THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Casey L. Manning, Circuit Court Judge

C.A. No.: 2016-CP-40-00818
Court of Appeals Docket No. 2016-000631

Amedisys SC, L.L.C ..... Appellant,

v.

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

and

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

Of whom, South Carolina Department of Health and Environmental Control, National Healthcare Corporation, Pruitthealth Corporation, In-Care Home Health, Inc., Tri-County Home Health Care & Services, Inc., M&C Group, LLC d/b/a/ Home Helpers of Bluffton, Tidewater Home Health, PA, Hedgemark Brentwood Medical Services Inc. d/b/a PHC Home Health are ..... Respondents.

FINAL BRIEF OF APPELLANT

Steve A. Matthews, SC Bar 3689
HAYNSWORTH SINKLER BOYD, P.A.
P.O. Box 11889
Columbia, South Carolina 29211-1889
803.540.7827
smatthews@hsblawfirm.com

Andrea H. Brisbin, SC Bar 68189
HAYNSWORTH SINKLER BOYD, P.A.
P.O. Box 340
Charleston, South Carolina 29402-0340
843.720.4440
abrisbin@hsblawfirm.com

Sarah P. Spruill, SC Bar 68337
HAYNSWORTH SINKLER BOYD, P.A.
P.O. Box 2048
Greenville, South Carolina 29602-2048
864.240.3200
sspruill@hsblawfirm.com

Counsel for Appellant Amedisys SC, LLC

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STATEMENT OF ISSUE ON APPEAL

Did the circuit court err in denying a preliminary injunction to enjoin the issuance of administrative decisions on home health certificate-of-need applications until the South Carolina Department of Health and Environmental Control and the participating parties can obtain a judicial determination of whether the current South Carolina Health Plan criteria that control such decisions violate the governing statute, S.C. Code Ann. §44-7-180(B) (Supp. 2015), by failing to set forth projections of need for additional home health services and standards for distribution of home health services as required by the statute?

STATEMENT OF THE CASE

The Parties

Plaintiff-Appellant Amedisys SC, LLC ("**Amedisys**") and each of the Intervenor-Defendant Respondents ("**Intervenors**") is an entity that provides home health services in various South Carolina counties and/or that has multiple pending applications for certificates of need ("**CONs**") to provide home health services in additional counties.

Defendant-Respondent Department of Health and Environmental Control ("**DHEC**") is an agency of the State of South Carolina, created by the General Assembly.

The Statutory Regime

DHEC is governed by S.C. Code Ann. §§ 44-1-20 *et seq.* (2002), and in particular as it relates to this action by the "State Certification of Need and Health Facility Licensure Act (S.C. Code Ann. § 44-7-110 *et seq.* (2002), the **"CON Act"**) and the "Licensure of Home Health Agencies Act" (S.C. Code Ann. § 44-69-10 *et seq.* (2002), the **"HHA Act"**).

The Regulatory Framework

In order "to promote cost containment, prevent unnecessary duplication of healthcare facilities and services, guide the establishment of health facilities and services which will best serve public needs, and ensure that high quality services are provided in health facilities in this State," the General Assembly requires that certain healthcare providers obtain a CON prior to undertaking certain healthcare activities. S.C. Code Ann. § 44-7-120(1) (2002). Included in that legislative determination is the requirement that a provider, in order to obtain a license to provide home health services in a county, must first demonstrate that there is an identified, unmet need for its services in that county and

receive a CON from DHEC for the services in that county. S.C. Code Ann. § 44-69-75(A) (2002); 3 S.C. Code Ann Regs. 61-15 § 202(2)(b)(11) (Supp. 2015).[1]

Prior to issuing CONs, DHEC must, under the CON Act and the HHA Act, establish objective criteria for need determination; and it must apply those criteria in evaluating and acting upon CON applications in its implementation of the CON program (the "**CON Program**"). The need-determination standards are to be revised biennially in a State Health Plan (a "**Plan**"). S.C. Code Ann. § 44-7-180 (Supp. 2015). Such Plans are legally binding and have the force of law, and thus control the issuance of CONs.[2]

A Plan "at a minimum must include," among other things, "projections of need for additional . . . health services" and "standards for distribution of . . . specified health services . . . including scope of services to be provided, utilization, . . . regionalization, [and] other factors relating to proper placement of services . . ." S.C. Code Ann. § 44-7-180(B) (Supp. 2015); 3 S.C. Code Ann. Regs. 61-15, § 106(1) & (2) (Supp. 2015) (emphasis added). And again, "[t]he South Carolina Health Plan must address and include projections and standards for specified health services and equipment which have a potential to substantially impact health care cost and accessibility." S.C. Code Ann. § 44-7-180(B) (Supp. 2015) (emphasis added).

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[1] The HHA Act defines "home health services" to include certain statutorily-listed healthcare items and services furnished on a visiting basis in a patient's residence (or as an outpatient at a facility where certain equipment cannot be readily brought to the patient's home). S.C. Code Ann. § 44-69-20(5) (2002). Entities providing home health services are defined as "home health agencies." S.C. Code Ann. § 44-69-20(4) (2002).

