THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court Of Common Pleas

The Honorable Casey L. Manning, Circuit Court Judge

Civil Action No.: 2016-CP-40-00818

Amedisys SC, LLC.....Plaintiff/Appellant,

v.

South Carolina Department of Health and Environmental Control.....Defendant,

And

National HealthCare Corporation, In-Care Home Health, Inc., Tri-County Home Health & Services, Inc., M&C Group, LLC d/b/a Home Helpers of Bluffton, Tidewater Home Health, P.A., Hedgemark Brentwood Medical Services, Inc., d/b/a PHC Home Health and PruittHealth Corporation,.....Intervenor-Defendants,

Of Whom, National HealthCare Corporation, In-Care Home Health, Inc., Tri-County Home Health & Services, Inc., M&C Group, LLC d/b/a Home Helpers of Bluffton, Tidewater Home Health, P.A., Hedgemark Brentwood Medical Services, Inc., d/b/a PHC Home Health and PruittHealth Corporation are the.....Respondents.

INITIAL BRIEF OF RESPONDENTS IN-CARE HOME HEALTH, INC., TRI-COUNTY HOME HEALTH & SERVICES, INC., M&C GROUP, LLC D/B/A HOME HELPERS OF BLUFFTON, TIDEWATER HOME HEALTH, P.A. AND HEDGEMARK BRENTWOOD MEDICAL SERVICE, INC. D/B/A PHC HOME HEALTH

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STATEMENT OF THE ISSUE ON APPEAL

I. WHETHER THE CIRCUIT COURT PROPERLY DENIED A PRELIMINARY INJUNCTION SEEKING TO ENJOIN THE SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL FROM ACCEPTING AND REVIEWING ALL CERTIFICATE OF NEED APPLICATIONS RELATING TO HOME HEALTH SERVICES, WHERE THE CIRCUIT COURT FOUND THAT APPELLANT FAILED TO ESTABLISH EACH OF THE THREE NECESSARY ELEMENTS FOR A PRELIMINARY INJUNCTION—IRREPARABLE HARM, A LIKELIHOOD OF SUCCESS ON THE MERITS OF THE LITIGATION AND AN INADEQAUTE REMEDY AT LAW?

STATEMENT OF THE CASE

Amedysis SC, LLC ("Amedysis" or "Appellant") instituted this action on February 8, 2016, pursuant to the Uniform Declaratory Judgments Act.[1] (R.___). Amedysis seeks a declaratory judgment finding that Chapter XII of the South Carolina Health Plan, the chapter addressing home health services, does not comply with the statutory requirements of S.C. Code Ann. §§ 44-7-110 *et. seq.* (the "State Certification of Need and Health Facility Licensure Act" (the "CON Act")). (R.___). In addition, Amedysis filed a Notice of Motion and Motion for Temporary Restraining Order and Preliminary Injunction, wherein it sought an injunction prohibiting DHEC from accepting any additional Certificate of Need applications relating to home health services and an injunction prohibiting DHEC from issuing decisions on any of the pending Certificate of Need applications relating to home health services. (R.___). On February 12, 2016, National Healthcare Corporation ("NHC") filed a Motion to Intervene in the subject action. On February 16, 2016, In-Care Home Health, Inc. ("In-Care"), Tri-County Home Health Care & Services, Inc. ("Tri-County"), M&C Group, LLC d/b/a Home Helpers of Bluffton ("Home Helpers"), Tidewater Home Health, PA ("Tidewater") and Hedgemark Brentwood Medical Services, Inc. d/b/a PHC Home Health ("PHC") filed a joint Motion to Intervene in the action. (R.___). (hereinafter referred to collectively as "Intervenors"). Likewise, on February 16, 2016, PruittHealth Corporation ("PruittHealth") filed a Motion to Intervene. (R.___).

On February 22, 2016, the Circuit Court heard arguments on the motions to intervene and Amedysis' motion for a preliminary injunction. On February 23, 2016, the Circuit Court entered an Order granting all motions to intervene and denying the motion for a preliminary injunction.

[1] The South Carolina Home Care Association was originally a Plaintiff; however, on February 16, 2016, it filed a Notice of Dismissal, effectively dismissing itself from the action. The South Carolina Home Care Association is not a party to this appeal.

(*See* Order, p. 4); (R.___)). Amedysis filed its Notice of Appeal challenging the denial of the preliminary injunction on March 21, 2016.[2] (R.___).

[2] In its Notice of Appeal, Amedysis states that it does not appeal the Circuit Court's granting of the motions to intervene.

