DEPARTMENT OF HEALTH & HUMAN SERVICES

Centers for Medicare & Medicaid Services
Office of Hearings
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June 27, 2023

Via Electronic Delivery

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Kelli Hishon
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RE: Hearing Officer Decision
Hearing Officer Docket Number: H-23-00003
Medicare Advantage/Prescription Drug Plan Contract Denial
Verda Health Plan of Texas, Inc. FFY 23, Contract/Plan/Provider Number: H5163

Dear Mr. Finkelstein and Ms. Hishon:

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

Verda Health Plan of Texas, Inc.	*	**Denial of Initial Application to Offer Medicare Advantage/ Medicare Advantage-Prescription Drug Plan**
Contract No. H5163,	*	
	*	
Appellant	*	
	*	
v.	*	**Contract Year 2024**
	*	
Centers for Medicare & Medicaid Services,	*	**Hearing Officer Docket No. H-23-00003**
	*	
Respondent	*	

ORDER GRANTING CMS' MOTION FOR SUMMARY JUDGMENT

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I. FILINGS

This Order is being issued in response to the following:

(a) Verda Health Plan of Texas, Inc.'s ("Verda") Hearing Request by letter dated May 18, 2023, and filed on May 19, 2023;
(b) Verda's Combined Pre-Hearing Brief and Motion for Summary Judgment ("Verda Pre-Hearing Brief and MSJ") dated and filed on May 25, 2023;
(c) Centers for Medicare & Medicaid Services' ("CMS'") Memorandum and Motion for Summary Judgment Supporting CMS' Denial of Verda's Initial Application for a Medicare Advantage ("MA")/MA-Prescription Drug ("MA-PD") Contract, Contract Number H5163 ("CMS Memorandum and MSJ") dated and filed on June 5, 2023; and
(d) Verda's Reply Brief ("Verda Reply") dated and filed on June 7, 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 Verda's initial application for an MA/MA-PD contract (Contract No. H5163), based on Verda's failure to meet CMS' state licensure requirements and failure to meet CMS' network adequacy requirements, was inconsistent with regulatory requirements.

IV. DECISION SUMMARY

The Hearing Officer grants CMS' Motion for Summary Judgment and denies Verda's Motion for Summary Judgment. The parties agree that there are no material facts in dispute. CMS Memorandum and MSJ at 1; Verda Pre-Hearing Brief and MSJ at 2. The Hearing Officer's authority is limited to deciding if CMS' determination was consistent with regulatory requirements. *See* 42 C.F.R. §§ 422.660 and 423.650. Within its application, Verda was required to fully complete all parts of the application in the form and manner required by CMS, including demonstrating compliance with the state licensure requirements set forth under 42 C.F.R. § 422.400 and 42 C.F.R. § 417.404, and demonstrating compliance with network adequacy standards outlined in 42 C.F.R. § 422.116(a)(1)(ii) by uploading Provider and Facility Health Service Delivery ("HSD") tables within the Health Plan Management System ("HPMS"). *See* 42 C.F.R. § 422.501(c)(1). Verda admits that, in response to CMS' April 17, 2023 Notice of Intent to Deny ("NOID"), its "staff inadvertently uploaded a copy of the associated Consent Order" instead of the required CMS State Certification Form," and that it did not omit, from its HSD table, two providers for which it did not submit valid Letters of Intent ("LOIs") despite attesting to the use of an LOI for these two providers. Verda Pre-Hearing Brief at 5, 8, 9, 11; Verda Reply at unnumbered pages 2-5. Thus, the Hearing Officer finds that there is no dispute that Verda's application did not, in the form and manner required, demonstrate compliance with CMS' state

licensure requirements,[1] nor did it demonstrate compliance with CMS' network adequacy standards as displayed on their as-submitted HSD table. The Hearing Officer concludes that, in denying Verda's application, CMS applied and followed the controlling regulations. Accordingly, the Hearing Officer upholds CMS' denial of Verda's application.

V. BACKGROUND

A. State Licensure or State Certification Requirement

Any entity seeking to contract as an MA organization must fully complete all parts of a certified application in the form and manner required by CMS. *See* 42 C.F.R. §§ 422.501(c) and 422.503(b)(1). Specifically, CMS requires that an application be submitted through HPMS and in accordance with instructions and guidelines that CMS may issue.