[2] The General Assembly has forbidden DHEC to "issue a Certificate of Need unless an application complies with the South Carolina Health Plan" and certain other requirements. S.C. Code Ann. § 44-7-210(B) (Supp. 2015); *see also Trident Med. Ctr. v. S.C. Dep't of Health & Envtl. Control*, 412 S.C. 341, 350, 772 S.E.2d 177, 182 (Ct. App. 2015), *cert. denied* (Dec. 18, 2015) ("[I]t is clear the legislature intended for the State Health Plan to be an enforceable document.").

The requirement that the Plan project need for additional services has a three-fold purpose. First, it helps to direct service expansion to areas – and thus patients – most in need of the services, by alerting existing and prospective home health providers as to where DHEC believes a need exists. Second, it provides DHEC thresholds and baselines from which to measure whether a CON applicant has met the basic need requirement. Third, it provides DHEC with an objective measurement by which to determine whether CON applicants are "competing" within the meaning of the CON Act and the Department's implementing regulations set forth at 3 S.C. Code Ann. Regs. 61-15 (the "***CON Regulations***"). Importantly, DHEC is prohibited from approving more than one application for similar services in the same area if doing so would "exceed the need" for such facilities and services. S.C. Code Ann. § 44-7-130(5) (2002); § 44-7-210(B) (Supp. 2015).

The Historical Context

This case arises in the aftermath of the funding hiatus in the CON Program from July 1, 2013 through June 30, 2014. This Court held on April 14, 2014, however, that the failure to fund did not terminate the CON Program and that the Program remained in full force and effect. *Amisub of S.C., Inc. v. S.C. Dep't of Health & Envtl. Control*, 403 S.C. 576, 743 S.E.2d 786 (2013). The uncertainty occasioned by the funding hiatus, however, delayed the adoption of a Plan for 2014-2015.

On August 13, 2015, DHEC's governing body, the South Carolina Board of Health and Environmental Control (the **"Board"**), adopted the State Health Plan for 2014-2015 (the "**Current Plan**"). (R. 299). The portion of the Current Plan relevant to home health services and thus to this action is Chapter XII "Long-Term Care Facilities

and Services – Home Health" (pp. XII-6 – XII-9; (R. 319-322)) and Chapter XIII "Inventories and Determinations of Need – Home Health Agency Utilization" (pp. XIII-46 – XIII-51; (R. 325-330)).[3] The Current Plan's "Certificate of Need Standards" for home health CONs (Current Plan, p. XII-7 – XII-8; (R. 320-321)) are significantly different from those of preceding State Health Plans. *Compare* the 2012-2013 State Health Plan (the "**Prior Plan**;" p. XII-13 – XII-15; (R. 289-291)), and the 2010-2011 State Health Plan (the "**2010 Plan**;" p. XII-13 – XII-16; (R. 259-262)).

In the 7 months following the adoption of the Current Plan, there have been approximately 150 home health CON applications filed with DHEC which collectively affect all 46 counties. This unprecedented figure compares to approximately 22 home health CON applications affecting only 4 counties during the preceding 7 years.[4] On January 22, 2016, DHEC declared 48 of the current CON applications to be complete, thus making them eligible for consideration and decision by DHEC.[5]

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[3] This lawsuit does not affect South Carolina's CON Program for any healthcare services or facilities other than home healthcare.

[4] The 150 applications filed in the last 7 months include 8 applications filed by Amedisys to preserve its interests in case DHEC is not enjoined in the present action. Data related to CON applications are drawn from public records, specifically the DHEC website at http://www.scdhec.gov/Health/docs/CON_PendingApp.pdf, the Notice of General Public Interest published at 40 S.C. State Reg. (No. 3) 8 (2016) listing CON applications that have been accepted for filing and/or have been deemed complete, the 2010 Plan, the Prior Plan, and the Current Plan), and Administrative Law Court decisions *NHC/OP, L.P. v. SCDHEC & Health Related Home Care*, Docket No. 12-ALJ-07-0299-CC and *Tri-County Home Health Care & Servs., Inc. v. SCDHEC & United Home Care, Inc.*, Docket No. 12-ALJ-07-0005-CC).

[5] 40 S.C. State Reg. (No. 1) 7 (2016). Once an application is submitted, DHEC may request additional information. After DHEC deems an application complete, it must notify affected persons of that fact through publication in the *South Carolina State Register*. DHEC must then either grant or deny the requested certificate of need within 30 to 120 days of the publication of the last competing application (or up to 150 days if someone requests a public hearing). S.C. Code Ann. § 44-7-210(A) (Supp. 2015). DHEC

The Procedural Posture

On February 8, 2016, Amedisys filed its Complaint under the Uniform Declaratory Judgment Act against DHEC, alleging that the Current Plan's criteria for home health CONs are invalid due to their omission of "projections of need for additional . . . health services" and "standards for distribution of . . . specified health services," which are required to be part of each State Health Plan by S.C. Code Ann. §44-7-180 (Supp. 2015). (R. 14). On the following day, Amedisys moved for a preliminary injunction preventing DHEC from acting on home health CON applications during the lawsuit. (R. 85).

