PROVIDER REIMBURSEMENT REVIEW BOARD
DECISION

2026-D23

PROVIDER –
ACE Home Health & Hospice, Inc.

PROVIDER NUMBER –
55-1669

vs.

MEDICARE CONTRACTOR –
National Government Services, Inc.

HEARING DATE –
December 3, 2024

FEDERAL FISCAL YEAR –
2023

CASE NUMBER –
23-1214

INDEX

ISSUE STATEMENT:

Whether the payment penalty imposed by the Centers for Medicare and Medicaid Services ("CMS") under the Hospice Quality Reporting Program ("HQRP") to reduce ACE Home Health & Hospice, Inc.'s annual payment update ("APU") by two (2) percentage points for Federal Fiscal Year ("FFY") 2023 was proper.[1]

DECISION:

After considering the Medicare law and regulations, the arguments presented, and the evidence admitted, the Provider Reimbursement Review Board ("Board") finds that CMS' decision to reduce ACE Home Health & Hospice, Inc.'s APU by two (2) percentage points for FFY 2023 was proper.

INTRODUCTION:

ACE Home Health & Hospice, Inc. ("ACE" or "Provider") is a free-standing hospice located in Orinda, CA.[2] ACE's assigned Medicare contractor[3] is National Government Services, Inc. ("Medicare Contractor").

By letter dated July 12, 2022, CMS notified the Provider that it was subject to a reduction of its APU by two (2) percentage points for FY 2023 for failure to meet the CY 2021 Hospice Quality Reporting Program ("HQRP") requirements.[4] Specifically, CMS stated that it had determined that the Provider "[d]id not collect and successfully submit sufficient monthly CAHPS® Hospice Survey data for CY 2021 (January 1, 2021 – December 31, 2021)."[5] The letter also indicated that "[i]f you believe you have been identified for this payment reduction in error, you have the right to request a reconsideration of this decision."[6]

By letter dated September 26, 2022, CMS upheld the decision to reduce the annual payment for FY 2023.[7] On March 23, 2023, the Provider timely appealed the reconsideration determination to the Board and met the jurisdictional requirements for a hearing.

---

[1] *See* Transcript of Proceedings (hereinafter "Tr.") at 5:11-16 (Dec. 3, 2024).
[2] Medicare Contractor's Final Position Paper (hereinafter "Medicare Contractor's FPP") at 2 (Oct. 3, 2024).
[3] CMS's payment and audit functions under the Medicare program were historically contracted to organizations known as fiscal intermediaries ("FIs") and these functions are now contracted with organizations known as Medicare administrative contractors ("MACs"). The relevant law may refer to FIs and MACs interchangeably, and the Board will use the term "Medicare contractor" to refer to both FIs and MACs as appropriate and relevant.
[4] *See* Medicare Contractor's Exhibit (hereinafter "Ex.") C-8 at C-0041. **Note**: Because Provider submitted its exhibits as Exhibit A, Exhibit B, and Exhibit C rather than as individually numbered exhibits P-1, *et seq*, as required by Board Rule 25.3.1, this decision differentiates by prefacing all exhibits with either "Medicare Contractor" or "Provider." Additionally, the Board notes that the Provider submitted a final/supplemental set of Exhibits A through C on June 15, 2026. It is to these Exhibits that the Board will cite in this decision, unless otherwise noted. As these Exhibits do not have page numbers, the cover page (which includes the name of the Exhibit) will be considered page 1 in all citations, and the numbering will be cited accordingly.
[5] *Id*.
[6] *Id.*
[7] *Id.* at C-0039.

ACE was represented by Jacqueline Early, Administrator of ACE Home Health & Hospice, Inc. The Medicare Contractor was represented by Charles Moreland, Esq. of Federal Specialized Services.