Among other requirements, an applicant must provide:

> Documentation of appropriate State licensure or State certification that the entity is able to offer health insurance or health benefits coverage that meets State-specified standards applicable to MA plans, and is authorized by the State to accept prepaid capitation for providing, arranging, or paying for the comprehensive health care services to be offered under the MA contract.

42 C.F.R. § 422.501(c)(1)(i).

For state licensure, applicants must attest in their application that they are licensed under state law as a risk-bearing entity eligible to offer health insurance or health benefits coverage in each state in which the applicant wishes to offer one or more MA plans. 42 C.F.R. § 422.400(a). CMS requires applicants to verify this attestation by uploading an executed copy of the state license certificate and the CMS State Certification Form. (*See* Part C – MA and 1876 Cost Plan Expansion Application, located at www.cms.gov/files/document/cy-2024-medicare-advantage-part-c-application.pdf, at 21-22.)

If not commercially licensed, applicants must obtain certification from the State that the organization meets a level of financial solvency and such other standards as the State may require for it to operate as an MA organization and demonstrate to CMS that it has obtained the required State certification. 42 C.F.R. § 422.400(b), (c)(2). CMS will verify that the applicant meets State

[1] Verda included, attached to its Pre-Hearing Brief as Exhibit P3, what it indicates is its April 25, 2023 CMS State Certification Form. CMS has not, however, reviewed the CMS State Certification Form that Verda submitted with its Pre-Hearing Brief, and the Hearing Officer does not possess the authority to consider this document as Verda submitted it after the regulatory deadline. *See* 42 C.F.R. § 422.502(c)(2)(iii); Exhibit P3; CMS MSJ at 4 n.13 (citing to 75 Fed. Reg. 19678, 19683 (April 15, 2010)).

financial solvency requirements as documented on the CMS State Certification Form. Part C – MA and 1876 Cost Plan Expansion Application, at 23-24.

Applicants must also demonstrate to CMS that the scope of their license or authority allows the applicant organization to offer the type of MA plan or plans (e.g., Preferred Provider Organization, Health Maintenance Organization ("HMO"), etc.) that it intends to offer in the state. 42 C.F.R. § 422.400(c)(1). With the application, applicants must submit a CMS State Certification Form executed by the state that confirms and certifies that the plan type to be offered by the applicant is within the scope of the license. *See* Part C – MA and 1876 Cost Plan Expansion Application at 55-60.

Applicants must meet and document all applicable licensure and certification requirements no later than the applicant's final upload opportunity, which is in response to CMS' NOID communication, described below. *Id.* at 22.

B. Provider Network Adequacy and Letter of Intent Requirements

Among other requirements, an applicant must "demonstrate that it has an adequate contracted provider network that is sufficient to provide access to covered services in accordance with access standards described in section 1852(d)(1) of the [Social Security] Act and in §§ 422.112(a) and 422.114(a)(1) and by meeting the standard in [§ 422.112(a)(2)]." 42 C.F.R. § 422.116(a)(1)(i). When required by CMS, an MA organization must attest that it has an adequate network for access and accessibility of a specific provider or facility type that CMS does not independently evaluate in a given year. *Id.*

Beginning with contract year 2024, an applicant for a new or expanding service area must demonstrate compliance with § 422.116(a)(1) as part of its application for a new or expanding service area and CMS may deny an application on the basis of an evaluation of the applicant's network for the new or expanding service area. 42 C.F.R. § 422.116(a)(1)(ii). MA plans demonstrate network compliance by submitting a list of their contracted providers and facilities via HSD tables through HPMS.

Changes that began with contract year 2024 for new or expanding service area applicants are provided in 42 C.F.R. § 422.116(d)(7) as follows:

> Beginning with contract year 2024, an applicant for a new or expanding service area receives a 10-percentage point credit towards the percentage of beneficiaries residing within published time and distance standards for the contracted network in the pending service area, at the time of application and for the duration of the application review. In addition, applicants may use a Letter of Intent (LOI), signed by both the MA organization (MAO) and the provider or facility with which the MAO 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. 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. At the beginning of the applicable contract year, the credit and the use of LOIs no longer apply and if the application is approved, the MA organization must be in full compliance with this section, including having signed contracts with the provider or facility.

