



DEPARTMENT OF HEALTH & HUMAN SERVICES

Centers for Medicare & Medicaid Services
Office of Hearings
7500 Security Boulevard
Mail Stop: B1-01-31
Baltimore, MD 21244

August 14, 2023

VIA ELECTRONIC DELIVERY

Bruce Grindrod
Provider Partners Health Plan of North
Carolina
785 Elkridge Landing Road, Suite 300
Linthicum Heights, MD 21090

Amber Casserly
MAPD Appeals Team
7500 Security Boulevard
Woodlawn, MD 21244

RE: Hearing Officer Order
Hearing Officer Docket Number: H-23-00008
Medicare Advantage/Prescription Drug Plan Contract Denial
Provider Partners Health Plan of North Carolina, Contract Number: H4439

Dear Ms. Clements and Ms. Spaccarelli:

A copy of the Hearing Officer's decision for the above-referenced appeal is attached.

The Hearing Officer's Order may be appealed to the Administrator of the Centers for Medicare & Medicaid Services. The parties may request review by the Administrator within 15 calendar days of receiving this decision. *See* 42 C.F.R. § 422.692; 42 C.F.R. § 423.666. Requests for review should be sent via email to Jacqueline R. Vaughn, Director, Office of the Attorney Advisor, at Jacqueline.Vaughn@cms.hhs.gov, with a copy to Arlene O. Gassmann, Paralegal Specialist, at Arlene.Gassmann@cms.hhs.gov.

Sincerely,
Office of Hearings

**DEPARTMENT OF HEALTH AND HUMAN SERVICES
CENTERS FOR MEDICARE & MEDICAID SERVICES**

Provider Partners Health Plan of North Carolina Contract No. H4439,	*	Denial of Initial Application to Offer Medicare Advantage/ Medicare Advantage- Prescription Drug Plan
Appellant	*	
	*	
v.	*	Contract Year 2024
	*	
Centers for Medicare & Medicaid Services,	*	Hearing Officer Docket No. H-23-00008
Respondent	*	

HEARING OFFICER REMAND ORDER

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I. FILINGS

This Order is being issued in response to the following:

- (a) Provider Partners Health Plan of North Carolina, Inc.’s (“PPHP-NC”) Request for Hearing by letter dated May 30, 2023, and filed on May 31, 2023;
- (b) PPHP-NC’s Initial Brief and exhibits, filed on June 3, 2023;¹
- (c) Centers for Medicare & Medicaid Services’ (“CMS”) Memorandum and Motion for Summary Judgment (“MSJ”) Supporting CMS’ Denial of Provider Partners’ Initial Application for a Medicare Advantage (“MA”)/MA-Prescription Drug (“MA-PD”) Contract, Contract Number H4439 (“CMS Memorandum and MSJ”) and exhibits, filed on June 14, 2023;
- (d) PPHP-NC’s Reply Brief and exhibits, filed on June 20, 2023;
- (e) CMS’ Response to PPHP-NC Contract (H4439) June 20, 2023, Reply Brief (“CMS Reply Brief”) and exhibits, filed on July 20, 2023; and
- (f) PPHP-NC’s Supplemental Reply Brief and exhibits, filed on July 25, 2023.

II. JURISDICTION

This appeal is provided pursuant to 42 C.F.R. § 422.660. The CMS Hearing Officer designated to hear this case is the undersigned, Amanda S. Costabile.

III. ISSUE

Whether CMS’ denial of PPHP-NC’s initial application for an MA/MA-PD contract (Contract No. H4439) was inconsistent with regulatory requirements.

IV. DECISION SUMMARY

The Hearing Officer denies CMS’ Motion for Summary Judgment. The Hearing Officer finds that CMS’ notice to PPHP-NC was insufficient when it, in effect, established an application-related (extended) deadline through a Division of Medicare Advantage Operations (“DMAO”) helpdesk portal rather than the Health Plan Management System (“HPMS”) system. The Hearing Officer remands PPHP-NC’s application to CMS in order for CMS to allow PPHP-NC the opportunity to avail itself of the extended deadline by filing, in the form and manner required, the Letters of Intent (“LOIs”) for CMS’ consideration.