STATEMENT OF FACTS

This action arises out of the South Carolina Department of Health and Environmental Control's ("DHEC" or "Department") operation of its Certificate of Need Program pursuant to the CON Act. The purpose of the CON Act is to promote cost containment, to prevent the unnecessary duplication of health care facilities and services, to guide the establishment of health facilities and services which will best serve public needs, and to ensure that high quality services are provided in health facilities in South Carolina. *See* S.C. Code Ann. § 44-7-120. The CON Act requires certain health care providers, prior to undertaking certain health care activities, to first obtain a certificate of need. In addition, the Licensure of Home Health Agencies Act, S.C. Code Ann. § 44-69-10, *et. seq.* ("Home Health Act"), requires the issuance of a CON prior to licensure for home health agencies. The CON Act further requires the Department to establish procedures and criteria for the submission of an application and appropriate review prior to the issuance of a certificate of need. *See* S.C. Code Ann. § 44-7-120(2).

The CON Act requires the issuance of a State Health Plan ("SHP") to be utilized by the Department in its administration of the CON Program. Pursuant to section 44-7-180(B), the SHP must include:

(1) An inventory of existing specified health services;

(2) Projections of need for additional health services, and equipment;

(3) Standards for distribution of specified health services; and

(4) A general statement as to the project review criteria considered most important in evaluating Certificate of Need applications for each type of service.

See S.C. Code Ann. § 44-7-180(B).

The CON Act provides a detailed process for the periodic review and issuance of the SHP. The State Health Planning Committee (the "SHP Committee"), reviews and revises the

SHP as it sees fit at least every two years. *See* S.C. Code Ann. § 44-7-180. The review process includes mandatory regional public meetings throughout the State. (*See* Order Denying Plaintiff's Motion for a Preliminary Injunction, p. 6) (referred to hereinafter as the "Order"); (R.___)). The SHP Committee must accept and consider written comments from interested parties. (*Id.*; (R.___)). After undergoing this significantly deliberative process, the SHP Committee makes a recommendation for the new SHP to the DHEC Board. (*Id.*; (R.___)). The DHEC Board then conducts its own review, including additional meetings and deliberation, before approving the SHP. (*Id.*; (R.___)). The current SHP passed through the full statutory process described above, received unanimous approval from the DHEC Board, and became effective August 13, 2015. (*Id.*; (R.___)).

The current SHP's home health section sets forth the following standards applicable to CON applications for home health services:

1. An applicant must propose home health services to cover the geographic area of an entire county and agree to serve residents throughout the entire county.
2. A separate application is required for each county in which services are to be provided.
3. **A new home health agency may be approved if an applicant can demonstrate it will serve 50 or more patients projected to be in need in non-rural counties, or 25 or more patients projected to be in need in rural counties**, through evidence that may include, but would not be limited to, the following:
    a. Letters of support that identify need for additional home health services from physicians and other referral sources.
    b. Evidence of underutilitization of home health services.
    c. Evidence of limited scope home health agency service including skilled nursing, physical therapy, occupational therapy, speech therapy, home health aides, and medical social workers.
    d. Evidence of the denial or delay in the provision of home health services, including but not limited to long waiting lists or delays which exceed industry standards.
4. For purposes of this Section, a rural county shall mean a county with a population of less than 50,000, according to the most recent projections of the South Carolina Revenue and Fiscal Affairs office as of the time the current Plan was adopted.
5. All home health agency services (Skilled Nursing, Physical Therapy, Occupational Therapy, Speech Therapy, Home Health Aide, and Medical Social Worker) should be

available within a county. If there is no hospital in a county and the existing licensed home health agencies between them do not provide all of the services identified above, this may be cited as potential justification for the approval of an additional agency that intends to offer these services.

6. Specialty home health providers are exempt from the need calculation applicable to full-service home health agencies, but are otherwise subject to Certificate of Need.
7. The applicant should have a track record that demonstrates a commitment to quality services. There should be no history or prosecution, consent order, abandonment of patients in other business operations, or loss of license. However, any consent orders or loss of licenses related to licenses that were obtained from the Department between July 1, 2013 and May 22, 2014 without a Certificate of Need shall not be grounds for denial of a Certificate of Need application pursuant to this Section. The applicant must provide a list of all licensed home health agencies it operates and the state(s) where it operates them.
8. The applicant must document that it can serve at least 25 patients annually in each rural county for which it is licensed and 50 patients annually in each non-rural county for which it is licensed within two years of initiation of services. The applicant must assure the Department that, should it fail to reach this threshold number two years after initiation of services in a county, it will voluntarily relinquish its license for that county.
9. Nothing in this Section is intended to restrict the ability of the Department to approve more than one new Home Health Agency in a County at any given time.