The December 22, 2022 Memorandum explained that the 10-percentage point credit will be automatically applied in the HPMS to applicants' network reviews. CMS Exhibit C11 at 1. The credit only applies during the application process and MAOs must comply with requirements for network adequacy and access to services beginning January 1 of the contract year. *Id.*

In the December 22, 2022 Memorandum, CMS provides instructions for notifying CMS of the intent to use one or more LOIs and submitting them to CMS. CMS states that organizations should only include providers with LOIs on their HSD tables that are necessary to meet the minimum standards. *Id.* Additionally, once the initial submission process begins, applicants must submit HSD tables that contain only providers with which they have a contract. *Id.* at 2.

When responding to a CMS initial deficiency notice, applicants that will utilize LOIs must resubmit their HSD tables and notify CMS of their use of one or more LOIs as follows:

> (1) Applicants must mark "Y" in the indicated column on the HSD table to notify CMS of the use of LOIs (note: If an applicant marks "Y" in the initial application submission, they will receive an error). An LOI must be uploaded into the [Network Management Module ("NMM")] in HPMS for each county specialty combination where the applicant has indicated the use of an LOI on their HSD table. LOIs are submitted at the provider level and the applicant must submit an LOI for each individual provider. Group practice LOIs are acceptable, but must still be submitted for each individual [National Provider Identifier ("NPI")] indicated on the HSD table. Please review the forthcoming Network Management Plan User Guide in the NMM for specific upload instructions.
>
> (2) Applicants must provide a one-page LOI in PDF format for each NPI identified in each county specialty combination, listed on the provider or facility table, for which the applicant wishes to use an LOI in lieu of a contract. A compliant LOI must be on the Medicare Advantage Organization's (MAO) letterhead and include signatures from the MAO and the provider or facility[.]

Id.

Per § 422.116(d)(7), an LOI must include (1) signatures of both the applicant and the provider and (2) a statement that the applicant and the provider have started negotiation or intend to negotiate for the provider to participate in the applicant's network of contracted providers. *Id.* at 3. In the December 22, 2022 Memorandum, CMS provides a suggested format for the LOI. *Id.*

If the network is not adequate and CMS intends to deny the application, CMS will notify the applicant using a NOID. 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. CMS informs that it "will not consider an LOI that does not comply with 422.116(d)(7) and the applicant must exclude non-compliant LOIs in the applicant's network submission in response to the NOID so that CMS may evaluate whether the submitted provider network complies with § 422.116." CMS Exhibit C11 at 3. If an applicant includes a non-compliant LOI (as part of the network submission) in response to the NOID, CMS states that the application may be denied. *Id*. CMS states that it "will not consider non-compliant LOIs in CMS' evaluation of the applicant's network." *Id.*

On April 20, 2023, CMS provided "CY 2024 MA Applicant Network Adequacy Operational Guidance" for MA applicants responding to a NOID based on network adequacy deficiencies, and outlined the steps that must be complied by the application final submission deadline. CMS Memorandum and MSJ at 4-5; CMS Exhibit C13. The guidance related to three scenarios: (1) Network deficiencies that require resubmitting revised HSD tables, (2) Passing HSD tables, but deficient LOIs that can be corrected, and (3) Passing HSD tables, but deficient LOIs that cannot be corrected. CMS Exhibit C13 (emphasis omitted). If applicants experienced a combination of these scenarios or ones not listed, they were instructed to reach out to CMS with questions through the Division of Medicare Advantage Operations portal. *Id.* Relevant here, for passing HSD tables, but deficient LOIs that cannot be corrected, applicants were instructed to upload revised HSD tables omitting the providers for the deficient LOIs and to upload an LOI zip file that only includes the approved LOIs. *Id.*

CMS' network review is performed through an automated tool within HPMS that compares data submitted by each applicant against standardized CMS network criteria. CMS Memorandum and MSJ at 2. HPMS then generates two reports, the Provider Automated Criteria Check ("ACC") and the Facility ACC. *Id.* These ACC reports are accessible to the applicants to track the adequacy of their networks. *Id.*

Under specific circumstances and rules, CMS permits applicants that are unable to satisfy network adequacy criteria to submit exception requests. 42 C.F.R. § 422.116(f); *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 5 (Last updated: Aug. 30, 2022) (hereinafter "Network Adequacy Guidelines"). CMS requires each applicant to use the Exception Request Template via HPMS. Network Adequacy Guidelines at 8. In order to be eligible for an exception request, there must be an insufficient number of available providers that meet network adequacy standards. 42 C.F.R. § 422.116(f)(1)(i).

