony would have shown that 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?" Mr. Adkins testified that it was when

"[w]e were informed that BMS was wanting to eliminate subcontractors." (*See* D.R. 368:12-13). It is clear that the potential elimination of subcontracting was the one and only reason that the WVHCA decided to modify the standards.

Respondent Panhandle has no argument in regard to WVHCA's reliance on the potential elimination of subcontracting for its decision to modify the standards other than referring to Petitioner's argument as "entirely self-serving". (*See* Resp't Panhandle's Br. at 20). With no legitimate argument to this point, it is assumed Panhandle capitulates to Petitioner's argument. Respondent WVHCA argues that Petitioners do not cite any laws or precedent supporting their argument that prematurely increasing the unmet need is improper. (*See* Resp't WVHCA's Br. at 27). 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."[3]

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 WVHCA's Br. at 26). In essence, the Respondents are asking this Court to give deference to the WVHCA

[3] 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 not come to fruition.

for a prediction of what another agency may do. This, however, makes no sense. The WVHCA has no control over the actions of BMS and cannot reasonably predict what BMS will do, nor should they be permitted to when it results in a violation of the Certificate of Need Statute. In fact, Respondents arguments regarding the WVHCA "expertise" on this matter are eroded by the fact that it has now been over a year, and subcontracting has still not been eliminated.

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

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

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

W. Va. Code § 16-2D-1. The Respondents do not appear to make any meaningful argument that an unnecessary duplication of services is against the legislative intent. Nor could they reasonably make such an argument.

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. Respondents argue that the one short meeting held by the "task force" was sufficient to meet its statutory requirement. (*See* Resp't Panhandle Br. at 18-19; *See also* Resp't WVHCA's Br. at 24-25). Respondents argue that the decision not to have another meeting does not illegitimize the initial meeting. However, as discussed in Petitioners initial Brief, the initial meeting falls significantly short of the statutory requirement because not only

were the discussions cut short with no follow-up, but only a few topics were covered on this complex topic, leaving many undiscussed.

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." 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 Panhandle and its application should be denied.

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

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

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

VI. Summary Judgment was improper as there was evidence in the record, as well as evidence that would have been added to the record, creating a genuine dispute of material fact regarding negative effect on the community by significantly limiting the availability and viability of other services or providers.

A CON application must show the proposed service will not have a negative effect on the community by significantly limiting the availability and viability of other services or providers. (*See* D.R. 1557). The WVHCA erred in finding that the services provided by the Petitioners will not be negatively affected and that the Petitioner's transportation and nutrition services are not contemplated in the 2023 Need Methodology Standards. 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. Additionally, Panhandle has failed to meet its burden that the granting of its application will not have a negative effect on other providers and their services, including the entity that Panhandle currently subcontracts through.

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. (*See* Resp't Panhandle's Br. at 17).; Resp't WVHCA's Br. at 22). However, despite this argument 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.

This testimony was not in the record, and therefore not considered by Ms. Connolly when she made her ruling. Although this testimony cannot be used in this matter, it is a perfect example of the dangers of prematurely dismissing a case before the close of discovery.

ii. Respondents' arguments fail to show a lack of facts, or potential facts, creating a genuine dispute of material facts.

As argued above, a genuine dispute of material fact exists as to the effect that granting this CON application would have on other services and other providers. First for the effect on other services as testified to by Mr. Adkins. Second, is the effect on services as interpreted by Heather Connolly and Respondents.

The WVHCA argues that Petitioner "does not explain how many clients or employees it thinks it might lose or identify any other "empirical data" the Authority missed in evaluation this claim." (*See* Resp't WVHCA's Br. at 30). This is an interesting position given that the Petitioner was not provided with an opportunity to enter into evidence testimony to this effect. Even more significantly, the WVHCA speaks of a lack of empirical data the Authority missed, yet the Authority reviewed no data at all and relied entirely on the twenty-five (25) minute prehearing as its sole source of information. To make a finding that no evidence could possibly be shown to create a genuine dispute of material fact is mighty impressive when the adjudicator has yet to even look at the evidence in the record.