2015 SHP, pp. XII-7–XII-8; (R.___) (emphasis added).

The current SHP's home health section contains specific objective standards applicable to CON applications for home health services. *See id.* An applicant must demonstrate that it will serve either 25 or 50 patients depending on whether it seeks to operate in a rural or non-rural county.[3] *See id.* In addition, the SHP includes an inventory of existing home health agencies in the State and 2013 utilization data for home health agencies, the most recent data available to the Department at the time of the SHP's adoption, showing the total number of persons served and total visits per home health agency. *See* 2015 SHP, pp. XIII-46–XIII-51; (R.___). The SHP also lists the project review criteria deemed most relevant for consideration of home health CON applications. *See* 2015 SHP, p. XII-7; (R.___).

[3] A rural county is a county with a population of less than 50,000 residents. A non-rural county means a county with more than 50,000 residents. *See* 2015 SHP, p. XII-7.

Intervenors are all home health agencies operating in South Carolina. (*See* Order, p. 7; (R.___)). In addition, shortly after the issuance of the current SHP, the Intervenors filed multiple CON applications seeking to expand their operations. (*Id.*; (R.___)). Pursuant to the current SHP, In-Care filed nine CON applications, Tri-County filed twenty five CON applications, Home Helpers filed two CON, Tidewater filed two CON applications and PHC filed one CON. (R.___). The application process required the Intervenors to incur considerable time and expense. (*See* Order, p. 7; (R.___)). Each application seeks to serve counties where there is an unmet need for home health services as proscribed by the SHP and the CON Act. (R.___).

STANDARD OF REVIEW

"The grant or denial of an injunction by the trial court will not be reversed absent an abuse of discretion." *Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 454, 626 S.E.2d 34, 36 (Ct. App. 2005). "An abuse of discretion occurs when the conclusions of the circuit court are either controlled by an error of law or are based on unsupported factual conclusions. *Carson v. CSX Transp., Inc.*, 400 S.C. 221, 229, 734 S.E.2d 148, 152 (2012) (citing *Kiriakides v. Sch. Dist. Of Greenville Cty.*, 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009)).

Amedyis makes a contrived argument that because the question of whether the SHP complies with the CON Act is a question of law, this Court may apply a de novo standard of review on this appeal. Amedysis further argues that this Court may decide the ultimate issue in this case—whether the SHP standards relating to home health services comply with the statutory requirements of the CON Act. Amedysis supports its position that this Court may decide the ultimate issue in this case by asserting that the sole issue in the underlying case is a "pure question of law involving statutory interpretation" which requires no findings of fact. (Brief of Appellant at 7.) Interestingly, Amedysis' brief cites extensively to statements made at an informal stakeholders meeting—a meeting to which Amedysis brought its own court reporter. (*See id.* at 12, 16.) Despite its statement that no findings of fact are required, Amedysis' entire argument regarding the likelihood of success on the merits appears to be based on its interpretation of the meeting and the effect of statements made in that meeting.

Amedysis' argument also ignores the fact that the only issue on appeal is whether the circuit court properly denied Amedysis' motion for a preliminary injunction. In reviewing the denial of the injunction, this Court should only consider the merits of the underlying case to the extent necessary to determine whether the Circuit Court properly denied the preliminary injunction. *See AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 51, 674 S.E.2d 505, 509 (Ct. App.

2009) (quoting *Helsel v. City of N. Myrtle Beach*, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992) ("When a court is requested to issue a temporary injunction it may consider the merits of the case to the extent necessary to determine whether a temporary injunction is appropriate."). At this time, it is neither necessary nor appropriate for this Court to make a final decision on the merits of the case. Amedysis mistakenly equates a determination of the *likelihood of success* with an ultimate determination of the issues. Indeed, the trial court noted that "[i]n reaching this decision, the Court expresses no final opinion or determination regarding the merits of the Plaintiff's claims." (Order, p. 13; (R.___)). The court's ruling was limited to whether Amedysis established the threshold requirements for obtaining a preliminary injunction. (*See id.*; (R.___)). There is a significant difference in deciding whether a party has a likelihood of success and reaching a final and definitive determination on the merits. This Court's premature review of the ultimate issue would prejudice the Respondents by denying them the opportunity to present evidence and argument to the court regarding the SHP's compliance with the CON Act. This is especially true where, as is the case here, the only evidence in the record relates to the granting or denial of the injunction.