V. BACKGROUND, AUTHORITY, AND SUBREGULATORY GUIDANCE

Under Title XVIII of the Social Security Act (codified at 42 U.S.C. §§ 1395-1395lll) (“the Act”), CMS is authorized to enter into contracts with entities seeking to offer Medicare Part C and Part D benefits to beneficiaries. 42 U.S.C. § 1395w-27, 112. Any entity seeking such a contract must fully complete all parts of a certified application in the form and manner required by CMS. 42 C.F.R. § 422.501(c)(1). CMS requires an entity seeking to contract as an MA organization to

¹ Although PPHP-NC filed its Initial Brief on June 3, 2023, the document is dated June 7, 2023.

submit an application through the Health Plan Management System (“HPMS”). See “Part C-Medicare Advantage and 1876 Cost Plan Expansion Application” at <https://www.cms.gov/files/document/cy-2024-medicare-advantage-part-c-application.pdf-1> at 6-7 (last visited June 27, 2023).

A. APPLICATION REQUIREMENTS AND REVIEW PROCESS

CMS requires an applicant to demonstrate that it has an adequate contracted provider network that is sufficient to provide access to covered services in accordance with access standards described by statute and regulation.² 42 C.F.R. § 422.116(a)(1)(i). Beginning with contract year 2024, an applicant must demonstrate compliance with the network adequacy requirements set forth under 42 C.F.R. § 422.116 as part of its application. 42 C.F.R. § 422.116(a)(1)(ii). To demonstrate compliance with these network adequacy standards, applicants must upload, as part of the application, Provider and Facility Health Service Delivery (“HSD”) Tables into HPMS. See “Part C-Medicare Advantage and 1876 Cost Plan Expansion Application” at <https://www.cms.gov/files/document/cy-2024-medicare-advantage-part-c-application.pdf-1> at 27; see also December 2022 Instructions, CMS Memorandum and MSJ Exhibit C-3 at 2. Furthermore, under 42 C.F.R. § 422.116(a)(1)(ii), CMS may deny an application on the basis of an evaluation of the applicant’s network for the new service area.

An organization must list every provider and facility with a fully executed contract in its network in the HSD Tables. See Medicare Advantage and Section 1876 Cost Plan Network Adequacy Guidelines, located at www.cms.gov/files/document/medicare-advantage-and-section-1876-cost-plan-network-adequacy-guidance08302022.pdf at 2 (last updated Aug. 30, 2022) (hereinafter “Network Adequacy Guidelines”). Beginning in 2024, applicants may use a LOI, signed by both the MA organization and the provider or facility with which the applicant has started or intends to negotiate, in lieu of a signed contract at the time of application and for the duration of the application review, to meet network standards. 42 C.F.R. § 422.116(d)(7). As part of the network adequacy review process, applicants must notify CMS of their use of LOIs to meet network standards in lieu of a signed contract and submit copies upon request and in the form and manner directed by CMS. *Id.*

CMS evaluates an application based on the information contained in the application itself, any additional information that CMS obtains through other means such as on-site visits, and any relevant past performance history associated with the applicant. 42 C.F.R. § 422.502(a)(1) and (b)(1). After reviewing whether the application meets all requirements, CMS issues, if necessary, a Deficiency Notice in which CMS notifies an applicant of deficiencies within the application and allows a specific time period within which the applicant may cure the deficiencies. See CMS Memorandum and MSJ at 4. If the applicant fails to cure the deficiencies cited within the Deficiency Notice or if the applicant is otherwise unable to meet the pertinent regulatory requirements, CMS issues the applicant a Notice of Intent Deny (“NOID”). 42 C.F.R.

² See section 1852(d)(1) of the Act; 42 C.F.R. §§ 422.112(a) and 422.114(a)(1).

§ 422.502(c)(2). Per § 422.502(c)(2)(ii), the applicant will have ten days from the NOID to respond in writing to correct deficiencies in the application.

If, in response to a NOID, an applicant either fails to submit a revised application within ten days from the date of the NOID, or if after timely submission of a revised application, CMS still finds that an applicant does not appear qualified or has not provided CMS enough information to allow CMS to evaluate the application, CMS will deny the application. 42 C.F.R. § 422.502(c)(2)(iii). For an application denial, CMS provides the applicant with written notice of the determination and the basis for the determination. 42 C.F.R. § 422.502(c)(3).

