DEPARTMENT OF HEALTH & HUMAN SERVICES

Centers for Medicare & Medicaid Services
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August 31, 2023

VIA ELECTRONIC DELIVERY

Daniel Foster
Wilke Fleury
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Sacramento, CA 95814

Kevin Stansbury
MAPD Appeals Team
7500 Security Boulevard
Baltimore, MD 21244

RE: Hearing Officer Decision
Hearing Officer Docket Number: H-23-00002
Medicare Advantage/Prescription Drug Plan Contract Termination
Imperial Health Plan of California, Contract Number: H2793

Dear Mr. Foster and Mr. Stansbury:

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

The Hearing Officer's decision 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

IMPERIAL HEALTH PLAN OF CALIFORNIA CALIFORNIA (MA-PD Plan), **Contract No. H2793** **Petitioner** **v.** **CENTERS FOR MEDICARE & MEDICAID SERVICES,** **Respondent**	* * * * * * * * * * * * * * *	**CMS Hearing Officer Case No.:** **H-23-00002** **Review of Termination Notice for Medicare Advantage /Medicare Advantage – Prescription Drug Plan Contract**

HEARING OFFICER ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

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I. STATEMENT OF THE ISSUE

Whether the Centers for Medicare and Medicaid Services' ("CMS'") February 22, 2023 termination notice for Imperial Health Plan of California ("Imperial") (Contract No. H2793) was proper.

II. SUMMARY OF DECISION

The Hearing Officer grants CMS' motion for summary judgment. It is undisputed that Imperial received Star Ratings of less than three stars for contract years 2021, 2022, and 2023. CMS accordingly concluded that Imperial substantially failed to carry out the terms of its contract H2793 "by failing to achieve a Part D summary Star Rating of at least three stars in the past three most recent Star Rating periods." CMS' determination was justified and consistent with the controlling legal authority at 42 C.F.R. § 423.510(a). Imperial did not establish by a preponderance of the evidence that CMS' decision to terminate contract H2793 was inconsistent with the controlling authority. 42 C.F.R. § 423.650(b)(3).

III. FILINGS

a) April 20, 2023 Imperial Initial Brief
b) May 9, 2023 Parties Stipulations of Facts and exhibits
c) May 12, 2023 CMS Brief and exhibits
d) May 12, 2023 CMS Motion for Summary Judgement ("MSJ")
e) May 19, 2023 Imperial Reply Brief
f) June 2, 2023 Imperial Opposition to CMS' Motion for Summary Judgment
g) June 23, 2023 CMS Reply in Support of Motion for Summary Judgment

IV. FACTUAL BACKGROUND

Imperial is a Medicare Advantage-Prescription Drug ("MA-PD") plan under contract H2793. Imperial offers the MA-PD plan as a coordinated care plan, which means it is required to offer Part C and Part D in the same service area.[1] CMS Brief at 1. *See* 42 C.F.R. 422.4(a)(c)(1), 423.4; CMS Exhibits 1, 2, 5.

By letter dated February 22, 2023, CMS issued a termination notice (effective December 31, 2023) to Imperial. CMS Exhibit 6. CMS determined that "Imperial has substantially failed to carry out its contract with CMS by failing to achieve a Part D summary Star Rating of at least three stars in the past three most recent Star Rating periods." CMS Exhibit 6 at 1. CMS also articulated that "Imperial . . . failed to comply with the Part D Star Ratings [regulatory] requirements. *Id.* at 3. CMS cited sections 1860D-12(b)(3)(B) and 1857(c)(2) of the Social Security Act (the "Act"); 42 C.F.R. §§ 423.505(b)(26), 423.509(a)(4)(x), and 422.510(a)(4)(xi); and Article VIII of the MA-

[1] An MA-PD is a Medicare Advantage organization that offers a qualified prescription plan. An MA-PD is subject to the same Part D requirements at 42 Part 423 as a stand-alone Part D plan sponsor. *See* CMS Brief at 9 for additional background information relating to Imperial's contract.