Regardless of whether the underlying issue is a legal question, Respondents should have the opportunity to present its case before the trial court.[4] The case cited by Amedysis in support of its argument is unpersuasive. *Brock v. Town of Mount Pleasant* does not stand for the proposition that an appellate court may decide the ultimate issue in a case notwithstanding the fact that the only issue on appeal is whether the trial court properly granted or denied an injunction. *See Brock v. Town of Mount*, No. 2015-000406, 2016 LEXIS 77. The suggestion that it does is a blatant mischaracterization. In *Brock,* the Supreme Court reviewed whether the

[4] Pursuant to Rule 245, SCACR, the Supreme Court may hear a matter in its original jurisdiction. However, Rule 245(c) sets forth specific procedure that a party must follow. Amedysis has not petitioned the Supreme Court in accordance with Rule 245(c), SCACR.

Town of Mount Pleasant violated the Freedom of Information Act. *Id.* The granting or denial of an injunction was not addressed by the Supreme Court. *Id.* Furthermore, the *Brock* appeal came after a full trial on the merits. Even if *Brock* can be construed as suggested by Amedyis, it is easily distinguishable in that the parties had an opportunity to fully present their case. Despite Amedysis' contention, the underlying question in this case is not yet before this Court. An abuse of discretion standard applies to this Court's review of the denial of the preliminary injunction. *See Peek*, 367 S.C. at 454, 626 S.E.2d at 36 (Ct. App. 2005).

ARGUMENT

Intervenors request that this Court affirm the circuit court's denial of the preliminary injunction. The circuit court properly determined that Amedysis failed to establish each of the three necessary elements for a preliminary injunction.

I. BECAUSE AMEDYSIS FAILS TO ESTABLISH IRREPARABLE HARM, A LIKELIHOOD OF SUCCESS ON THE MERITS AND AN INADEQUATE REMEDY AT LAW, THE CIRCUIT COURT PROPERLY DENIED ITS MOTION FOR A PRELIMINARY INJUNCTION.

"The remedy of an injunction is a drastic one and ought to be applied with caution." *Strategic Res. Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006) (citing *Forest Land Co. v. Black*, 216 S.C. 255, 267, 57 S.E.2d 420, 426 (1950)). Generally, one may not enjoin a state agency from performing duties pursuant to a valid statute. *See Frady v. Student Loan Servicing Center*, 313 S.C. 561, 564, 442 S.E.2d 580, 582 (1994). The party moving for an injunction has the burden of demonstrating facts and circumstances warranting an injunction. *See Strategic Res. Co.*, 367 S.C. at 544, 627 S.E.2d at 689. (citing *Calcutt v. Calcutt*, 282 S.C. 565, 320 S.E.2d 55 (Ct. App. 1984)). An injunction seeking to enjoin a government agency from performing tasks which it has expressly been given authority to perform should be denied absent a clear showing of injury. *See Tallevast v. Kaminski*, 146 S.C. 225,---, 143 S.E. 796, 800 (1928).

For a preliminary injunction to be granted "the plaintiff must establish that (1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law." *Scratch Golf Co. v. Dunes West Residential Golf Properties, Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 907 (2004) (citing *County of Richland v. Simpkins*, 348 S.C. 664, 669, 560 S.E.2d 903, 904 (Ct. App. 2002)). The party seeking an injunction must establish all three elements. *See id.* Here, Amedysis fails to establish

any of the three of the elements necessary for an injunction. Therefore, the circuit court's decision should be affirmed.

A. Irreparable Harm

The purpose of an injunction is to preserve the status quo to avoid possible irreparable injury to a party while litigation is pending. *See Peek*, 367 S.C. at 455, 626 S.E.2d at 37. The operative word is "irreparable". *See Sampson v. Murray*, 415 U.S. 61, 90, 94 S. Ct. 937, 953 (1974). "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of stay, are not enough." *Id.* Amedysis contends that it will suffer "immediate and irreparable harm" in the absence of an injunction through "the loss of its statutorily protected ability to participate meaningfully in DHEC's consideration of Amedysis' own and other applicants' applications." (Brief of Appellant at 19). Amedysis' argument relies on the flawed assumption that the home health services section of the SHP does not contain objective standards for determining need. However, as found by the circuit court, the SHP does contain objective standards. (Order, pp. 10-11); (R.___); *see also* 2015 SHP, p. XII-7; (R.___).