Following motions to intervene by the Intervenors, a memorandum by DHEC in opposition to a preliminary injunction (R. 106, 114), and notice to all parties including the Intervenors, Judge Casey L. Manning heard the motion on February 22, 2016, and at the conclusion of the hearing invited proposed orders from all parties, including the Intervenors whom he admitted to the case. (Tr. at 5:15-19; 53:11-13. R. 197, 245). Each party submitted a proposed order as directed. Judge Manning adopted the proposed order of the Intervenors in full on February 23, 2016. *See* Order (R. 1).[6] Amedisys appealed from the denial of a preliminary injunction on March 21, 2016, and served the notice thereof on all counsel of record on that day.

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has now deemed 81 out of the 150 submitted applications to be complete and has published notices to affected persons in the *South Carolina State Register* issues of January 22, 2016, February 26, 2016, and March 25, 2016. Thus, with respect to those 81 applications, DHEC is now in the period in which it may issue staff decisions and must decide beginning on May 23, 2016. 40 S.C. State Reg. (No. 1) 7 (2016); 40 S.C. State Reg. (No. 2) 19 (2016); and 40 S.C. State Reg. (No. 3) 8 (2016).

[6] Subsequent to entry of the Order, DHEC filed its Answer in this action on March 10, 2016. (R. 120).

STANDARD OF REVIEW

The standard of review on the grant or denial of an injunction is for an abuse of discretion. *Gilley v. Gilley,* 327 S.C. 8, 11-12, 488 S.E.2d 310, 312 (1997); *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 decision of the trial court is unsupported by the evidence or controlled by an error of law." *Peek, supra, citing Ledford v. Pa. Life Ins. Co.,* 267 S.C. 671, 675, 230 S.E.2d 900, 902 (1976) (emphasis added).

One of the criteria for a preliminary injunction is whether there is a likelihood of success on the merits. *Compton v. S.C. Dep't of Corr.*, 392 S.C. 361, 366, 709 S.E.2d 639, 642 (2011). Judge Manning ruled that this criterion was not met. Order at 12; (R. 12).

However, the sole issue in the underlying declaratory judgment action is whether the Current Plan, as it relates to home health services, violates S.C. Code Ann. §44-7-180(B) (Supp. 2015). The Supreme Court has previously held that that issue "is a legal conclusion based on statutory interpretation principles. Thus, no factual findings are necessary to determine compliance with § 44-7-180(B)." *MRI at Belfair, LLC v. S. Carolina Dep't of Health & Envtl. Control*, 379 S.C. 1, 7, 664 S.E.2d 471, 474 (2008) (emphasis added). Further, "'[t]he interpretation of a statute is a question of law.' . . . This Court may interpret statutes, and therefore resolve this case, 'without any deference to the court below.'" *Brock v. Town of Mt. Pleasant*, Op. No. 27621 (S.C.Sup.Ct. filed April 13, 2016) (Shearouse Adv.Sh. No. 16 at 21) (citations omitted; emphasis added].

Thus, because the sole question in the underlying declaratory judgment action is a pure question of law involving statutory interpretation and for which no factual finding is necessary, the question of the likelihood of success on the merits of that question is also a

pure question of law, as to which this Court owes no deference to the lower court. Moreover, because it is a pure question of law, the determination of the likelihood of success on the merits with respect to the motion for a preliminary injunction will necessarily be a determination of the merits of the underlying declaratory judgment action. And because that question of the merits is the sole question in the underlying declaratory judgment action, its determination will resolve this case and thus resolve this appeal.

Accordingly, the "Argument" section below is devoted primarily to the issue of the circuit court's error of law with respect to the likelihood of success on the merits. The other aspects of preliminary injunction review, irreparable harm and adequate remedy at law, will be dealt with at less length.

ARGUMENT

What is at issue here amounts to a second attempted vitiation of the CON Program (the first being the 2013 failure to fund) for critical home health services state-wide, this time through an administrative implementation that is neither legislatively authorized nor promulgated as a regulation. The Current Plan eviscerates the CON Program of the statutorily-mandated objective standards and criteria to guide applicants, opponents, and DHEC itself in the administration of the CON Program for home health services. The disappearance from the Current Plan of objective criteria by which to establish need with respect to home health CON applications is reflected in the free-for-all atmosphere that it has engendered. *See* text accompanying footnote 4, *supra*.

To obtain a preliminary injunction, the moving party must demonstrate 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 no adequate remedy at law. *Compton v. S.C. Dep't of Corr.*, 392 S.C. 361, 366, 709 S.E.2d 639, 642 (2011). As demonstrated below, Amedisys met each of those requirements.

I. Unlike previous Plans, the Current Plan fails to articulate objective, discernible, reviewable criteria for measuring need for home health services.

Under previous Plans, applicants, opponents, and DHEC had demonstrated, denied, or evaluated need based on established criteria related to population, growth, inventory of current services, and demographic need. For example, the Prior Plan (for 2012-2013) established a detailed methodology for determining need based on population, projected population growth, and utilization rates broken down by age-demographic. The need calculation methodology of the Prior Plan related to home health services is described in Paragraph 4 of "Certificate of Need Standards," as follows:

> 4. The need methodology creates statewide use rates for four population groups (0-17, 18-64, 65-74, 75+) based on 2011 utilization data; 75% of these rates are applied against the projected 2013 populations for each county to get a total number of estimated patients in need. It then takes the actual number of patients served in 2011 and multiplies them by the population growth factor to project the number of patients to be served by the existing home health agencies in the county for 2013. The projected number of patients served by the existing agencies is subtracted from the total estimated number of patients in need. If there is a difference of 100 or more patients projected to be in need, then another agency could be approved for that county.