STATEMENT OF RELEVANT FACTS:

CMS will reduce the APU for FY 2023 for any Medicare provider that fails to comply with Hospice Item Set ("HIS") and/or the Hospice Consumer Assessment of Healthcare Providers and System ("CAHPS") survey reporting requirements.[8] The CAHPS survey reporting requirements are at issue in this appeal. The CAHPS hospice survey quarterly ("Q[X]") data submission deadlines for the APU in FFY 2023 were as follows:

- Q1 due August 11, 2021;
- Q2 due November 10, 2021;
- Q3 due February 9, 2022; and
- Q4 due May 11, 2022.[9]

On November 27, 2020, ACE entered into a three-year service order with Axxess as its CAHPS survey provider.[10] The service order authorizes Axxess to provide the following service: "**Axxess CAHPS** Provides surveys of patients' care experience, business intelligence data, and benchmarking services enabling users to monitor and compare various key performance indicators. Services include secure data transmission, HIPAA compliance, and data storage."[11] The service order indicates that it is a binding agreement that incorporates by reference terms and conditions available on the Axxess website.[12]

On October 4, 2021, a representative from ACE contacted Axxess via email with questions regarding a CAHPS form.[13] A representative from Axxess responded on November 3, 2021 indicating that "we've been attempting to work with [ACE representatives] since last November 2020 when Home Health and Hospice solution agreements were signed and hadn't had luck either, with confirming start dates."[14]

On November 5, 2021, ACE completed and notarized a Survey Vendor Authorization Form for the CAHPS Hospice Survey.[15] According to the Survey Vendor Authorization Form, the vendor authorization form deadline for Q3 was October 2021 and January 2022 for Q4.[16]

---

[8] Medicare Contractor's Preliminary Position Paper (hereinafter "Medicare Contractor's PPP") at 6 (Feb. 27, 2024); Medicare Contractor's Ex. C-2 (Hospice Quality Reporting Program: Requirements for the Fiscal Year (FY) 2023 and Future FY Reporting Years) at C-0006-C-0007.
[9] 86 Fed. Reg. 42528, 42572 (Aug. 4, 2021), *also available at* Medicare Contractor's Ex. C-5 at C-0024.
[10] *See* Provider Ex. A at 2-3.
[11] *Id*. at 2.
[12] *Id.* The Board notes that the Provider did not include the referenced terms and conditions as exhibits in this appeal.
[13] *See* Provider Ex. C at 2.
[14] *Id*.at 5.
[15] *See* Provider Ex. B at 2–4; *see also* Tr. at 21:6 – 22:25.
[16] *See id*. Note that the chart setting forth the applicable quarterly deadlines does not provide specific dates, only the month and year.

After several exchanges, on November 10, 2021, an Axxess representative informed ACE that CMS still did not reflect that Axxess was ACE's Hospice CAHPS vendor; however, they were able to pull and send sample month surveys "in a timely manner" for Q3 2021.[17] Nonetheless, the Axxess representative reminded ACE that the HHCAHPS authorization form had yet to be completed and provided a link with instructions, offering assistance if needed.[18]

On February 9, 2022 – the submission deadline for Q3 2021 – Axxess contacted ACE again indicating that Axxess was not listed as the authorized survey vendor with CMS and requested that ACE work with the CMS Hospice Data team to resolve the issue or delay with the authorization.[19] Axxess indicated that it would submit the Q3 2021 hospice data that day if they could get access by 5pm.[20] Later the same day, at 11:09am, ACE received an email from the CAHPS Hospice Survey Team (1) acknowledging receipt of the authorization form; (2) noting that "***[w]e will process this form***, and inform your survey vendor that we have received it," and (3) requesting a hard copy of the form be mailed to the address provided.[21]

By letter dated July 6, 2022, the Medicare Contractor notified ACE that its Medicare payments would be subject to a 2-percentage point reduction for FY 2023.[22] By letter dated July 12, 2022, CMS notified ACE that it would be subject to the payment reduction because it "did not collect and successfully submit sufficient monthly CAHPS® Hospice Survey data for CY 2021 (January 1, 2021 – December 31, 2021)."[23]

On or about July 19, 2022, ACE's Administrator initiated contact with Axxess via email and telephone regarding the noncompliance notices and on July 21, 2022, they indicated that no one had returned their calls or responded to their emails.[24] However, when they checked their Axxess ticket list, it indicated that a ticket was opened and subsequently closed.[25]