Prior to the adoption of the current SHP, need for home health services was projected using a formula. (R.___). The current SHP replaced the previously used formula with new standards after following the statutorily mandated revision procedure and after conducting regional public meetings and receiving public comments regarding unmet need for home health services throughout the state. Under the current SHP, an applicant must demonstrate that it will serve either 25 or 50 patients, depending on whether it seeks to serve a rural or non-rural county. *See* 2015 SHP, p. XII-7; (R.___). The SHP also contains specific guidance as to the type of evidence DHEC may consider in evaluating an applicant's projection of need. *See id.* The

current standards were recommended by the SHP Committee after thorough review and then adopted by the DHEC Board following careful consideration.[5]

Although the SHP does not contain a formulaic approach, the statutory provisions governing the home health section of the SHP do not require a formulaic approach. *See* S.C. Code Ann. § 44-7-180(B) only requires that the SHP contain "projections of need." The statute was written in a way that allows DHEC, an agency with expertise in the area of healthcare regulation, to craft standards that best carry out the goals of the CON Act. The DHEC Board determined that the new standards are preferable to the previously used formula. Despite Amedysis' contention that DHEC must adopt a formulaic approach, such language is notably absent from the statutes governing the CON program. Amedysis' disfavor with the new standards does not render them unlawful.

Amedysis mistakenly equates using a non-formulaic approach to project need as being arbitrary. This is not the case. DHEC can still make objective decisions based upon evidence and other supporting documentation submitted with CON applications. The SHP provides that applicants may support their projections of unmet need by submitting letters of support from physicians or other referral sources, evidence of underutilization of home health services and evidence of denial or delay in the provision of home health services.[6] *See* 2015 SHP, p. XII-7; (R.___). Based upon the evidence submitted with an application, DHEC can objectively determine whether there is unmet need in the county where the applicant seeks to operate. Furthermore, despite Amedysis' contention to the contrary, the standards in the current SHP do

[5] Despite Amedysis' complaints about the revisions to the SHP and its resulting inability to meaningfully participate in the process, Amedysis failed to appear or participate at any of the regional public meetings. At each public meeting, there were numerous people who spoke in favor of revising the SHP and not one person spoke against the revisions to the SHP.

[6] DHEC is not limited to reviewing these types of evidence. The SHP provides specific examples of evidence that may be reviewed by DHEC but also allows an applicant to submit other kinds of evidence supporting its projection of need. *See* 2015 SHP, p. XII-7.

not impede DHEC's ability to review an applicant's supporting evidence to determine whether two applications may "double count" or otherwise exceed the need such that the applications would be considered "competing."[7] The absence of a formulaic approach will not lead to arbitrary decisions.

Amedysis' argument that the current SHP prevents it from participating in DHEC's review of CON applications is also without merit. The SHP does not limit Amedysis' ability to appeal the granting of a CON by requesting a final board review from the DHEC Board pursuant to S.C. Code Ann. § 44-1-60 or its ability to further request a contested case hearing before the Administrative Law Court ("ALC"). *See* S.C. Code Ann. § 44-7-210(D) and (E). The statutorily created appeals procedure precludes Amedysis from arguing that it would suffer irreparable harm in the absence of an injunction. The possibility that "corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *Sampson*, 415 U.S. at 90, 94 S. Ct. at 953. In the event a contested case hearing is filed with the ALC, the decision approving the CON is automatically stayed. *See* S.C. Code Ann. § 1-23-600(H)(2). In effect, the automatic stay provision acts as an injunction and ensures the status quo will remain pending the resolution of a contested case hearing. Amedysis will suffer no irreparable harm prior to having a full merits hearing on the CON application at issue. No injunction is necessary to preserve the status quo. At the contested case hearing, Amedysis would have the opportunity to argue why DHEC erred in granting the CON, including arguing that the evidence of need submitted along with an application is insufficient or based upon faulty

[7] "'Competing applicants' means two or more persons or health care facilities as defined in this article who apply for Certificates of Need to provide similar services or facilities in the same service area within a time frame as established by departmental regulations and whose applications, if approved, would exceed the need for services or facilities." S.C. Code Ann. 44-7-130(5).

data. The new standards in no way limit Amedysis' ability to participate in DHEC's decision to grant or deny a CON.

Amedysis also suggests that it may suffer financial harm in the absence of an injunction. Amedysis' argument is entirely speculative. (*See* Order, p. 8); (R.___)). Furthermore, economic loss only constitutes irreparable harm when the absence of an injunction threatens the very existence of the party's business. *Peek*, 367 at 455, n.2, 626 S.E.2d at 37, n.2. Amedysis failed to submit affidavits or any other evidence suggesting that granting of additional CONs would adversely impact its business. Without any evidence even suggesting financial harm, there is no basis to find Amedysis will suffer irreparable harm.