Prior Plan at XII-13 (R. at 289). This explanation was accompanied by a spreadsheet applying that methodology to calculate home-health services need in each of the 46 counties. Prior Plan at XII-14 (R. at 290). Moreover, beginning with the 2010 Plan, DHEC established a mechanism for keeping the population and services-inventory information up-to-date throughout the life of a Plan, and had followed through on that mechanism. 2010 Plan and Prior Plan updates, Complaint, Ex. B (R. at 41).

The Current Plan, however, rejects the need projection methodology that had been used for the past several biennial Plans as they related to home health services. (*Compare* Prior Plan at ¶ 4 and page XII-14 (R. 289, 290), *with* Current Plan at ¶¶ 3 and 4 (R. 320).

The need component of the Current Plan related to home health services states:

> 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 underutilization 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 the 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.

Current Plan at XII-7 (R. at 320).

II. The circuit court made an error of law in determining Amedisys was not likely to succeed on the merits because the omission of reviewable, objective criteria regarding home health services from the Current Plan violates the CON Act, deprives providers of due process, and abrogates the rule of law.

As shown, the Current Plan differs very significantly from its predecessors by omitting meaningful, reviewable standards for assessing home health CON applications. Unlike previous Plans, the home health "Certificate of Need Standards" of the Current Plan, in the paragraphs quoted immediately above, do not set, or provide a method for determining, a uniformly applicable and objective projection of need in any county, and thus provide no usable criteria for granting or denying an applicant a CON on a principled, reviewable basis. This difference violates S.C. Code Ann. § 44-7-180(B) (Supp. 2015).

A. *The deficient standards of need deprive DHEC of the tools that the CON Act and the HHA Act require it to utilize in its consideration of any new and pending applications.*

Without uniformly applicable and objective criteria for granting or denying a home health CON application or determining which applications are "competing," DHEC's own decisions would, by definition, be arbitrary and capricious and subject to judicial invalidation. S.C. Code Ann. § 1-23-380(5)(f) (Supp. 2015). The failure to provide such standards renders that portion of the Plan invalid.

1. DHEC cannot objectively determine need under the Current Plan.

DHEC has acknowledged that the Current Plan is devoid of the objective criteria and standards necessary to avoid that result. On September 18, 2015, shortly after the Board adopted the Current Plan, DHEC staff convened an open forum meeting of participants in the home health services industry in South Carolina to seek guidance from those participants on how DHEC might implement the Current Plan. *See, e.g.*, Transcript of September 18, 2015 ("**Forum Tr.**" (R. 132). "[T]his is new to all of us, and I know we have some – some folks here who have some ideas about how to have documentation. I'm hoping, at some point, that they can share them." Maggie Murdock, DHEC CON staff). Forum Tr. 24:20 – 25:21 (R. 155-156). Thus, more than a month after the final adoption of the Current Plan, DHEC acknowledged that there were no standards in place. In response to a question, "[W]hat is the department going to utilize?" when two different applicants submit their "clearly different approaches," the response from DHEC staff (Ms. Murdock) was "That is a very good question. And, you know, I can't – we don't – we can't – at this point, we haven't established a set policy outside of the methodology that we have adopted in the state health plan." (Forum Tr. 28:20 - 29:3 (R. 159-160)). Perhaps most directly, one applicant consultant asked: "So in terms of needs, since there's no methodology in the plan, I assume each one of us can develop the need to justify 25 or 50 patients in the second year of operation. Any new methodology that makes sense to us, hopefully will make sense to you." The response from DHEC (Shelly

Kelly, DHEC Director of Health Regulation): "That's probably the truth." (Forum Tr. 27: 8-14 (R. 158)).[7]

Thus, within the context of home health CONs, this case presents the question of whether there will be a promulgated, standards-based rule of law, or an *ex post facto* and arbitrary rule of agency staff.

2. DHEC cannot objectively identify competing applicants under the Current Plan.

The Current Plan contains no objective criteria for determining whether approval of more than one application would "exceed the need" in that area. In other words, there is no way to determine whether multiple applicants for home health services in a service area are "competing applicants." S.C. Code Ann. §44-7-130(5) (2002).

The CON Act and CON Regulations define "competing applicants" as:

> two or more persons and/or health care facilities as defined in this regulation who apply for Certificates of Need to provide similar services and/or facilities in the same service area and whose applications if approved would **exceed the need** for this facility or service. An application shall be considered competing if it is received by the Department no later than fifteen (15) calendar days after a Notice of Affected Persons is published in the State Register for one or more applications for similar services and/or facilities in the same service area. All applications received by the Department within fifteen (15) calendar days of publication of the Notice of Affected Persons in the State Register for the first application(s) will be considered to be competing. Any applications received by the Department later than the fifteenth day following publication of the Notice of Affected Persons in the State Register for the first application(s) will not be considered to be competing with the(se) application(s).

S.C. Code Ann. §44-7-130(5) (2002); 3 S.C. Code Ann. Regs. 61-15 §103 (6) (Supp. 2015) (emphasis added).