PD contract between CMS and Imperial. The notice indicated that Imperial's Star Ratings for the past three years were as follows:

Rating Year	Determination Issuance Date	Star Rating
2021	10/08/2020	2.0
2022	10/06/2021	2.5
2023	10/04/2022	2.5

Id. at 2-3.

Moreover, with regards to advanced notice, the termination notice added:

> Imperial has been on notice of the need to improve its Part D summary Star Ratings performance since the issuance of the 2021 Star Ratings on October 8, 2020. Imperial, therefore, had an opportunity to improve certain measures for the 2022 Star Ratings and all of its measures for the 2023 Star Ratings. In addition, on February 25, 2022, CMS notified Imperial of its low Part D summary Star Ratings and the possibility that contract H2793 would be terminated if it failed to achieve a Part D summary Star Rating of at least three stars for three consecutive years. Therefore, pursuant to 42 C.F.R. § 423.509(c), Imperial has had notice of its insufficient Part D summary Star Ratings and an opportunity to correct this deficiency by improving its Star Rating performance, which it failed to do.

Id. at 3.

By letter dated March 3, 2023, Imperial timely filed an appeal before the Hearing Officer pursuant to 42 C.F.R. §§ 422.662 and 423.651. Subsequently, the Hearing Officer established a briefing schedule and the parties filed the materials referenced above in Section III.

V. SUBSTANTIVE AUTHORITY — STAR RATINGS AND TERMINATION ACTIONS

CMS has established a 5-star scale as one of the ways to track and measure compliance with Part D requirements. The regulation at 42 C.F.R. § 423.182 describes the content of the Star Ratings as follows:

> (c) Data sources.
> (1) Part D Star Ratings measures reflect structure, process, and outcome indices of quality. This includes information of the following types: Beneficiary experiences, benefit administration information, clinical data, and CMS administrative data. Data underlying Star Ratings measures may include survey data, data separately collected and used in oversight of Part D plans' compliance with contract requirements, data submitted by plans, and CMS administrative data.
> (2) Part D sponsors are required to collect, analyze, and report data that permit measurements of health outcomes and other indices of quality. Part D sponsors

must provide unbiased, accurate, and complete quality data described in paragraph (c)(1) of this section to CMS on a timely basis as required by CMS.[2]

Additionally, 42 U.S.C. § 1395w-27(a) (section 1857 of the Social Security Act)[3] recognizes that MA plans may ultimately be terminated for failure to achieve a minimum quality rating under the 5-star rating system. The statute provides:

> (a) In general
> The Secretary shall not permit the election under section 1395w–21 of this title of a Medicare+Choice plan offered by a Medicare+Choice organization under this part, and no payment shall be made under section 1395w–23 of this title to an organization, unless the Secretary has entered into a contract under this section with the organization with respect to the offering of such plan. Such a contract with an organization may cover more than 1 Medicare+Choice plan. Such contract shall provide that the organization agrees to comply with the applicable requirements and standards of this part and the terms and conditions of payment as provided for in this part.
>
> . . .
>
> (c) Contract period and effectiveness
> (1) Period
> Each contract under this section shall be for a term of at least 1 year, as determined by the Secretary, and may be made automatically renewable from term to term in the absence of notice by either party of intention to terminate at the end of the current term.
> (2) Termination authority
> In accordance with procedures established under subsection (h), the Secretary may at any time terminate any such contract if the Secretary determines that the organization—
> (A) has failed substantially to carry out the contract;
> (B) is carrying out the contract in a manner inconsistent with the efficient and effective administration of this part; or
> (C) no longer substantially meets the applicable conditions of this part.
>
> . . .
>
> (h) Procedures for termination
>
> . . .

[2] For additional authority and details regarding Star Ratings, *see* 42 C.F.R. § 423.180-86; 77 Fed. Reg. at 22109; 83 Fed Reg. 16440-01, 16520-21 (Apr. 16, 2018); and CMS Brief at 2-4.