Amedysis' own action (or failure to act) further supports that it has not and will not suffer irreparable harm in the absence of an injunction. The SHP at issue became effective on August 13, 2015. At any point after the effective date, Amedysis could have initiated this lawsuit. However, Amedysis waited until February 8, 2016 before filing a Summons and Complaint. Thereafter, in its Motion for a Preliminary Injunction, it sought "emergency interim relief" and an injunction even though it could have filed the action 6 months prior. (*See* Order, n. 2). If the threat of irreparable harm was real, Amedysis would have instituted this action earlier. The circuit court properly found that Amedysis failed to establish irreparable harm.

B. Likelihood of Success on the Merits

The circuit court also properly determined that Amedysis is unlikely to succeed on the merits of the litigation. Amedysis argues that it is likely to succeed on the underlying case because the SHP does not contain "usable criteria" for granting or denying a CON application. Amedysis further contends that the DHEC has acknowledged that the current SHP is devoid of objective criteria and standards necessary to determine need. (*See* Brief of Appellant at 16).

Such a representation is patently false. From the outset of the implementation of the current plan, DHEC has administered its review of pending home health applications in such a way that recognizes the current standards comply with the CON Act. The only support Amedysis provides for its contention is selected quotes from an open forum discussion between DHEC and stakeholders. These excerpts reflect nothing more than preliminary dialogue occurring only a few weeks after the passage of the current SHP and do not, in any way, support the argument that the SHP does not contain usable criteria or otherwise fails to comply with the CON Act.

Further supporting the argument that Amedysis is unlikey to succeed on the merits of the case is the fact that DHEC's interpretation of S.C. Code Ann. § 44-7-180(B) is entitled to deference and its interpretation will govern unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Trident Medical Center v. South Carolina Dep't of Health & Envtl. Control*, 412 S.C. 341, 354, 772 S.E.2d 177, 184 (2015). Amedysis correctly states that determining whether an agency's interpretation of a statute is entitled to deference involves a two-step process. *See Kiawah Dev. Partners, II v. South Carolina Dep't of Health & Envtl. Control*, 411 S.C. 16, 32, 766 S.E.2d 707, 717 (2014). "First a court must determine whether the language of the statute or regulation directly speaks to the issue. If so, the court must utilize the clear meaning of the statute or regulation." *Id.* (citing *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003). Second, if the court determines that the statute or regulation "'is silent or ambiguous with the respect to the specific issue,' the court then must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference." *Id.* (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843, 104 S.Ct. 2778 (1994). An agency's interpretation is worthy of deference so long as it is not

"arbitrary, capricious, or manifestly contrary to the statute." *Trident Medical Center*, 412 S.C. at 354, 772 S.E.2d at 184.

S.C. Code Ann. § 44-7-180(B)(2) states that the SHP must include "projections of need for additional health care facilities, beds, health services and equipment." No further guidance is provided. While the statute clearly provides that the SHP must include projections of need, it is silent as to a specific methodology that must be employed. The statute fails to "speak directly to the issue." *Kiawah Dev. Partners, II*, 411 S.C. at 32, 766 S.E.2d at 717. Because the statute is silent as to a specific method for projecting need, the next step of the analysis is determining whether DHEC's interpretation of the statute is "worthy of deference" *Id.* at 33, 766 S.E.2d 717 (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843, 104 S.Ct. 2778 (1994). In making this determination, courts are guided by the principle that deference is given to agencies "because they have been entrusted with administering their statutes and regulations and because they have unique skill in administering those statutes and regulations." *Id.* at 34, 766 S.E.2d at 718. Also relevant is the fact that the General Assembly designated DHEC as the "sole state agency for the control and administration of the granting of Certificates of Need...." S.C. Code Ann. § 44-7-140; *see also Spartanburg Reg'l Med. Ctr. v. Oncology & Hematology Associates of S. Carolina, LLC*, 387 S.C. 79, 83, 690 S.E.2d 783, 785 (2010) ("DHEC is designated as the sole state agency for control and administration of the granting of CONs *which includes the preparation of the State Health Plan*") (emphasis added). "It is well-settled that 'the construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons.'" *Spartanburg Reg'l Med. Ctr.* 387 S.C. at 90-91, 690 S.E.2d 789 (quoting *Dunton v. South Carolina Bd. of Examiners in Optometry*, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987). Clearly, DHEC's

interpretation of S.C. Code Ann. § 44-7-180 is entitled to deference unless it is "arbitrary, capricious or manifestly contrary to the statute." *Kiawah Dev. Partners, II*, 411 S.C. at 34–35, 766 S.E.2d at 718.