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[7] The open forum transcript was provided to the circuit court without objection during the preliminary injunction hearing (Tr. 12:13 – 15:5 (R. 204-207) and is identified in the transcript of that hearing as "Plaintiff's Exb. No. 3." Tr. 2:12 (R. 194).

Where need is subjectively established, it will not be possible to distinguish two separate needs from a single, double-counted need. Thus, even assuming that an applicant, presenting subjective evidence, could show some quantifiable need in a county, it would not be possible to determine whether that "need" was identical to, overlapped with, or was completely separate from, the "need" similarly shown by another applicant in that same county. There would, thus, be no way to ascertain whether two applicants were competing applicants such that only one would be eligible for a CON under the CON Act. This problem was also raised in the September 18, 2015 open forum meeting, but without any resolution. Tr. 30:17 –31:22 (R. 161-162).

Without establishing, at the outset, any meaningful objective measurement of need, DHEC cannot non-arbitrarily and accountably determine whether multiple CON applications, if granted, would exceed the need for home health services in a particular county.[8] Thus, there effectively will be no justifiable limit on the number of applicants who, if they satisfy the other criteria, will be entitled to a CON.[9] DHEC consequently cannot discharge its statutory duty of preventing the unnecessary duplication of services, let alone its duties of promoting cost containment, guiding the establishment of services to best meet public need, and ensuring a high quality of health services in the State.[10]

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[8] *Tri-County Home Health Care & Servs., Inc. v. S.C. Dep't of Health and Environmental Control*, 12-ALJ-07-0005-CC, 2013 WL 5783540, at *29 (Oct. 23, 2013) ("the State Health Plan Standards are threshold requirements").

[9] *Cf.* 3 S.C. Code Ann. Regs. 61-15, §307(1) (prohibiting the Department from issuing a CON unless the application complies with the Plan, project review criteria and other Department regulations and requiring the Department to identify any regulation used as a basis for denying an application that complies with the Plan).

[10] *Tri-County Home Health, supra,* at *25. ("[T]o determine whether an application is contrary to the purposes of the CON Act, the Court must consider: 1) whether the proposal results in duplicative health care . . . services, and 2) whether the duplication is

B. *The deficient standards of need strip Amedisys and all other CON participants of their statutorily-conferred right to participate meaningfully in legal proceedings that affect their interests.*

In the same way, the Current Plan's lack of objective criteria has the effect of depriving, immediately and irreparably, Amedisys and others of due process rights guaranteed to them by S.C. Const. art. I, § 22 and the CON Act.[11] Interested parties have a right to notice from DHEC of completed applications that affect their interest. S.C. Code Ann. § 44-7-210(A) (Supp. 2015). Importantly, DHEC is prohibited from approving more than one application for similar services in the same area if doing so would "exceed the need" for such facilities and services. S.C. Code Ann. § 44-7-130(5) (2002); § 44-7-210(B) (Supp. 2015). During the course of DHEC's review of applications, anyone can demand a public hearing on the application and present arguments for or against the application. Once DHEC staff issues a decision in favor of an application, an interested party has rights both before the Board and with the ALC as outlined in the Order (pp. 9, 12, *citing* S.C. Code Ann. § 44-1-60 (Supp. 2015); S.C. Code Ann. § 44-7-210(D) & (E)) (Supp. 2015).

Without intelligible standards that can be applied to the particular facts related to the services and territory involved in an application, however, neither potential applicants nor potential opponents of applications – both of which have a statutory right to

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unnecessary or should be allowed to promote cost containment and establish high quality health facilities and services.").

[11] S.C. Const. art. I, § 22 provides that before Amedisys or any other interested party can be bound by a DHEC or Administrative Law Court proceeding, it is entitled to notice, which must at a minimum must provide "an opportunity to be heard in a meaningful way." *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008). Failure to provide intelligible notice of the standards to be applied in an administrative process cannot provide an opportunity to be heard in a meaningful way.

participate in the CON process – would be able to formulate a legally coherent position on the merits of an application or determine whether there was any legal basis to justify their expenditure of resources in applying for or opposing a CON; and DHEC's decisions would be, by definition, arbitrary and capricious and therefore subject to judicial invalidation. S.C. Code Ann. § 1-23-380(5)(f) (Supp. 2015). Even if the qualitative evidence described in subparagraphs 3(a) through 3(d) of the Current Plan's "Standards of Need" (*see* pp. 11-12, *supra*) could lead to a quantifiable figure showing, say, a 50-patient need in a non-rural county, there would be no way to distinguish the 50 patient need shown by one applicant from the 50 patient need shown by another applicant. There would, thus, be no way to determine whether two applicants were competing applicants such that only one would be eligible for a CON. S.C. Code Ann. § 44-7-130(5) (2002); § 44-7-210(B) (Supp. 2015); 3 S.C. Code Ann. Regs. 61-15, § 103(6) (Supp. 2015). DHEC confirmed that it would just be operating on an ad hoc, unprincipled basis in this situation during its open forum meeting in September 2015. A consultant asked:

> [T]en people put in tomorrow, and we're all projecting 50 patients. How do you make the decision to stop saying, okay, they're all projecting the same 50 need and when to stop? Do we all go head-to-head or do you – are you just – I mean, is that arbitrary right now, we don't know what's going to happen?