If CMS denies an MA application, the applicant is entitled to a hearing before a CMS Hearing Officer. 42 C.F.R. § 422.502(c)(3)(iii). The applicant has the burden of proving by a preponderance of the evidence that CMS' determination was inconsistent with the requirements of 42 C.F.R. §§ 422.501 (application requirements) and 422.502 (evaluation and determination procedures). 42 C.F.R. § 422.660(b)(1). In addition, either party may ask the Hearing Officer to rule on a MSJ. 42 C.F.R. § 422.684(b). The authority of the Hearing Officer is found at 42 C.F.R. § 422.688, which specifies that “[i]n exercising his or her authority, the hearing officer must comply with the provisions of title XVIII [of the Social Security Act (“Act”)] and related provisions of the Act, the regulations issued by the Secretary, and general instructions issued by CMS in implementing the Act.”³

B. SUBREGULATORY GUIDANCE REGARDING FORM AND MANNER REQUIREMENTS FOR LOIs

Within memoranda dated December 22, 2022, and February 9, 2023, CMS provided additional information to applicants, specifically addressing operational instructions regarding LOIs, including guidance regarding submission of LOIs in response to Deficiency Notices and NOIDs. *See* CMS Memorandum and MSJ Exhibits C-3 at 2-3 and C-4; CMS Memorandum and MSJ at 8. In the December 22, 2022 Memorandum, CMS explained that applicants “must (i) mark “Y” in the indicated column on the HSD table to notify CMS of the use of LOIs[;] (ii) [an] LOI must be uploaded into HPMS for each county specialty combination where the applicant has indicated the use of an LOI on their HSD table[;] and (iii) that LOIs are submitted at the provider level and the applicant must submit an LOI for each individual provider.” CMS Memorandum and MSJ at 8; *see also* CMS Memorandum and MSJ Exhibit C-3 at 2. Additionally, CMS informs that “[g]roup

³ Within the preamble to the 2010 Final Rule, the Secretary provided additional clarification regarding the hearing process:

[T]he applicant would not be permitted to submit additional revised application material to the Hearing Officer for review should the applicant elect to appeal the denial of its application. Allowing for such a submission and review of such information would, in effect, extend the deadline for submitting an approvable application.

Policy and Technical Changes to the Medicare Advantage and Medicare Prescription Drug Benefit Programs, 75 Fed. Reg. 19678, 19683 (Apr. 15, 2010).

practice LOIs are acceptable, but must still be submitted for each individual [National Provider Identifier (“NPI”)] indicated on the HSD table.” *Id.*

Within the February 9, 2023 Memorandum, CMS further explains that “if an applicant used a group practice LOI, they must upload the group practice LOI for each provider’s NPI, within the group practice, that the applicant includes on their HSD table, and that the individual provider NPI indicated on the provider HSD table must be included in the LOI naming convention.” CMS Memorandum and MSJ at 8; *see also* CMS Memorandum and MSJ Exhibit C-4. Specifically, CMS instructs that “applicants should use the naming convention found in the [Network Management Module (“NMM”)] Plan User Guide at HPMS > Monitoring > Network Management > Documentation.” CMS Memorandum and MSJ Exhibit C-4.

VI. FACTUAL BACKGROUND AND CONTENTIONS

On February 15, 2023, PPHP-NC filed an initial MA/MA-PD application with CMS to operate in 26 counties in North Carolina. CMS Memorandum and MSJ at 1, 5; *see* PPHP-NC Initial Brief at 2. Specifically, PPHP-NC is seeking an MA contract to allow it to offer an MA institutional special needs plan (“I-SNP”) in North Carolina. *Id.*

CMS issued PPHP-NC a Deficiency Notice on March 20, 2023, in which CMS states that PPHP-NC’s initial application failed to demonstrate that the organization met contract year (“CY”) 2024 Part C application requirements for management, experience, and history, as well as administrative management, state licensure and health services management and delivery. *See* CMS Memorandum and MSJ Exhibits C-7, C-8, and C-9; CMS Memorandum and MSJ at 5-6.