C. Procedure for CMS MA/MA-PD Application Review

Under current regulations and procedures, after receiving an application, CMS reviews the application for any issues. 42 C.F.R. § 422.116(f)(1)(i). CMS then gives an applicant a Deficiency Notice, when applicable, to provide notice of any application deficiencies. CMS Memorandum and MSJ at 3. This is an applicant's first opportunity to amend its application. *See id.*

If an applicant fails to cure its deficiencies, CMS will issue a NOID. 42 C.F.R. § 422.502(c)(2)(i). The NOID affords an applicant a second opportunity to cure its application. *See* 42 C.F.R. § 422.502(c)(2)(ii). After a NOID is issued, an applicant has a final ten-day period to cure any deficiencies in order to meet CMS' requirements; otherwise, CMS will deny the application. 42 C.F.R. § 422.502(c)(2)(ii)–(iii).

The formal NOID process is outlined at 42 C.F.R. § 422.502(c)(2)(i)–(iii), which states:

> (i) If CMS finds that the applicant does not appear to be able to meet the requirements for an MA organization or Specialized MA Plan for Special Needs Individuals, CMS gives the applicant notice of intent to deny the application for an MA contract or for a Specialized MA Plan for Special Needs Individuals a summary of the basis for this preliminary finding.
>
> (ii) Within 10 days from the intent to deny, the applicant must respond in writing to the issues or other matters that were the basis for CMS' preliminary finding and must revise its application to remedy any defects CMS identified.
>
> (iii) If CMS does not receive a revised application within 10 days from the date of the notice, or if after timely submission of a revised application, CMS still finds that the applicant does not appear qualified or has not provided CMS enough information to allow CMS to evaluate the application, CMS will deny the application.

If, after review, CMS denies the application, written notice of the determination and the basis for the determination is given to the applicant. 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's 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 Motion for Summary Judgment. 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."

VI. PROCEDURAL HISTORY AND STATEMENT OF FACTS

On February 15, 2023, Verda filed an initial MA/MA-PD application with CMS to operate in Fort Bend, Harris and Montgomery Counties in Texas. Verda Pre-Hearing Brief and MSJ at 2; Verda Reply at unnumbered page 4; CMS Memorandum and MSJ at 1. Verda is a Texas corporation that was formed in 2022 to serve as an MA-PD plan for residents in the Houston metropolitan area. Verda Pre-Hearing Brief and MSJ at 2. Verda is now a Texas-licensed HMO. *Id.* at 1; Verda Exhibit P1.

CMS determined that Verda's application failed to demonstrate that the organization met CY 2024 Part C application requirements for state licensure outlined in 42 C.F.R. § 422.400(c)(2), finding that the applicant failed to submit (1) a Certificate of Authority ("COA") for Texas or (2) a completed CMS State Certification Form. *See* CMS Exhibit C4. Consequently, CMS issued a Deficiency Notice to Verda by email on March 20, 2023. *See* CMS Exhibit C5. The Deficiency Notice provided Verda with the opportunity to correct the deficiencies identified in the notice no later than March 28, 2023, at 8:00 PM, and provided instructions on how to do so and where to direct any questions. *Id*. at 2.

Verda responded by submitting a letter regarding the status of its COA application with the Texas Department of Insurance but did not submit a COA or a completed CMS State Certification Form. *See* CMS Exhibit C6. On April 17, 2023, CMS issued a NOID that noted the failure to submit a COA or a completed CMS State Certification Form, as well as the finding that Verda's contracted network of providers and facilities did not meet CMS network standards. CMS Exhibit C7. Specifically, with regard to the network adequacy deficiency, CMS found that Verda did not submit valid LOIs for providers for which Verda attested to the use of an LOI on their facility HSD tables in Harris and Montgomery Counties. CMS Memorandum and MSJ at 4; *see* CMS Exhibits C9 and C10. CMS gave Verda ten days, i.e., no later than April 27, 2023, at 8:00 PM EST, to cure all deficiencies listed, in order to receive approval on its Part C-MA application. CMS Exhibit C7.

On April 20, 2023, CMS indicated that it issued via email, additional network adequacy guidance to applicants, in which CMS provided information regarding the submission of revised HSD tables and LOIs. CMS Memorandum and MSJ at 5; *see* CMS Exhibit C13.