The standard for projecting need for home health services is not arbitrary, capricious or manifestly contrary to the applicable statute. S.C. Code Ann. § 44-7-180 only requires that the SHP contain projections of need. *See* S.C. Code Ann. § 44-7-180(B)(2). Similarly, S.C. Code Ann. § 44-7-250 only requires that DHEC establish "basic standards for the licensure, maintenance and operation" of health services in the State. Contrary to Amedysis' position, the CON Act does not require that the SHP have a formulaic approach of projecting need. The newly adopted standards requires an applicant to demonstrate need of either 25 or 50 patients. *See* 2015 SHP, p. XII-7; (R.___). These standards are reasonable and consistent with the SHP's statutory authority.[8] Amedysis' argument that the SHP provides no "usable criteria" is unfounded and ignores the language of the SHP which plainly requires that an applicant establish need of either 25 or 50 patients. *See id.* After careful review and deliberation, DHEC determined that the new standards are preferable to the formulaic approach contained in the prior SHP. Courts "may not substitute [their] judgment for that of the agency upon questions as to which there is room for a difference of opinion." *Byerly Hosp. v. South Carolina State Health and Human Services Fin. Comm'n*, 319 S.C. 225, 229, 460 S.E.2d 383, 385-86 (1995) (citing *Hamm, etc. v. SCPSC*, 315 S.C. 119, 432 S.E.2d 454 (1993)).

The case of *MRI at Belfair v. South Carolina Dep't of Health & Envtl. Control*, 379 S.C. 1, 664 S.E.2d 471 (2008) illustrates the deference that South Carolina courts afford to DHEC's

[8] There are a number of other health services in the 2015 SHP that do not contain a need projection based on a formulaic approach and contain standards far less objective than the home health standards. These health services include but are not limited to Medical Detoxification Facilities (R.___), Narcotic Treatment Programs (R.___), Emergency Hospital Services (R.___), Ambulatory Surgical Facilities (R.___) and Hospice Facilities and Hospice Programs (R.___). These standards for health services have existed in this or similar forms in prior SHPs for years.

interpretation of the statutes governing the CON program. *MRI at Belfair* addressed a similar challenge to the SHP. *See id.* In *MRI at Belfair*, the petitioner brought suit against DHEC claiming that the SHP standards for MRI services did not comply with S.C. Code Ann. § 44-7-180(B). *Id.* at 5, 664 S.E.2d at 473. The MRI standards at issue in *MRI at Belfair* were as follows:

> 1) Each hospital should have at least one MRI unit available for diagnosis of emergency patients, inpatients and outpatients.
>
> 2) In order to promote cost-effectiveness the use of shared mobile MRI units should be considered.
>
> 3) The applicant agrees in writing to provide the Department utilization data on the operation of the MRI service.

Id. at 6–7, 664 S.E.2d at 474. The petitioner challenged the standards on the basis that they were overly broad and therefore violated the CON Act. *Id.* at 4–5, 664 S.E.2d at 473. The Supreme Court ruled that the MRI standards did not violate the CON Act even though the standards did not "give specific projections of need or standards of distribution in terms that track the exact statutory language." *Id.* at 7, 664 S.E.2d at 474. The court found that the standards' reference to "each hospital" was sufficient to satisfy the projection of need requirement of S.C. Code Ann. § 44-7-180(B)(2). *Id.* The court also found the second standard relating to distribution and utilization of existing of services to be sufficient. *Id.*

The Supreme Court's ruling in *MRI at Belfair* demonstrates the deference afforded to DHEC's interpretation of the CON Act. It also suggests that Amedysis is unlikely to succeed on the merits of the underlying case. As noted by the circuit court, the standards at issue in this case "are far more specific than the standards upheld by the Supreme Court in *MRI at Belfair*." (Order at 12; (R.___)). Amedysis attempts to distinguish *MRI at Belfair* by arguing that the MRI standards "included an objective minimum number of MRI's that DHEC concluded was

necessary to meet public need." (Brief of Appellant at 18). Once again, this argument ignores that the home health services standards also have "an objective minimum number"—an applicant must demonstrate that it will serve either 25 patients in a rural county or 50 patients in a non-rural county. *See* 2015 SHP, p. XII-7; (R.___). The argument that the CON Act requires a detailed methodology for determining need is wholly unsupported by the language of the CON Act and the South Carolina case law interpreting the CON Act. Amedysis fails to establish a likelihood of success on the merits.