PPHP-NC submitted revised application materials by the March 28, 2023 deadline. According to CMS, those revised materials addressed their management, experience, and history and administrative management deficiencies. CMS Memorandum and MSJ at 6. In addition, PPHP-NC submitted revised Provider and Facility HSD tables but did not submit LOIs or exception requests. *Id.*; *see* CMS Memorandum and MSJ Exhibits C-10 and C-11.

On April 17, 2023, CMS issued a NOID, listing state licensure deficiencies and network adequacy deficiencies. In response, on April 27, 2023, PPHP-NC notified CMS of its intent to withdraw 22 counties from their initial application. CMS Memorandum and MSJ Exhibit C-18. CMS processed this request on April 28, 2023. CMS Memorandum and MSJ at 6. Further, PPHP-NC submitted revised Provider and Facility HSD tables for their remaining pending service areas in which they indicated the use of 180 LOIs. *See* CMS Memorandum and MSJ Exhibits C-14, C-15, and C-16.

On May 17, 2023, CMS issued a letter denying PPHP-NC’s application due to the following:

Health Services Management & Delivery

* MA Letters of Intent - NMM Review - You uploaded information that does not support your attestation. Please refer to HSD

Submission Reports (available in HPMS), including the LOI Results Report for further details on the status of your submission.

CMS Memorandum and MSJ Exhibit C-1.

Also on May 17, 2023, CMS contacted PPHP-NC, via the DMAO helpdesk portal, regarding the LOI deficiency and provided PPHP-NC the opportunity to submit the omitted LOIs in order to cure the deficiency by May 24, 2023. *See id.* at 6-7; CMS Memorandum and MSJ Exhibit C-17. PPHP-NC did not respond to this request by the deadline provided.⁴ CMS Memorandum and MSJ at 7; PPHP-NC Reply Brief at 2.

PPHP-NC filed its Hearing Request on May 31, 2023. The Office of Hearings acknowledged the appeal request that same day and provided the parties with a hearing date and briefing schedule. PPHP-NC filed its Initial Brief and accompanying exhibits on June 3, 2023. *See* PPHP-NC Initial Brief. CMS filed its responsive brief, and accompanying exhibits, on June 14, 2023, within which it moved for summary judgment in its favor. *See* CMS Memorandum and MSJ.

Within its Initial Brief, PPHP-NC disagrees with CMS' finding that PPHP-NC "did not upload information that supported an attestation." PPHP-NC Initial Brief at 2. Specifically, PPHP-NC states that it "indicated each provider for which it was submitting an LOI, by name and NPI[;] [that it] designated for each provider the group practice with which the provider is affiliated[;] [and that it] submitted an LOI for each group practice with which providers designated as being under an LOI participate[;]" referring to its Exhibit 7. *Id.* at 4. PPHP-NC concluded that "it submitted an LOI applicable to every provider listed as a 'fail' on the LOI Results Report." *Id.*; *see also* PPHP-NC Exhibit 8. Thus, "PPHP-NC asserts that it has shown by a preponderance of the evidence that CMS' denial of its MA-PD application was inconsistent with its stated rationale for the denial." *Id.* PPHP-NC requested a Hearing Officer decision based on the record. *Id.*

In its brief, CMS explains that "PPHP failed to submit the omitted LOIs in order to support where PPHP indicated their use on the provider HSD submission[;]" and that PPHP "failed to follow the correct naming convention for their LOIs." *Id.* at 7-8. Specifically, CMS asserts that PPHP-NC failed to upload 179 of the 180 LOIs. *See id.* at 6; CMS Memorandum and MSJ Exhibit C-16. CMS argues that PPHP "did not meet CMS's requirements for valid LOI submissions during the application process[;]" thus "PPHP failed to demonstrate in its application that it fully met all Part C requirements to offer an MA contract H4439 for [Calendar Year] 2024." CMS Memorandum and MSJ at 8. As explained above, CMS also noted that it contacted PPHP-NC, via the DMAO helpdesk portal, in order to provide PPHP-NC the opportunity to submit the omitted LOIs by May 24, 2023, but PPHP-NC did not avail itself of the opportunity to do so. *See id.* at 6-7.