Verda timely supplemented its application by submitting an acceptable COA. Verda Pre-Hearing Brief and MSJ at 5; CMS Memorandum and MSJ at 5. However, Verda did not submit a completed and signed CMS State Certification Form. *Id.* In addition, Verda did not submit additional valid LOIs or remove any facility NPIs from its HSD tables where it attested to the use of a valid LOI. CMS Memorandum and MSJ at 5.

On May 17, 2023, CMS denied Verda's MA/MA-PD application due to these certification and network adequacy deficiencies, which were described in the denial letter as follows:

> Medicare Advantage Deficiencies:
>
> State Licensure
>
> * CMS State Certification Form - You failed to submit a fully and appropriately completed CMS State Certification Form demonstrating that you meet the necessary requirements.
>
> 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.

Verda filed its Request for a Hearing on May 19, 2023. The Office of Hearings acknowledged the appeal request on the same date and provided the parties with a hearing date and briefing schedule. The parties timely submitted their briefs pursuant to the briefing schedule. In Verda's brief, it moved for summary judgment in its favor. *See* Verda Pre-Hearing Brief and MSJ. Likewise, in CMS' responsive brief, it moved for summary judgment in its favor. *See* CMS Memorandum and MSJ. Along with its brief, Verda attached what it purports to be the missing CMS State Certification Form, as well as a LOI for the Cornerstone facility in Conroe. *See* Verda Exhibits P3 and P4.

VII. DISCUSSION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Hearing Officer grants CMS' Motion for Summary Judgment. The parties agree that there are no material facts in dispute. CMS Memorandum and MSJ at 1; Verda Pre-Hearing Brief and MSJ at 2. Verda failed to meet the MA/MA-PD application requirements when it failed to timely cure, via HPMS, the CMS State Certification Form and network adequacy deficiencies by April 27, 2023 — the deadline established in the NOID.

The Hearing Officer must comply with the provisions of Title XVIII of the Act — Health Insurance for the Aged and Disabled — and related provisions of the Act, regulations issued by the Secretary of Health and Human Services, and general instructions issued by CMS in implementing the Act. 42 C.F.R. § 422.688. The regulations are clear that an applicant must provide CMS, in the form and manner required by CMS, documentation of appropriate state licensure that the entity is able to offer health insurance or health benefits coverage that meets state-specified standards applicable to MA plans and is authorized by the state to accept prepaid capitation for providing, arranging, or paying for the comprehensive health care services to be offered under the MA-PD contract. 42 C.F.R. § 422.501(c)(1)(i). Further, an applicant for a new or expanding service area must demonstrate compliance with the network adequacy requirements outlined in 42 C.F.R. § 422.116(a)(1).

A. The Parties' Contentions Regarding the CMS State Certification Form Deficiency

Verda explains that in response to the deficiency related to state licensure, Verda's staff uploaded a copy of its newly issued Texas COA. Verda Pre-Hearing Brief and MSJ at 5. Verda also states that its staff inadvertently uploaded a copy of the associated Consent Order instead of its April 25, 2023, CMS State Certification Form. *Id.* Thus, Verda admits that it did not provide one of the two forms requested by CMS, namely, the CMS State Certification Form. *Id.*

CMS explains that it initially determined that Verda's application failed to demonstrate that the organization met contract year 2024 Part C application requirements for state licensure outlined in 42 C.F.R. § 422.400(c)(2) as the applicant failed to submit a Texas COA or a completed CMS State Certification Form. CMS Memorandum and MSJ at 4. Instead, Verda submitted a letter regarding the status of its COA application with the Texas Department of Insurance. *Id.* Although CMS states that Verda submitted an acceptable COA on April 25, 2023, CMS also asserts that Verda did not submit a completed and signed CMS State Certification Form. *Id.* at 5.

Verda included, as Exhibit P3 attached to its Pre-Hearing Brief and MSJ, a copy of what it purports is the CMS State Certification Form that was signed on April 25, 2023. Verda Pre-Hearing Brief and MSJ at 3. Verda asserts that on April 27, 2023, the deadline to submit documentation to CMS to cure any deficiencies, Verda met CMS' requirements for state licensure and provided sufficient documentation of such to CMS, notwithstanding the inadvertent omission of the CMS State Certification Form, as the Consent Order provided (in error) indicates that Verda could offer MA HMO products in Texas. *Id.* at 7-9. Verda argues that such a minor omission constitutes harmless error and should not merit denial of an entire application. *Id.* at 9. Verda requests that the Hearing Officer overturn CMS' contract determination. *Id.* at 12.