DHEC's (Ms. Kelly's) response was:

> No, I mean, well, that's what we're – we need to see the applications and – may be deferred Ashley here.

Ashley (Ms. Biggers, also of DHEC and counsel for DHEC in this action) responded:

> Well, it – I think will have to wait until we see the applications –.

Forum Tr. 47:8 - 47:24 (R. 178).

Each step in the process that is allowed to occur, whether at the agency or at the Administrative Law Court (**"ALC"**) or on subsequent appeals, without articulated, objective, reviewable standards in place on which all interested parties (including DHEC) can evaluate, formulate, and assert their positions, claims and defenses, is a step at which each of those parties loses forever the statutory rights of meaningful participation as an interested party that are granted and guaranteed to it by the CON Act and related statutes. Participation is meaningless in an adjudicative process when the substantive rules are not just hidden but are in fact being made up as one goes along. Parties that have a statutory right to participate in the DHEC review process cannot have meaningful input when the decisional criteria themselves lack meaning. Requiring a party to guess as to the relevance of potential evidence and its weight, and after the process, to guess as to whether the same standards have been applied uniformly to all applicants, rips at the fabric of the rule of law.

C. *The circuit court wrongly considered itself bound to defer to an agency interpretation of a pure question of law.*

The circuit court based its denial of the preliminary injunction in significant part on its perception of the deference it owes to an agency's statutory interpretation. *See* Order, pp. 10-11 (R. 10-11). However:

> Interpreting and applying statutes and regulations administered by an agency is a two-step process. First, a court must determine whether the language of a statute or regulation directly speaks to the issue. If so, the court must utilize the clear meaning of the statute or regulation.

Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control, 411 S.C. 16, 32, 766 S.E.2d 707, 717 (2014), *citing Brown v. Bi–Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003).

In *MRI at Belfair, supra*, this Court undertook the evaluation of a Plan's compliance with the CON Act on its own, with no discussion of or deference to the agency position. *See also Monex Int'l, Ltd. v. Commodity Futures Trading Com'n*, 83 F.3d 1130, 1133 (9th Cir. 1996) ("[J]udicial deference is not necessarily warranted where courts have experience in the area and are fully competent to decide the issue.") (citation omitted). The question of what the standards should be, may be appropriate for agency deference; the question of whether the statute requires meaningful, intelligible standards is not.

Here, the "statute directly speaks to the issue" of what the mandatory minimum elements of a Plan are. S.C. Code Ann. §44-7-180 (Supp. 2015). There is no basis for deference to an agency interpretation.

D. *The Belfair case, relied upon by the circuit court with respect to likelihood of success, is not on point.*

In *MRI at Belfair, supra,* concerning a hospital's application for a CON for MRI equipment, the Court rejected the argument that the Plan standards violated the CON Act because they failed to adequately establish need for additional MRI equipment. However, those standards included an objective minimum number of MRI's that DHEC concluded was necessary to meet public need, *i.e.*, at least one MRI available to every hospital. That constituted a clear, objective standard: was one available or was one not? It was a simple matter of ordinary judicial construction of a text and statutory interpretation to determine what was meant by that provision of the Plan. By contrast, the Current Plan provides no objective quantification (or methodology for reaching an objective quantification) of what additional home health services are needed where and what applicants must show to meet that need.

E. *Conclusion with regard to success on the merits.*

Under the Current Plan, DHEC is without the tools that the CON Act and the HHA Act require it to utilize in its consideration of any new and pending applications; and other affected parties are without the tools necessary to give their statutory rights substance. If DHEC proposed to issue a CON in a county in which a provider is already providing such services and in which a statutorily-compliant methodology would show that there is no unmet need, the existing provider would have no standard by which to defend its rights, DHEC would have no standard by which to defend its decision, the investments by both the incumbent provider and the new provider would be impaired, and the legislative purposes of the CON Act would be thwarted, all to the endangerment of the care of home health patients in that county.

III. The circuit court wrongly determined that Amedisys would not suffer irreparable harm if DHEC were allowed to issue decisions on CON applications pending this lawsuit.

In its Order, the circuit court erroneously conjectured, "Amedisys is presumably concerned with the possible adverse financial impacts it may suffer if other businesses are granted licenses to operate in the counties where it currently operates." Order, p. 8 (R. 8). While there may well be financial injury that occurs depending on how DHEC rules on various applications (see further discussion on that below), the immediate and irreparable harm that Amedisys suffers is the loss of its statutorily protected ability to participate meaningfully in DHEC's consideration of Amedisys's own and other applicants' applications. That Amedisys has an important interest in that right to participate is demonstrated by the discussion in Argument II(B), above, and by the same arguments that the Intervenor-Respondents made in seeking intervention and that the circuit court accepted. Order, pp. 2-4 (R. 2-4). The confusion as what criteria will be

applied, how, and on the basis of what evidence, is manifest from the September 18, 2015 open forum meeting described above.

The Order at p. 9 (R. 9) discusses the legal remedies available to Amedisys, from a review conference to a contested case hearing in the ALJ, as a further refutation of the presence of irreparable injury. Although that discussion seems to address more the adequacy of legal remedy, it only serves in this context to highlight the legal rights of participation in the adjudicative process of which Amedisys is being presently and irrevocably deprived in any meaningful sense.