[3] This section is incorporated into Medicare Part D by 42 U.S.C. § 1395w-112(b)(3).

(3) Delay in contract termination authority for plans failing to achieve minimum quality rating

During the period beginning on December 13, 2016, and through the end of plan year 2018, the Secretary may not terminate a contract under this section with respect to the offering of an MA plan by a Medicare Advantage organization solely because the MA plan has failed to achieve a minimum quality rating under the 5-star rating system under section 1395w–23(*o*)(4) of this title.[4]

42 C.F.R. § 423.505(b)(26) provides that the contract between CMS and the plan sponsor must contain a provision stating that the plan must "[m]aintain a Part D summary plan rating score of at least 3 stars[,]" which is calculated in accordance with 42 C.F.R. § 423.186. Moreover, 42 C.F.R. § 423.509(a)(1-3) reiterates the elements listed at 42 U.S.C. § 1395w-27(c)(2)(A)-(C) regarding when a Part D sponsor may be terminated. The regulation further specifies that a Part D organization which does not meet Star Ratings requirements may ultimately be terminated as follows:

(a) Termination by CMS. CMS may at any time terminate a contract if CMS determines that the Part D plan sponsor meets any of the following:

(1) Has failed substantially to carry out the contract.

(2) Is carrying out the contract in a manner that is inconsistent with the efficient and effective administration of this part.

(3) No longer substantially meets the applicable conditions of this part.

(4) CMS may make a determination under paragraph (a)(1), (2) or (3) of this section if the Part D sponsor has **had one or more of the following occur**:

. . .

(x) Achieves a Part D summary plan rating of less than 3 stars for 3 consecutive contract years. Plan ratings issued by CMS before September 1, 2012 are not included in the calculation of the 3-year period.[5,6]

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[4] Section (h)(3) was promulgated through the 21st Century Cures Act, Pub. L. No. 114-255, § 17001, 130 Stat. 1033, 1330 (Dec. 13, 2016).

[5] *See* 79 Fed. Reg. 29844, 29965 (May 23, 2014); 77 Fed. Reg. at 22072, 22111, 23019 (Apr. 12, 2012); 85 Fed. Reg. 19230, 19270 (Apr. 6, 2020).

[6] CMS provides the following explanation relating to Star Ratings and the COVID 19 Public Health Emergency ("PHE"):

> In April 2020, the Secretary adjusted some aspects of the Star Ratings methodology for the 2021 and 2022 contract years due to the COVID-19 Public Health Emergency (PHE). See Medicare and Medicaid Programs; Policy and Regulatory Revisions in Response to the COVID-19 Public Health Emergency, 85 Fed Reg 19,230-01 at 19,269-75, 19,269-19,275 (Apr. 6, 2020). When adjusting the Star Ratings methodology in light of the COVID PHE, the Secretary explicitly considered the effect of these adjustments on plans that began to operate in 2019. 85 Fed. Reg at 19,275. But the Secretary did not provide any grace period for contract termination for persistently low Star Ratings under 42 C.F.R. 423.509(a)(4)(x).