Subsequently, a communication dated August 10, 2022, provided a summary of findings for Axxess' investigation related to ACE's CAHPS survey noncompliance for Q4 2021:

> 10/Aug/22 9:19 PM
>
> A review of the missing Hospice CAHPS submission for Q4 2021 shows it was caused by the delayed CMS authorization of Axxess as a Hospice CAHPS for Ace Home Health Care and Hospice Inc. Ace Home Health Care and Hospice switched from Fazzi June 2021, and it is unclear if Fazzi completed and submitted Q2 2021 Hospice CAHPS results for Ace. After the teams finally connected, the Ace Hospice team completed and shared a copy of their Axxess Hospice CAHPS authorization form to be submitted

[17] Provider Ex. C at 11.
[18] *Id.*
[19] *See id*. at 12.
[20] *Id.*
[21] *Id*. at 17 (bold and italics emphasis added); *see also* Tr. at 29:12 – 30:18.
[22] Medicare Contractor Ex. C-4 (July 6, 2022 CMS noncompliance letter).
[23] *See supra* n.4.
[24] *See* Provider Ex. C at 19-20.
[25] *See id*. at 20-21.

> to CMS November 5, 2021, leading to Axxess initiating Q3 data collection, but discontinued when CMS authorization did not come through. CMS notified Axxess of the approved authorization February 9, 2022, after which Q3 2021 results were submitted, and surveying continued with Q1 2022 since majority of Q4 2022 [sic] data collection deadline passed.[26]

ACE requested reconsideration of CMS' APU reduction determination,[27] and on September 26, 2022, CMS issued a notice letter indicating that the noncompliance decision was upheld because of ACE's failure to "Submit Consumer Assessment of Health Providers and Systems (CAHPS) Hospice Survey Data – 2021/2022."[28]

STATEMENT OF RELEVANT LAW:

A. Hospice Quality Reporting Requirements

The statute addressing a hospice provider's eligibility for its full APU increase is found at 42 U.S.C. § 1395f(i)(5) (2020), and states:

> **(5) Quality Reporting**
>
> **(A) Reduction in update for failure to report**
>
> **(i) In general**
>
> For purposes of fiscal year 2014 and each subsequent fiscal year, in the case of a hospice program that does not submit data to the Secretary in accordance with subparagraph (C) with respect to such a fiscal year, after determining the market basket percentage increase under paragraph (1)(C)(ii)(VII) or paragraph (1)(C)(iii), as applicable, and after application of clauses (iv) and (vi) of paragraph (1)(C), with respect to the fiscal year, the Secretary shall reduce such market basket percentage increase by 2 percentage points (or, for fiscal year 2024 and each subsequent fiscal year, 4percentage points).
>
> **(ii) Special rule**
>
> The application of this subparagraph may result in the market basket percentage increase under paragraph (1)(C)(ii)(VII) or paragraph (1)(C)(iii), as applicable, being less than 0.0 for a fiscal year, and may result in payment rates under this subsection for a

[26] Provider's "Signed CAHPS Appeal" submitted Mar. 23, 2023 at 4.
[27] *See* Reconsideration Request (Mar. 23, 2023) (where ACE's reconsideration request states, in its entirety, "ACE is requesting the removal of the 2% CMS Non-Compliance reduction penalty.").
[28] Medicare Contractor Ex. C-8 at C-0039.

> fiscal year being less than such payment rates for the preceding fiscal year.
>
> **(B) Noncumulative application**
>
> Any reduction under subparagraph (A) shall apply only with respect to the fiscal year involved and the Secretary shall not take into account such reduction in computing the payment amount under this subsection for subsequent fiscal year.
>
> **(C) Submission of quality data**
>
> For fiscal year 2014 and each subsequent fiscal year, each hospice program shall submit to the Secretary data on quality measures specified under subparagraph (D). Such data shall be submitted in a form and manner, and at a time, specified by the Secretary for purposes of this subparagraph.