Nor is this the situation, as suggested by the Order at p. 8 (R. 8) of *Frady v. Student Loan Servicing Center,* 313 S.C. 561, 443 S.E.2d 580, 582 (Ct. App. 1994) (quoting 43A C.J.S. *Injunctions* § 116, at 192 (1978) ("[O]ne may not generally enjoin a state agency from the performance of duties imposed by valid statutes.")). That case involved the straightforward application of a valid law. The present case, on the other hand, involves an agency application of a Plan that is manifestly contrary to a valid law.

Even if the Order were correct that the appropriate inquiry for irreparable harm must be directed to financial concerns, the requirement for irreparable injury has been met. The element of irreparable harm is satisfied when it is difficult to calculate the amount of damages, such that an equitable remedy is necessary to make the aggrieved party whole. *Bethel Methodist Episcopal Church v. City of Greenville*, 211 S.C. 442, 45 S.E.2d 841 (1947).

Nor is it necessary, as the Order suggests at p.9 that only a threat to the movant's business can constitute an irreparable injury. Although there is not a South Carolina case directly on point for the present case, the approach of South Carolina's courts in two

contexts is compelling. First, one of the longest standing rules regarding injunctive relief in South Carolina is that an injunction is the appropriate remedy to abate an alleged waste of property or assets while ownership of the same property or assets is being litigated. *Kinsler v. Clarke, 11 S.C. Eq. 617 (S.C. App. Eq. 1837)*; *Grosshuesch v. Cramer*, 367 S.C. 1, 623 S.E.2d 833 (2005); *County Council of Charleston v. Felkel*, 244 S.C. 480, 137 S.E.2d 577, 578 (1964). Here, the "asset" would be the right to serve in a particular county. Amedisys has that valuable right in which it has invested substantially. Second, an imminent violation of a reasonable restriction on competition is a proper basis for a finding of irreparable harm to support a preliminary injunction. *See Standard Lighting Distributors, Inc. v. Sweatman*, 2006 WL 4911571 (S.C.Com.Pl., October 9, 2006) (Trial Order, 2006-CP-32-2056). Here, the restriction established by the CON Act is by definition legally reasonable, as it was established by the General Assembly.

IV. The circuit court was in error in concluding that Amedisys has an adequate remedy at law.

A. *A remedy that requires multiple legal actions is not an "adequate remedy at law."*

The circuit court ruled that "Amedisys has an adequate remedy at law, which is to request a contested case hearing at the ALC challenging any decision granting a CON application for a home health agency in a county in which Amedisys is an affected person with standing." Order, p. 12 (R. 12). Here, again, however, the circuit court misconstrues what is to be protected. While an ALC appeal might be sufficient protection for financial interests, it cannot protect the right to participate meaningfully at every stage of legal proceedings that affect Amedisys's rights, including those stages that occur before there even is a contested case before the ALC.

"[W]hether there is an adequate remedy at law for a wrong, [is a] question [] that

[is] not decided by narrow and artificial rules." *Kirk v. Clark*, 191 S.C. 205, 4 S.E.2d 13, 15 (1939). "The adequacy of a legal remedy is a pragmatic determination based upon the certainty of fixing damages, the practicality of obtaining relief, and the efficiency of the legal remedy in the particular circumstances." Flanagan, *South Carolina Civil Procedure* at 508. "[I]f the available legal remedy in a given case reduces itself to a matter of words, rather than to a matter of efficacy, because of its impracticability, or because the threatened acts may continue during the progress of an action at law, or because successive actions at law would be necessary to protect the plaintiff's rights, equity will hold that the existence of a legal remedy is not an obstacle to the exertion of the equitable power." *Kirk v. Clark*, *supra*, 191 S.C. at 211-12, 4 S.E.2d at 16 (emphasis added); *Columbia Broadcasting Sys., Inc. v. Custom Recording Co.*, 258 S.C. 465, 189 S.E.2d 305, 312 (1972).

The circuit court's reference to having an adequate remedy consisting of participating in "**a** contested case hearing" further highlights the inadequacy of this "remedy." There are already 150 CON applications pending across all 46 counties. "**A**" contested case hearing will be wholly inadequate to protect Amedisys's rights, both due process and financial.

B. *The "adequate remedy at law" standard does not strip Amedisys of its rights under the Uniform Declaratory Judgment Act and require it to pursue instead multiple administrative appeals as the only means of resolving this important public question of law.*

The circuit court's reliance on the existence of a right to a separate ALC appeal of each CON decision also raises the important issue of whether case-by-case administrative appeal rights constitute an "adequate remedy at law," such that the existence of those

rights prevent Amedisys and others similarly situated from bringing an alternative action under the Uniform Declaratory Judgment Act. S.C. Code Ann. § 15-53-10 *et seq.*

If the circuit court's approach prevails, no plaintiffs would be able to obtain a preliminary injunction under the Uniform Declaratory Judgment Act because they could always wait for an actual lawsuit (or, in this case, multiple lawsuits) and seek their remedy there. There is nothing in the Rules of Civil Procedure, the principles of equity, or the Uniform Declaratory Judgment Act that directs such a result. The Uniform Declaratory Judgment Act is an alternate remedy that a plaintiff is entitled by statute to pursue.