42 C.F.R. § 423.509 (emphasis added).

> We have previously issued guidance (for example, CY 2012 Call Letter, page 119, issued April 4, 2011) to MA organizations and Part D sponsors indicating that we considered organizations with 3 consecutive years of less than 3-star Plan Ratings to be out of compliance with Medicare program requirements. We stated there that organizations with such a Plan Rating history should expect that, prior to initiating a termination action, we would confirm that the data used to calculate the Plan Ratings did reflect an organization's substantial failure to comply with Part C or D requirements. In essence, we noted that poor Plan Rating scores were a strong indication, but not conclusive evidence, of substantial non-compliance. In applying that policy, we include Plan Ratings issued in years prior to the issuance of the guidance to identify organizations whose performance may warrant contract termination.
>
> With the elevation of low Plan Ratings from the status of likely indicator **to conclusive evidence** of substantial non-compliance, we believe that the use of prospective Plan Ratings is more appropriate in our application of this authority.
>
> While the plan ratings were originally developed by CMS as a beneficiary comparison tool, and Congress has authorized the awarding of bonus payments based on plan rating performance, those facts do not preclude the use of plan ratings as an indicator of contract compliance. To the extent that the ratings provide reliable evidence of compliance with program requirements, they may be used as a basis for contract termination. Our preamble discussion in the proposed rule and this final rule with comment period describes the connections between each plan measure and a Part C or D requirement, noting that the measures are an effective tool for capturing information on the effectiveness of a sponsor's administrative and management arrangements as opposed to whether the arrangements are merely in place. Thus, a sponsor's failure to meet minimal performance thresholds for 3 straight years can reasonably be said to be evidence of substantial failure to meet contract requirements.
>
> Our use of low plan ratings as a basis for contract termination does not relieve us of our obligation to prove at least one of the three statutory bases for termination. Rather, the plan ratings are a tool that we will use to establish, consistent with the Part C and D statutes, that a sponsor has substantially failed to meet the requirements of its Part C or D contract. As noted previously and in the proposed rule, the data used to calculate the plan ratings are derived directly from a sponsor's performance of its Medicare program obligations.

77 Fed. Reg. at 22111-13 (emphasis added).

CMS MSJ at 3; *see also* CMS Brief at 3, 11-12.

VI. PROCEDURAL AUTHORITY- RIGHT TO HEARING/MOTION FOR SUMMARY JUDGMENT

MA-PD organizations receiving a notice of intent to terminate have a right to a hearing under 42 C.F.R. Subpart N of Parts 422 and 423. 42 C.F.R. §§ 422.510(d), 423.509(d). MA-PD plans have "the burden of proving by a preponderance of the evidence that CMS' determination was inconsistent" with the applicable regulatory requirements (in this case 42 C.F.R. § 423.509) upon which CMS' determination was based. 42 C.F.R. §§ 422.660(b) and 423.650(b). The regulation at 42 C.F.R. §§ 422.684(b) and 423.662(b) provides that either party may request that the Hearing Officer rule on a motion for summary judgment.[7] Moreover, 42 C.F.R. §§ 422.688 and 423.664 specifies that "[i]n exercising his or her authority, the hearing officer must comply with the provisions of title XVIII and related provisions of the Act, the regulations issued by the Secretary, and general instructions issued by CMS in implementing the Act."

VII. ANALYSIS

The Hearing Officer grants CMS' Motion for Summary Judgment. There are no material facts in dispute, rather, Imperial presents legal arguments regarding its interpretation of the controlling legal authority, as well as policy related contentions, which are beyond the scope of the Hearing Officer's authority. It is undisputed that Imperial received Star Ratings of less than three stars for contract years 2021, 2022, and 2023. CMS accordingly concluded that Imperial failed to substantially carry out the terms of its contract "by failing to achieve a Part D summary Star Rating of at least three stars in the past three most recent Star Rating periods." CMS Exhibit 6 at 1. As support, CMS cited the regulations at 42 C.F.R. §§ 423.510(a)(4)(ix), 423.509(a)(4)(x), and 423.505(b)(26) and Article II.D.3 of the Part D addendum to the MA-PD contract. The Hearing Officer finds that CMS' determination was justified and consistent with the controlling legal authority. Accordingly, Imperial did not establish by a preponderance of the evidence that CMS' decision to terminate contract H2793 was inconsistent with the controlling authority. 42 C.F.R. § 423.650(b)(3).

Imperial claims that low Star Ratings alone are insufficient to support a termination. Imperial states

> In terminating the MA-PD Contract, CMS fell into the trap of mechanically applying the Star Rating metrics without analyzing whether the [prescription drug plan ("PDP")] actually achieved the goals of the Medicare Program. Had it done so, CMS would have concluded that while the pandemic affected Imperial's ability to achieve the three-star ratings during the three-year period, it did not impact Imperial's ability to provide a high quality Part D Plan.