The regulations providing the data submission requirements under the hospice quality reporting program, including exemptions and extensions requirements, are found at 42 C.F.R. § 418.312 (Aug. 31, 2020), which states:

> (a) ***General rule***. Except as provided in paragraph (g) of this section, Medicare-certified hospices must submit to CMS data on measures selected under section 1814(i)(5)(C) of the Act in a form and manner, and at a time, specified by the Secretary.
>
> (b) ***Submission of Hospice Quality Reporting Program data.*** Hospices are required to complete and submit an admission Hospice Item Set (HIS) and a discharge HIS for each patient admission to hospice, regardless of payer or patient age. The HIS is a standardized set of items intended to capture patient-level data.
>
> (c) A hospice that receives notice of its CMS certification number before November 1 of the calendar year before the fiscal year for which a payment determination will be made must submit data for the calendar year.
>
> (d) Medicare-certified hospices must contract with CMS-approved vendors to collect the CAHPS® Hospice Survey data on their behalf and submit the data to the Hospice CAHPS® Data Center.
>
> (e) If the hospice's total, annual, unique, survey-eligible, deceased patient count for the prior calendar year is less than 50 patients, the hospice is eligible to be exempt from the CAHPS® Hospice Survey reporting requirements in the current calendar year. In order to

qualify for this exemption the hospice must submit to CMS its total, annual, unique, survey-eligible, deceased patient count for the prior calendar year.

(f) Vendors that want to become CMS-approved CAHPS® Hospice Survey vendors must meet the minimum business requirements. Survey vendors must have been in business for a minimum of 4 years, have conducted surveys in the approved survey mode for a minimum of 3 years, and have conducted surveys of individual patients for a minimum of 2 years. For Hospice CAHPS®, a "survey of individual patients" is defined as the collection of data from at least 600 individual patients selected by statistical sampling methods, and the data collected are used for statistical purposes. Vendors may not use home-based or virtual interviewers to conduct the CAHPS® Hospice Survey, nor may they conduct any survey administration processes (for example, mailings) from a residence.

(g) No organization, firm, or business that owns, operates, or provides staffing for a hospice is permitted to administer its own Hospice CAHPS® survey or administer the survey on behalf of any other hospice in the capacity as a Hospice CAHPS® survey vendor. Such organizations will not be approved by CMS as CAHPS® Hospice Survey vendors.

(h) ***Reconsiderations and appeals of Hospice Quality Reporting Program decisions.***

(1) A hospice may request reconsideration of a decision by CMS that the hospice has not met the requirements of the Hospice Quality Reporting Program for a particular reporting period. A hospice must submit a reconsideration request to CMS no later than 30 days from the date identified on the annual payment update notification provided to the hospice.

(2) Reconsideration request submission requirements are available on the CMS Hospice Quality Reporting Web site on CMS.gov.

(3) A hospice that is dissatisfied with a decision made by CMS on its reconsideration request may file an appeal with the Provider Reimbursement Review Board under part 405, subpart R of this chapter.

(i) ***Exemptions and extensions requirements.***

(1) A hospice may request and CMS may grant exemptions or extensions to the reporting requirements under paragraph (b) of this section for one or more quarters, when there are certain extraordinary circumstances beyond the control of the hospice.

(2) A hospice requesting an exemption or extension must do so within 90 days of the date that the extraordinary circumstances occurred by sending an email to CMS Hospice QRP Reconsiderations at HospiceQRPReconsiderations@cms.hhs.gov that contains all of the following information:

(i) Hospice CMS Certification Number (CCN).

(ii) Hospice Business Name.

(iii) Hospice Business Address.

(iv) CEO or CEO-designated personnel contact information including name, title, telephone number, email address, and mailing address (the address must be a physical address, not a post office box).

(v) Hospice's reason for requesting the exemption or extension.

(vi) Evidence of the impact of extraordinary circumstances beyond the hospice's control, including, but not limited to photographs, newspaper, other media articles, or independent sources attesting to the incident that can be reasonably corroborated. Include dates of occurrence and other documentation that may support the rationale for seeking extension or exemption.

(vii) Date when the hospice believes it will be able to again submit data under paragraph (b) of this section and a justification for the proposed date.