B. The Parties' Contentions Regarding the Network Adequacy Deficiency

With regards to the network adequacy requirements, Verda explains that CMS denied Verda's application for failure to submit LOIs, and that one of the three facilities identified was acquired by a new owner in January 2023 and falls under an LOI that Verda in fact provided. Verda Pre-Hearing Brief and MSJ at 1. Specifically, the LOI that Verda entered into with Kindred Healthcare Operating, LLC, covered eight facilities in Verda's network and while seven of those facilities operate under the "Kindred" brand, the eighth facility, Cornerstone Healthcare Group Hospital Conroe, LLC (in Montgomery County), does business under the "Cornerstone" brand. *Id.* at 3. This Cornerstone facility came under common ownership with Kindred in January 2023 when ScionHealth, the parent of Kindred, acquired the Cornerstone Healthcare Group. *Id.*

With regards to the two other Cornerstone facilities (Cornerstone Specialty Hospitals Houston Medical Center and Cornerstone Specialty Hospitals Clear Lake) in Harris County, however, Verda explains that they were inadvertently included on Verda's revised HSD table for Harris County, under the mistaken assumption that they fell under the ScionHealth group banner. *Id.* at 5-7. To Verda's understanding, these two facilities are now operating independently from Kindred and ScionHealth, under the "Vibra" brand, even though they currently appear in CMS' facility

supply file using the "Cornerstone" brand name. *Id.* at 6.

To be clear, Verda explains that it is not asserting that CMS should have credited these two Cornerstone facilities. *Id.* Instead, Verda argues that in preparation for this appeal, it performed network analyses using CMS' Network Management Module tools, and based on the results of that analysis, Verda meets the CMS network adequacy standards in Harris County for all facility types, even with the exclusion of the two now-independent "Cornerstone" facilities. *Id.* Verda also notes that it would meet the network adequacy standards for both Harris and Montgomery Counties in all relevant facility types if the Cornerstone Specialty Hospitals Conroe facility (the one acquired by ScionHealth and for which the Kindred LOI includes) were also to be excluded from consideration, i.e., leaving all three Cornerstone hospitals out of the network analysis.[2] *Id.*

In summary, Verda argues that its network of contracted providers meets CMS requirements, and Verda timely provided sufficient documentation of that fact in its application. *Id.* at 9. Verda notes that CMS accepted the Kindred LOI as meeting the criteria for acceptance in CMS regulations and guidance, as CMS rated Kindred Hospital Clear Lake as "pass" on the same LOI report that Cornerstone Specialty Hospitals Conroe is marked as "fail." *Id.* at 11. But even if that LOI were found deficient for Cornerstone Specialty Hospitals Conroe, Verda asserts that the remedy would not be outright denial of the application but removal of the facility from Verda's HSD table and reassessment. *Id.*

Verda acknowledges that CMS guidance states that invalid LOIs may lead to application denial, but emphasizes that immediately after that statement, it is noted that "CMS will not consider non-compliant [LOIs] in CMS's evaluation of the applicant's network." *Id.* While invalid letters may in turn lead to the failure of network adequacy and therefore, potentially, application denial, Verda again argues that its network is adequate even when all three Cornerstone facilities are excluded. *Id.* at 12. For this reason, Verda asserts that CMS erred in denying Verda's application on this basis. *Id.*

CMS states that Verda did not submit valid LOIs for providers for which Verda attested to the use of LOIs on their facility HSD tables for Harris and Montgomery Counties. CMS Memorandum and MSJ at 4. CMS notified Verda of its intent to deny based in part on this deficiency and issued additional network adequacy guidance to applicants via email on April 20, 2023, providing information regarding the submission of revised HSD tables and LOIs (CMS Exhibit C13). *Id.* at 4-5. However, Verda did not submit additional LOIs or remove from the HSD table the facilities for which Verda attested to the use of valid LOIs. *Id.* at 5.

CMS acknowledges that Verda submitted a valid LOI for Cornerstone Specialty Hospitals Conroe with its request for hearing, but that there is no dispute that Verda failed to submit valid LOIs for

[2] In the HSD table in Verda Exhibit P8, Verda acknowledges that the distance score for Harris County in the Critical Care Services – Intensive Care Units category is listed as 87.8% and "fail." However, Verda asserts that it is entitled to a temporary credit of ten percentage points at this stage in the application process, lowering the threshold from 90% to 80%, pursuant to 42 C.F.R. § 422.116(d)(7), and that this credit was not reflected in CMS systems and must be assumed manually. Verda Brief and MSJ at 6 n.11.