Imperial Initial Brief at 3.

> In advancing its argument, CMS relies on a 2012 determination by the Secretary of Health and Human Services ("Secretary") that three years of Star Ratings below

[7] *See* 72 Fed. Reg. 68700, 68714 (Dec. 5, 2007) ("Where no factual dispute exists, the hearing officer may make a decision on the papers, without the need for a hearing.")

> three constitute conclusive evidence of substantial noncompliance and warrant automatic termination. The Secretary completely ignores the plain language of the enabling statute, which authorizes CMS to terminate an MA-PD contact only "if the Secretary determines that the organization (A) has failed to substantially carry out the contract; (B) is carrying that the contract in a manner inconsistent with the efficient and effective administration of this part; or (C) no longer substantially meets the applicable conditions of this part." 42 U.S.C. § 1395w-27(c)(2) (incorporated into Medicare Part D by 42 U.S.C. § 1395w-112(b)(3)(B)).

Imperial Opposition to MSJ at 3.

CMS responds that the Plan's argument relating to the 2012 Federal Register ignores the context of the 2012 preamble statement. CMS Reply Brief at 5. CMS explains:

> The pre 2012 version of 42 C.F.R. § 423.509(a)(4) did not enumerate deficient Star Ratings as a basis for contract termination. The 2012 preamble statement was part of CMS's discussion about its decision to specify this as a basis for contract termination. 77 Fed. Reg. at 22,108-22,115. CMS explained it had previously issued guidance in which it indicated that three consecutive deficient Star Ratings periods were a strong indication, but not conclusive evidence, of substantial noncompliance—i.e., that three consecutive years of deficient Star Ratings would not by itself necessarily warrant contract termination. 77 Fed. Reg. at 22,111. Through the 2012 notice-and-comment rulemaking, CMS revised its position to reflect that deficient Star Ratings did warrant contract termination. 77 Fed. Reg. at 22,111. Notably, this 2012 preamble discussion reflects that when CMS added what is now section 423.509(a)(4)(x), it rejected the argument that is the cornerstone of Imperial's appeal; that three consecutive deficient Star Ratings do not, without more, justify contract termination. 77 Fed Reg. at 22,111.

Id.

The Hearing Officer concurs with CMS that both the plain language of the regulation and the preamble support that the cornerstone of Imperial's appeal, that three consecutive deficient Star Ratings do not, without more, justify contract termination, is incorrect. Rather, the Hearing Officer finds that three consecutive deficient Star Ratings are conclusive evidence to support a termination. There is no absolute requirement for CMS to engage in an additional multi-step inquiry to support this particular § 423.509(a)(4)(x) termination in which the plan clearly did not meet the numerical rating criteria. Moreover, 42 C.F.R. § 423.509(a)(4) clearly provides that CMS may rely solely on inadequate Star Ratings (423.509(a)(4)(x)) to conclusively support its decision that the requirements of 423.509(a)(1), (2) or (3) were not met.[8] The Hearing Officer is bound to follow

[8] The Hearing Officer notes that the enabling statute at 42 U.S.C. § 1395w-27(h)(3) indicates that from the 2016 to 2018 timeframes, the Secretary may not terminate "*solely* because the MA plan has failed to achieve a minimum quality rating under the 5-star rating system under section 1395w–23(o)(4) of this title." It follows that for the time period at issue here, CMS may *solel*y rely upon failure to achieve a minimum quality rating to terminate a contract.

the regulation. Additionally, the Hearing Officer finds that the regulation may easily be read in concert with the statute.