(3) CMS may grant exemptions or extensions to hospices without a request if it determines that one or more of the following has occurred:

(i) An extraordinary circumstance, such as an act of nature including a pandemic, affects an entire region or locale.

> (ii) A systemic problem with one of CMS' data collection systems directly affect the ability of a hospice to submit data under paragraph (b) of this section.

B. Annual update of the payment rates

CMS establishes payment rates for hospice care, as set forth in 42 C.F.R. § 418.306 (Oct. 1, 2015), which states, in pertinent part:

> (a) ***Applicability.*** CMS establishes payment rates for each of the categories of hospice care described in § 418.302(b). The rates are established using the methodology described in section 1814(i)(1)(C) of the Act and in accordance with section 1814(i)(6)(D) of the Act.
>
> (b) ***Annual update of the payment rates.*** The payment rates for routine home care and other services included in hospice care are the payment rates in effect under this paragraph during the previous fiscal year increased by the hospice payment update percentage increase (as defined in sections1814(i)(1)(C) of the Act), applicable to discharges occurring in the fiscal year.
>
> [* * *]
>
> (2) For fiscal years 2014 and subsequent fiscal years, in accordance with section 1814(i)(5)(A)(i) of the Act, in the case of a Medicare-certified hospice that does not submit hospice quality data, as specified by the Secretary, the payment rates are equal to the rates for the previous fiscal year increased by the applicable hospice payment update percentage increase, minus 2 percentage points. Any reduction of the percentage change will apply only to the fiscal year involved and will not be taken into account in computing the payment amounts for a subsequent fiscal year.

C. Guidance

The Medicare Contractor included as an exhibit the "**Hospice Quality Reporting Program: Requirements for the Fiscal Year (FY) 2023 and Future FY Reporting Years**" which explains:

> **CAHPS® Hospice Survey Requirements:**
>
> To comply with CMS' quality reporting requirements, hospices are required to collect data monthly using the CAHPS® Hospice Survey. Hospices comply by utilizing a CMS-approved third-party survey vendor. Approved CAHPS® Hospice Survey vendors must successfully submit data on the hospice's behalf to the CAHPS®

> Hospice Survey Data Warehouse. A list of the approved survey vendors can be found on the CAHPS® Hospice Survey website: www.hospicecahpssurvey.org.
>
> CAHPS® Hospice Survey **Compliance**
>
> Compliance with CAHPS® Hospice Survey requirements is determined based on whether your vendor successfully submits a total of 12 months of data to the CAHPS® Hospice Survey Data Warehouse, which each submission made by the quarterly deadline. This means:
>
> - Each quarterly submission must be complete (have 3 months or 1 quarter's worth of data)
> - Each quarterly submission must be submitted and accepted by the quarterly data submission deadline[29]

The Compliance Checklist provided within *Hospice Quality Reporting Program: Requirements for the Fiscal Year (FY) 2023 and Future FY Reporting Years* serves to illustrate the statement that "[c]ompliance for the CY 2021 data submissions impacts the FY 2023 APU . . ."[30] The Checklist refers to, "[o]ngoing monthly participation in the CAHPS® Hospice Survey 1/1/2021 – 12/31/2021" as a factor in the determination of the FY 2023 APU.[31]

The CMS "Hospice Quality Reporting Program (HQRP) Quick Reference Guide" provides that for FFY 2023 and all subsequent years, the Secretary required the CAHPS quarterly data submissions as follows:

> The data submission deadlines for *CAHPS® Hospice Survey data* are the second Wednesday of the month for the months of February, May, August, and November. It is important for hospices to submit their patient counts to their selected vendor monthly. Approved CAHPS vendors submit data on behalf of their client hospices on or before that date. Late data is not accepted.[32]

The *HQRP Quick Reference Guide* also provides:

> A hospice and its vendors can monitor CAHPS® Hospice Survey data submissions through reports posted to the CAHPS® Hospice Survey Data Warehouse. These reports are available by 5:00 PM Eastern Time on the next business day after submission. More detail on the CAHPS® Hospice Survey, including podcasts about

[29] Medicare Contractor Ex. C-2 at C-0007.
[30] *Id.* at C-0008.
[31] *Id.* at C-0009.
[32] Medicare Contractor Ex. C-7 at C-0035. *See also* Medicare Contractor Ex. C-6 at C-0032-33.