Had Ms. Sutherland had the opportunity to present testimony in this case, she would have testified to the extent that the granting of this application creates a negative effect on the Petitioner's services. She would have been able to give in-depth analysis of the Petitioner's financials and past experience of when new providers enter a county. Furthermore, she would have been able to provide a firsthand account of Medicaid In-Home Personal Care services as she handles it on a daily basis. Panhandle would have had the opportunity to also cross examine Ms. Sutherland in an attempt to make its case.

However, Panhandle opted only to "predict" what Ms. Sutherland would have hypothetically testified.

In Petitioner's initial brief, it claimed that the effect on its service will be significant enough to potentially oust them from providing services. Interestingly, in Response to this argument, Respondent WVHCA argued "'potentially' is a hedge, and anyway, Petitioner itself conceded below that it 'd[idn't] have any facts in the record' demonstrating this…" (*See* Resp't WVHCA's Br. at 31). Of course, this "concession" was based on Petitioner's testimony that no facts existed due to an incomplete record. Regardless, Respondent clearly intends this to be a jab that the record does not support Petitioner's position. However, there is no record that was even relied on by Ms. Connolly when finding no negative effect. This does nothing more than to highlight another pitfall of prematurely granting a Motion for Summary Judgment prior to the completion of discovery.

Not only was Petitioner prevented from providing an argument for other services as interpreted by Tim Adkins, but also under the WVHCA attorney's interpretation. Respondent Panhandle raises a good point to its own detriment. Panhandle argues "[i]n theory, the only party that could reasonably argue it would be adversely impacted by Panhandle receiving its own CON is the entity with which Panhandle was subcontracting." (*See* Resp't Panhandle's Br. at 13). This is yet another genuine dispute of fact that Panhandle has highlighted. Panhandle claims this point to be irrelevant because "that entity did not object to Panhandle's Application." (*See* Resp't Panhandle's Br. at 13). However, the standard is not that the granting of an application not negatively affect the challenging party, it is that "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. 789). At a bare minimum, a genuine dispute of material fact exists regarding whether the current CON provider that Panhandle provides services to will be negatively affected, clearly Panhandle as failed to meet its burden otherwise.

WVHCA argued that there are already ten other providers "competing" against the Petitioners and "[i]f any marginal loss in profits from those providers hadn't led to the dire consequences they predict, it is hard to see how one more would. (*See* Resp't WVHCA Br. at 33). 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. Lastly, Respondents' arguments that it is already providing services does not remedy the issue of creating unmet need as the entity it is provided services through will continue to be a CON Medicaid In-Home Personal Care provider as well.

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

As discussed above, the 2023 Need Methodology as promulgated by the WVHCA is arbitrary and capricious. Although the 2023 Need Methodology is improper, and therefore cannot be relied on by the WVHCA to support a finding of unmet need, this Court need only find an improper reliance on the Methodology and does not need to overrule the same. Petitioners filed a Verified Complaint Seeking a Preliminary Injunction, Permanent Injunction, and Declaratory Judgment in the Circuit Court of Kanawha County against the promulgated standards. (*See* D.R. 1492 n. 9). In response,

the WVHCA made the argument that Petitioners "failed to exhaust [their] administrative remedies." (*See* D.R. 1729:22-24). More specifically, it argued that Petitioners had not exhausted their administrative remedies because they had not yet concluded the underlying WVHCA proceedings. To be clear, Petitioners do not believe WVHCA's perceived administrative exhaustion is required. 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 Panhandle's application. First, Respondents do not gain the benefit from any deference, either because of the overturing of *ley* or because its actions are in direct contradiction to the Certificate of Need statute. Second, the WVHCA had no authority to grant a Motion for Summary Judgment in the underlying matter. Third, even if the WVHCA's attorney had the authority to grant the Motion, the Motion was granted prematurely as discovery had not been completed. Fourth a genuine dispute of material fact existed, or would have existed, regarding the question of unmet need. Fifth, a genuine dispute of material fact existed, or would have existed, regarding the WVHCA's reliance on the 2023 Need Methodology. Lastly, a genuine dispute of material fact existed, or would have existed, regarding the effect on other services and service providers. 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 Panhandle's Motion for Summary Judgment be reversed.

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

By Counsel

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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

vs.) NO: 24-ICA-98

Panhandle Support Services, Inc.,
Applicant Below, *Respondent*

And

West Virginia Health Care Authority,
Respondent

CERTIFICATE OF SERVICE

I, Ryan W. Walters, do hereby certify that on this 14th 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)