CONCLUSION

The Current Plan gives neither to DHEC nor to home health providers either a map or a compass for attempting to discern the merits of CON applications for home health services. For the foregoing reasons, this Court should:

1. Determine *de novo* as a matter of statutory interpretation that the portion of the current State Health Plan that relates to home health services does not comply with S.C. Code Ann. § 44-7-180(B) (Supp. 2015);

2. Determine that Plaintiff-Appellant Amedisys does, therefore, have a likelihood of success on the merits of the declaratory judgment action underlying this appeal;

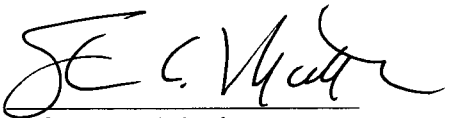
3. Determine that the other requisite elements for granting a preliminary injunction have been met; and

4. Remand to the circuit court for entry of appropriate orders.

July 12, 2016

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.

By: 

Steve A. Matthews
SC Bar 3689
1201 Main Street (29201-3226)
P.O. Box 11889 (29211-1889)
Columbia, South Carolina
803.540.7827
smatthews@hsblawfirm.com

Andrea H. Brisbin
SC Bar 68189
134 Meeting Street (29401-2240)
P.O. Box 340 (29402-0340)
Charleston, South Carolina
843.720.4440
abrisbin@hsblawfirm.com

Sarah P. Spruill
SC Bar 68337
ONE North Main, 2nd Floor (29601-2772)
P.O. Box 2048 (29602-2048)
Greenville, South Carolina
864.240.3200
sspruill@hsblawfirm.com

Counsel for Appellant Amedisys SC, LLC

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Casey L. Manning, Circuit Court Judge

C.A. No.: 2016-CP-40-00818
Court of Appeals Docket No. 2016-000631

Amedisys SC, L.L.C ..... Appellant,

v.

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

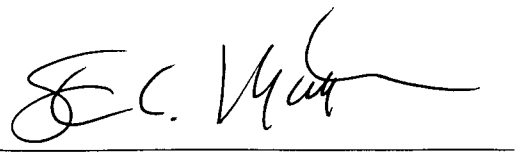
and

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

Of whom, South Carolina Department of Health and Environmental Control, National Healthcare Corporation, Pruitthealth Corporation, In-Care Home Health, Inc., Tri-County Home Health Care & Services, Inc., M&C Group, LLC d/b/a/ Home Helpers of Bluffton, Tidewater Home Health, PA, Hedgemark Brentwood Medical Services Inc. d/b/a PHC Home Health are ..... Respondents.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Reply Brief of Appellant complies with Rule 211(b).



Steve A. Matthews, SC Bar 3689
HAYNSWORTH SINKLER BOYD, P.A.
P.O. Box 11889
Columbia, South Carolina 29211-1889
803.540.7827

Andrea H. Brisbin, SC Bar 68189
HAYNSWORTH SINKLER BOYD, P.A.
P.O. Box 340
Charleston, South Carolina 29402-0340
843.720.4440

Sarah P. Spruill, SC Bar 68337
HAYNSWORTH SINKLER BOYD, P.A.
P.O. Box 2048
Greenville, South Carolina 29602-2048
864.240.3200

Counsel for Appellant

July 12, 2016

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PROOF OF SERVICE

Pursuant to Rule 211(a), SCACR, I hereby certify that one copy of the printed and bound Final Reply Brief of Appellant in the above-referenced matter was served on each of the Respondents by hand-delivery to their attorneys at the following address:

Ashley C. Biggers, Esq.
Vito M. Wicevic, Esq.
South Carolina Department of Health and
Environmental Control
2600 Bull Street
Columbia, South Carolina 29201

Counsel for Respondent South Carolina Department of Health and Environmental Control

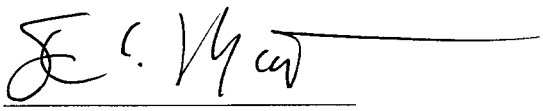
E. Wade Mullins, III, Esq.
Robert C. Osborne, Esq.
Bruner, Powell, Wall & Mullins, LLC
1735 S. Julian Place, Suite 200
Columbia, South Carolina 29204

Counsel for Respondents In-Care Home Health, Inc., Tri-County Home Health Care & Services, Inc., M&C Group, LLC d/b/a/ Home Helpers of Bluffton, Tidewater Home Health, PA, and Hedgemark Brentwood Medical Services Inc. d/b/a PHC Home Health

Daniel J. Westbrook, Esq.
Stuart M. Andrews, Jr., Esq.
Lacy R. Lee, Esq.
Nelson Mullins Riley & Scarborough, LLP
1320 Main Street, 17th Floor
Columbia, South Carolina 29201

Counsel for Respondents National Healthcare Corporation and Pruitthealth Corporation

HAYNSWORTH SINKLER BOYD, P.A.

By: 

Steve A. Matthews
smatthews@hsblawfirm.com
1201 Main Street (29201-3226)
P.O. Box 11889 (29211-1889)
Columbia, South Carolina
803.779.3080
Counsel for Appellant Amedisys SC, LLC

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