PPHP-NC filed a Reply Brief on June 20, 2023, and along with its Reply Brief, it attached 179 LOIs. *See* PPHP-NC Reply Brief and Exhibits 1-2.

⁴ PPHP-NC states that until reading CMS' brief, it was unaware that such a communication had been sent out and that an additional curing opportunity had been offered to it. PPHP-NC Reply Brief at 1.

Within its Reply Brief, PPHP-NC argues that all of its “LOIs were executed by April 27, 2023 and were submitted with its application during the final cure period, albeit not in the format requested by CMS.” PPHP-NC Reply Brief at 2. Additionally, PPHP-NC claims that it “has no record of receiving” CMS’ May 17, 2023, email regarding curing PPHP-NC’s LOI deficiencies. *Id.* PPHP-NC argues that “[w]hile CMS had no legal obligation to give PPHP-NC additional time to address this issue, if CMS decides to do so, it has the obligation to assure that PPHP-NC has reasonable notice of this supplemental process.” *Id.* PPHP-NC claims that the email was sent from a “Help Desk” and not through the “formal” communication method used throughout the application process, thus requests that the Hearing Officer “direct CMS to allow PPHP-NC a short window of opportunity to submit the information at issue in the format requested by CMS.” PPHP-NC Reply Brief at 2-3.

On July 13, 2023, the Hearing Officer requested that the parties submit additional briefing to address the supplemental curing opportunity that CMS offered to PPHP-NC on May 17, 2023. In response to the request, CMS filed its Reply Brief on July 20, 2023, and PPHP-NC filed its Supplemental Reply Brief on July 25, 2023.

With respect to the additional LOI-related curing opportunity that CMS offered to PPHP-NC, CMS explains that

[o]n Wednesday, May 17, 2023, CMS contacted PPHP via the DMAO resource mailbox, regarding their LOI deficiency (See: Exhibit C-8). CMS conducted outreach from the DMAO resource mailbox to applicants that received a denial notice and had LOI deficiencies. The purpose of this outreach was to provide applicants an opportunity to correct their deficiencies ahead of the appeals process. In the notification, CMS instructed PPHP-NC to correct any LOI deficiencies that could result in an application denial by responding to the helpdesk by Wednesday, May 24, 2023, 5:00 PM EST. PPHP-NC did not respond to this outreach attempt.

CMS Reply Brief at 2-3.

CMS further explains that it

conducted outreach to all organizations with . . . LOI deficiencies on the denial notice to provide an opportunity to correct their deficiencies in advance of the decision memos. These applicants, including PPHP, were given the opportunity to submit revised LOIs after the application deadline to revise a technical error in filing LOIs even after CMS issued guidance memos, applicant training and sub-regulatory guidance that included detailed instructions on how to submit group level LOIs throughout the application process. PPHP-NC continued to submit LOIs incorrectly during the application process.

Id. at 3.

With respect to communicating this additional curing opportunity through the DMAO resource mailbox, CMS states that it

sent the notification from the DMAO resource mailbox to the same contacts provided to CMS as the Part C Application contact, the Plan CEO contact, and the Medicare Compliance Officer contact. All three contacts listed in the Health Plan Management System (HPMS) received the Application Deficiency Notice, the NOID, and the Denial Notice.

Id.

Regarding its use of the DMAO resource mailbox, CMS explains that “[t]he [DMAO] maintains a resource mailbox that allows MAOs and CMS to communicate. Applicants that received a Deficiency Notice and a NOID during the CY 2024 application cycle received instructions in the notice informing applicants to contact the DMAO resource mailbox . . . if the applicant has any questions about the deficiencies in the notice.” *Id.* at 2.

In its Supplemental Reply Brief, PPHP-NC states that

CMS provided no announcement to applicants that it was adding an additional opportunity to cure deficiencies related to the letter of intent (LOI) submission requirements. Without notice, CMS’ contractor, LMI, sent out the communication in the form of a response from its DMAO mailbox (from “DoNotReply@lmi.org”), which is used to respond to a wide variety of inquiries from plan sponsors and their representatives.

PPHP-NC Supplemental Reply Brief at 2.