The regulation at 42 C.F.R. § 423.509(a)(1-3) reiterates the elements listed at 42 U.S.C. § 1395w-27(c)(2)(A)-(C) regarding when a Part D sponsor may be terminated. The regulation further specifies that a Part D organization which does not meet Star Ratings requirements may ultimately be terminated. 42 C.F.R. § 423.509(a)(4). Imperial argues that that if 42 C.F.R. § 423.509(a)(4)(x) had "conclusively establishe[d] a basis for contract termination," then the regulation would have read "CMS ***shall*** make a determination under paragraph (a)(1), (2) or (3) of this section if the Part D Plan sponsor . . . Achieves a Part D summary plan rating of less than 3 stars for 3 consecutive years." Imperial Opposition to MSJ at 3. The Hearing Officer rejects the Plan's analysis as the use of the term "may" could be appropriate for several reasons. For example, it might refer to CMS' overall discretion whether to issue a determination letter. Moreover, the term "may" accounts for the possibility that CMS could terminate a plan for some or all of the reasons enumerated in subsections (i)-(xi).

Imperial also clarifies that while it "is not attacking the Star Rating System as a whole or insisting that the system be disregarded[,]" it alleges that because CMS continually revised the Star Rating system and the Star Ratings, CMS does not evaluate all the requirements under Part D,[9] and therefore the Star Ratings alone should not be conclusive evidence in the contract termination analysis. Imperial Opposition to MSJ at 2, 4-7, 11-12; Imperial Reply Brief at 2, 4. CMS counters "[i]f anything, this highlights the reliability of the Star Ratings . . . because CMS is routinely re-assessing the accuracy and validity of its data." CMS Reply Brief at 6. The Hearing Officer does not have the authority to disregard the controlling regulation. Under 42 C.F.R. § 423.664, the regulation specifies that "[i]n exercising his or her authority, the hearing officer must comply with the provisions of title XVIII and related provisions of the Act, the regulations issued by the Secretary, and general instructions issued by CMS in implementing the Act."

Imperial also presents arguments (which CMS responds to) seeking relief relating to Imperial's COVID-19 experience, its satisfactory score in certain Star Rating categories, and the ramification of terminating Imperial's MA-PD contracts. While the Hearing Officer does not have the authority to consider policy related arguments, the Hearing Officer, nevertheless, summarizes the policy-related contentions presented below.

Regarding the impact of COVID-19, Imperial states it

> did not have a full and fair opportunity to achieve a 3 Star Rating because of the impacts of (1) starting operations in 2019, (2) the COVID-19 pandemic, and (3) the compounding effect of the low star ratings issued by CMS.

[9] For example, Imperial alleges that Star Ratings "primarily focus on clinical outcomes, patient experience, and customer service" (Imperial Opposition to MSJ at 12) but do not evaluate all requirements under Part D, including drug management, operational effectiveness, formulary management, and fraud, waste and abuse reporting and monitoring. Imperial Opposition to MSJ at 6-7; *see* Imperial Reply Brief at 10-11 for additional detail regarding CMS' modification of the data collection rules, the Star Rating methodology, and the influence of beneficiary decision making. CMS defends the reasonableness, reliability, and stability of the beneficiary centered criteria. CMS Reply Brief at 6-7.

Imperial Reply Brief at 6.

> Imperial is not asserting that it did not receive due process or that it lacked notice of the issues it needed to address in order to achieve a 3 Star Rating. Imperial's point is that a confluence of circumstances beyond Imperial's control frustrated its ability to achieve a 3 Star Rating.
>
> . . .
>
> In an attempt to ameliorate the impact of the COVID-19 pandemic, CMS modified the Star Rating System in April 2020. While undertaken with the best of intentions, CMS' modifications cleaved the Medicare Advantage Programs into winners and losers. While these modifications benefited established Medicare Advantage Plans and Prescription Drug Plans, they negatively impacted newer, smaller plans like Imperial.

Imperial Opposition to MSJ at 9-10.