Cornerstone Specialty Hospitals Houston Medical Center and Cornerstone Specialty Hospitals Clear Lake. *Id.* Due to Verda's failure to demonstrate that it met all Part C requirements prior to the expiration of the ten-day cure period following issuance of the NOID, CMS denied Verda's application pursuant to 42 C.F.R. § 422.502(c)(3), and CMS asserts that this determination was made in a manner consistent with 42 C.F.R. §§ 422.501 and 422.502. *Id.*

C. Discussion and Conclusion

Verda does not contest CMS' position that the controlling authorities require an applicant to submit the appropriate state licensure to be approved by CMS, or that CMS' deficiency notice stated that the CMS State Certification Form was missing. Rather, Verda explains that on April 25, 2023, Texas state officials signed and returned a completed CMS State Certification Form, and the reason the CMS State Certification Form was not timely submitted to CMS was due to the fact that Verda inadvertently uploaded a different form, the Consent Order, instead of the CMS State Certification Form. Verda emphasizes that at the time of Verda's April 27, 2023, supplement to its application, Verda was duly licensed in the state of Texas to offer an MA plan, Texas officials had completed a CMS State Certification Form, and the Consent Order uploaded (in error) confirmed Verda's authority to contract with CMS, which should be sufficient information to show that Verda met the regulatory certification requirements. Verda Pre-Hearing Brief and MSJ at 3, 5; Verda Reply at 2-4.

Verda also does not contest CMS' position that it did not submit LOIs for two facilities listed on its HSD tables. Rather, Verda explains that the two Cornerstone facilities at issue were inadvertently included on Verda's HSD table for Harris County under the mistaken assumption that the two facilities fell under the ScionGroup banner, whereas Verda now understands that the two Cornerstone facilities are now operating independently from Kindred and ScionHealth under the "Vibra" brand even though they currently appear in CMS' facility supply file using the "Cornerstone" brand. Verda Pre-Hearing Brief and MSJ at 5-6. Thus there is no dispute that Verda did not submit additional valid LOIs for those two facilities, or remove the two facility NPIs from its HSD tables where it attested to the use of valid LOIs for those two facilities, as CMS guidance required them to do. CMS Memorandum and MSJ at 5; CMS Exhibit C13.

While Verda claims that its application deficiencies were a result of inadvertent error in uploading the wrong document and the mistaken belief that ScionHealth was the parent organization of two of the Cornerstone facilities on Verda's HSD table for Harris County, CMS bases its decision to approve or deny each application solely on information appropriately submitted by the applicant through HPMS as part of the application itself. 42 C.F.R. § 422.502(a)(1). CMS will not consider information submitted after the ten-day response period following issuance of the NOID. 42 C.F.R. § 422.502(c)(2)(iii); 75 Fed. Reg. 19678, 19683 (Apr. 15, 2010). If, after timely submission of a revised application, the applicant still appears unqualified to contract as an MAO or has not provided enough information to allow CMS to re-evaluate the application, CMS will deny the application. *Id.*

Following the ten-day period for submission after the issuance of a NOID, CMS also does not allow a revised application or additional information to be submitted for consideration by the

Hearing Officer. 75 Fed. Reg. at 19683. Allowing for such a submission and review of such information would, in effect, extend the deadline for submitting an approvable application. *Id.* Allowing exceptions to application timeline requirements to address unique circumstances, including clerical errors, would undermine the need for a uniform application process applied fairly to all applicants. *See id.*

Accordingly, the Hearing Officer does not possess a broad scope of discretionary authority to provide the relief Verda seeks. The Hearing Officer must decide if CMS' determination was consistent with regulatory requirements. *See* 42 C.F.R. §§ 422.660 and 422.688. The Hearing Officer finds that Verda failed to timely meet CMS' application requirements. Thus, CMS' denial was an appropriate exercise of its delegated authority. For these reasons, the Hearing Officer grants CMS' Motion for Summary Judgment and denies Verda's Motion for Summary Judgment.

VIII. DECISION AND ORDER

CMS' Motion for Summary Judgment is granted. Verda's Motion for Summary Judgment is denied.

Amanda S. Costabile, Esq.
CMS Hearing Officer

Date: June 27, 2023