PPHP-NC goes on to assert that “[a] communication through the DMAO portal is an aberration from the manner in which CMS generally communicates with plan sponsors about their applications.” *Id.* at 3. PPHP-NC states that it is “very familiar with the CMS application process” and that “[a]ctions under this process are conveyed through emails from CMS[,] [s]pecifically from CMSHpms@cms.hhs.gov.” *Id.* PPHP-NC argues that the “[u]se of the DMAO portal for purposes of notifying PPHP-NC of a supplemental opportunity to correct its application was misleading, confusing and did not guarantee receipt in the same manner as CMS’ other communications related to PPHP-NC’s application.” *Id.* at 4.

Lastly, PPHP-NC states that its “sole deficiency [for its application] was the format in which it submitted its LOIs.” *Id.* at 5. As such, PPHP-NC asserts that it “would most certainly have responded to the supplemental opportunity to cure its application [as it] has expended substantial energy and resources to have an approved application to offer an I-SNP in North Carolina.” *Id.*

VII. DISCUSSION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Hearing Officer hereby denies CMS' MSJ and remands PPHP-NC's application to CMS for effectuation of this Order, as explained below.

The Hearing Officer finds that although PPHP-NC did not originally meet the regulatory requirement to cure its application in the form and manner that CMS requires by the date set in the NOID (April 27, 2023), CMS, in effect, extended PPHP-NC's application deadline beyond the deadline set in the NOID by offering, on May 17, 2023, an additional opportunity to "revise a technical error in filing LOIs." CMS Reply Brief at 3. This is reflected in CMS' own statement that, on May 17, 2023, it "instructed PPHP-NC to correct any LOI deficiencies *that could result in an application denial* by responding to the helpdesk by Wednesday, May 24, 2023[.]" CMS Reply Brief at 3 (emphasis added). The Hearing Officer also finds that CMS did not provide PPHP-NC or other applicants with advance notice that they should be looking for an additional application-related LOI curing opportunity outside the general application deadlines.

For the CY 2024 application cycle, the Hearing Officer observes that CMS issued critical application-related notices (application status, Deficiency Notices, NOIDs and Denials) by using the HPMS email. *See* PPHP-NC Supplemental Reply Brief Exhibit 2. However, for PPHP-NC's additional LOI curing opportunity that CMS provided on May 17, 2023, CMS issued the notice by using the DMAO portal. *See* CMS Memorandum and MSJ Exhibits C-4, C-6, C-10, and C-17; PPHP-NC's Supplemental Reply Brief Exhibit 2.

Although CMS claims that PPHP-NC should have been aware of the notice as it was communicated through the DMAO helpdesk portal, the Hearing Officer notes that a primary purpose of the DMAO helpdesk portal is for plans to reach out to CMS with questions. *See* CMS Reply Brief at 2; PPHP-NC Supplemental Brief at 2-3. For example, CMS informs—in the Deficiency Notices and NOIDs—that *applicants* may "contact the DMAO resource mailbox" with "any questions about the deficiencies in the notice[s]." CMS Reply Brief at 2. Additionally, on CMS' DMAO public webpage, CMS describes the DMAO portal as being the "site [that] serves as a single portal for submitting questions pertaining to various aspect of [DMAO] related services[.] <https://dmao.lmi.org/dmaomailbox> (last visited on August 11, 2023). Thus, the Hearing Officer finds that it is understandable that PPHP-NC did not check the DMAO resource for an unexpected additional LOI curing opportunity which effectively established a new deadline on the same day as receiving its May 17, 2023, Denial Notice.

The record reflects that CMS' notices (e.g., Deficiency Notices and NOIDs) which communicated and established the deadlines for the CY 2024 application cycle were sent through the HPMS system. *See* PPHP-NC Supplemental Reply Brief Exhibit 2. As CMS, instead, established a critical application deadline (albeit, an extension) via the DMAO portal, the notice to PPHP-NC was not fully adequate.

VIII. ORDER

The Hearing Officer remands PPHP-NC's initial application for contract number H4439 to CMS in order to allow PPHP-NC the opportunity to file its LOIs (for CMS' substantive review) by submitting them in the form and manner required by CMS.

Amanda S. Costabile, Esq.
CMS Hearing Officer

Date: August 14, 2023