CMS responds

> Imperial's argument also fails because there is nothing for this Tribunal to decide about how the COVID PHE affected Imperial. CMS has already recognized that the COVID PHE affected health care providers and has already applied the "regulatory adjustment for extreme and uncontrollable circumstances" to the Star Ratings of MA-PDs affected by the COVID PHE. . . . Imperial may wish that CMS had made different policy choices about how to adjust the Star Ratings during the COVID PHE, but Imperial has never alleged that its Star Ratings were improperly calculated. *See* Imperial Opp'n at 2; 85 Fed. Reg. 19230-01 at 19,275 (regarding adjustments to Part D Star Ratings). Imperial complains it was missing certain data and was therefore uniquely affected by the COVID PHE. Opp'n at 12. But the regulations already establish how CMS will calculate Star Ratings where data are missing, and Imperial does not allege, let alone show, that CMS departed from those procedures. *See, e.g.,* 42 C.F.R. § 423.186(i). Imperial's Star Ratings are indeed poor, but that is because they are based on the available data, which reflected Imperial's poor performance.

CMS Reply Brief at 8-9.

Regarding Imperial's claim that its ability to achieve an adequate Star Rating suffered during the COVID PHE as a newer and smaller plan, CMS claims that Imperial's "size and age do not absolve it of its poor performance." CMS Brief at 21. CMS also claims that "Imperial had notice and

opportunity to perform satisfactorily and to address any performance issues." *Id.* at 16; CMS MSJ at 11-15.[10]

Imperial also points out that it achieved satisfactory scores in six of the eleven categories in the 2023 Star Ratings.[11] Imperial Opposition to MSJ at 11. CMS points out that "[i]ndividual measure-level ratings cannot raise a disputed fact because they have already been used to calculate Imperial's Part D summary Star Ratings." CMS Reply Brief at 9.

Finally, with regards to the ramification of terminating the contract, Imperial states

> [i]f the decision to terminate Imperial's MA-PD contract is affirmed, there will be a direct and immediate impact on the Medicare patients enrolled in Imperial's MA-PD Plan. Those Medicare patients will immediately experience a lack of options for MA-PD plans that provide a range of benefits that are affordable and competitively priced. They will also experience a loss of access to innovative benefits that, while provided by other plans in urban areas, are not typically provided in Imperial's rural service areas. The individuals enrolled in Imperial's Special Needs Plans are even more vulnerable and will experience an avoidable severance of their vital healthcare. This patient population relies heavily on their existing doctor relationships and the Imperial patient portal.

Imperial Opposition to MSJ at 12-13.[12]

Pointing to various components of Imperial's Star Ratings, CMS concludes that "Imperial's beneficiar[ies] have a decidedly mixed view of its offerings." CMS Reply Brief at 10. CMS also alleges that "Imperial's claim of unique offerings is exaggerated" and that "[t]here are better-rated alternatives in all of the areas where Imperial offers services." CMS Brief at 24-25. Furthermore, CMS states

> [e]ven assuming, for the purposes of summary judgment, that Imperial could demonstrate that contract termination would change the options available to beneficiaries, Imperial fails to cite any legal authority that would make that an impediment to contract termination. *See* Imperial Opp'n at 12-14. Imperial's argument is equitable; it does not raise a disputed issue of material fact.

CMS Reply Brief at 9-10.

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[10] While CMS provides data to support that, as a whole, Imperial performed poorly in comparison to similar sized plans, CMS Brief at 21-22, the Plan counters that while the plans may share some characteristics, it is not clear that they were similarly situated. Imperial Reply Brief at 7.

[11] CMS also believes that Imperial "is apparently arguing that" it has shown some improvement over time. CMS also indicates that the individual ratings that Imperial represents it received was erroneous. CMS Reply Brief at 9 n.7. The Hearing Officer finds this discrepancy is immaterial. *Id.* at 9.

[12] *See also* Imperial Reply Brief at 8-10.

VIII. ORDER

The Hearing Officer grants CMS' MSJ. The Hearing Officer upholds CMS' February 22, 2023 decision to terminate Imperial's contract number H2793.

Benjamin Cohen -S

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Benjamin R. Cohen, Esq.
CMS Hearing Officer

Date: August 31, 2023