C. Adequate Remedy at Law

Courts reserve equitable powers for situations when there is no adequate remedy at law. *See Strategic Resources Co.*, 367 S.C. at 544, 627 S.E.2d at 689; *see also American Surety Co. of New York v. Muckenfuss*, 172 S.C. 169, 173, 172 S.C. 169, 292 (1934) (stating equitable remedies are inappropriate when there is an adequate legal remedy provided by statute). Here, Amedysis has an adequate remedy at law—the ability to appeal the granting or denial of a CON. *See Strategic Resources Co.*, 367 S.C. at 545, 627 S.E.2d at 689-90 (holding the right to appeal provides an adequate remedy at law). The CON Act explicitly provides a process by which an "affected person" can challenge DHEC's decision to grant or deny a CON.[9] Pursuant to S.C. Code 44-7-210, an affected person may challenge DHEC's decision to grant or deny a CON through a contested case hearing before the ALC. Although contested case hearings are designed to be "more efficient", "less burdensome" and "less costly" than traditional litigation, the parties are given the opportunity to engage in discovery, take depositions and present witness

[9] "'Affected person' means the applicant, a person residing within the geographic area served or to be served by the applicant, persons located in the health service area in which the project is to be located and who provide similar services to the proposed project, persons who before receipt by the department of the proposal being reviewed have formally indicated an intention to provide similar services in the future, persons who pay for health services in the health service area in which the project is to be located and who have notified the department of their interest in Certificate of Need applications, the State Consumer Advocate, and the State Ombudsman." S.C. Code Ann. § 44-7-130(1).

testimony and argument before the ALC. S.C. Code Ann. § 44-7-210(F). The CON Act also provides that an affected person may appeal the decision of the ALC to the State's appellate courts. *See* S.C. Code Ann. § 44-7-220. In the same way a party could challenge evidence supporting a CON application under the previous SHP, Amedysis can challenge DHEC's decision and the evidence relied upon in reaching that decision under the current SHP. The appeals process provides all affected persons with a full opportunity to either challenge or argue in favor of any DHEC decision relating to a CON. This is not a situation where the available legal remedy "reduces itself to a matter of words." *See Kirk v. Clark*, 191 S.C. 205, 211-12, 4 S.E.2d 13, 16 (1934).

Amedysis' argument that it lacks an adequate remedy due to the possibility that it may have to pursue administrative appeals on a case-by-case basis rather than bringing a single action is equally unavailing. Bringing a single lawsuit may be more cost effective and convenient; however, Amedyisis' inability to bring a single action does not leave it without an adequate remedy. A case-by-case approach is preferable for a number of reasons. First, a case-by-case approach allows the ALC to rule on the merits of each individual case. Second, Amedysis lacks standing to enjoin DHEC from reviewing applications in counties where it does not operate or has not applied for a CON. *See* S.C. Code Ann. § 44-7-130(1) (defining an "affected person" for purposes of the CON Act); *see also* S.C. Code Ann. § 44-7-220 (limiting persons or entities who can challenge CON decisions to affected persons). Despite only operating in 20 counties, Amedysis seeks an injunction prohibiting DHEC from taking any action on CON applications relating to home health services in all 46 counties. Clearly, the injunction sought is overly broad. *See Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 392–93 (4th Cir. 2001) (quoting *Califano 20 v. Yamasaki*, 442 U.S. 682, 702, 99 S. Ct. 2545 (1979) ("Injunctive relief should be

no more burdensome than necessary to provide complete relief to the plaintiffs"); *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 766 (4th Cir. 1998) ("Being equitable relief, an injunction should be no broader than necessary to achieve its desired goals"). Finally, Amedysis exaggerates the practical impact of the denial of the injunction. It is highly unlikely that Amedysis would appeal every CON which is granted. Even if it desired to do so, Amedysis lacks standings to appeal decisions relating to counties where it does not operate or has not applied for a CON. *See* S.C. Code Ann. 44-7-220. Additionally, if, as Amedysis suggests, the appeals involve identical legal issues, bringing subsequent actions asserting the same legal position after the ALC has rendered a decision on that legal issue would be akin to the proverbial tilting at windmills.

CONCLUSION

The circuit court did not abuse its discretion in determining that Amedysis failed to establish irreparable harm, a likelihood of success on the merits and an inadequate remedy at law. Therefore, the order denying Amedysis' motion for a preliminary injunction should be affirmed.

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