> data submission and other key items, can be found in the Information for Hospices section of the CAHPS® Hospice Survey website.
>
> CMS provides multiple educational resources and training opportunities on the Hospice Quality Reporting Program and CAHPS® Hospice Survey websites to help providers be successful.[33]

D. Burden of Proof and Standard of Review

A Board decision must include findings of fact and conclusions of law that "the provider carried its burden of production of evidence and burden of proof by establishing, by a preponderance of the evidence, that the provider is entitled to relief on the merits of the matter at issue."[34] Additionally, "[a] decision by the Board shall be based upon the record made at such hearing, which shall include the evidence considered by the [Medicare contractor] and such other evidence as may be obtained or received by the Board, and shall be supported by substantial evidence when the record is viewed as a whole."[35] In *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 217 (1938), the U.S. Supreme Court held, "[s]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[36] Accordingly, in an appeal before the Board, a provider must prove by a preponderance of substantial, relevant evidence that it is entitled to the relief sought. Further, the "Board shall afford great weight to interpretive rules, general statements of policy, and rules of agency organization, procedure, or practice established by CMS."[37]

DISCUSSION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW:

To find in favor of ACE (*i.e.*, to find that the APU reduction does *not* apply), the Board must find that ACE submitted the quality data in the "*form and manner, and at a time*, specified by the Secretary."[38]

The CAHPS® Hospice Survey Quality Assurance Guidelines (Version 7.0, dated September, 2020) states, in relevant part:

---

[33] Medicare Contractor Ex. C-7 at C-0036.
[34] 42 C.F.R. § 405.1871(a)(3).
[35] 42 U.S.C. § 1395oo(d). This statutory provision further confirms: "[t]he Board shall have the power to affirm, modify, or reverse a final determination of the fiscal intermediary with respect to a cost report and to make any other revisions on matters covered by such cost report (including revisions adverse to the provider of services) even though such matters were not considered by the intermediary in making such final determination." *See also* 42 C.F.R. § 405.1869(a).
[36] *See also Pomona Valley Hosp. Med. Ctr. v. Becerra*, 82 F.4th 1252, 1258-59 (D.C. Cir. 2023).
[37] 42 C.F.R. § 405.1867.
[38] 42 U.S.C. § 1395f(i)(5)(C); 42 C.F.R. § 418.312(a) (italics emphasis added).

> **Survey Vendor Authorization Process**
>
> Hospices must submit documentation to the CAHPS Hospice Survey Data Coordination Team authorizing survey vendors to collect and submit data on their behalf ***before*** survey vendors can access the data submission application hosted by the RAND Corporation. ***A hospice's CAHPS Hospice Survey Vendor Authorization Form (see Appendix B) must be received at least 90 days prior to the submission of the hospice's data to the Data Warehouse.***
>
> Upon receipt of the CAHPS Hospice Survey Vendor Authorization Form, the CAHPS Hospice Survey Data Coordination Team will confirm the authenticity of the authorizing entity verifying contact information at both the hospice and survey vendor level. ***Only then will the hospice be added to the list of hospices authorizing that survey vendor.***[39]

The record indicates that ACE signed a CAHPS Hospice Survey Vendor Authorization Form on ***November 5, 2021*** for the Q3-2021 submission as indicated by the handwritten entry of "7/1/21 – Q3 2021" in the box for "Start date for Vendor Authorizing."[40] As mentioned previously, according to the information included in the CAHPS Hospice Survey Vendor Authorization Form executed by ACE, the authorization form was due in ***October 2021*** for Q3 and in ***January 2022*** for Q4.[41] ACE's Administrator testified that she believed that the authorization form that was signed and notarized on November 5, 2021 ***applied to Q3 and subsequent quarters***.[42] Thus, the authorization form was completed after the October 2021 deadline for Q3 had passed. Indeed, ACE's witness recognized that "it was a late submission."[43] The Administrator also stated that she believed, without confirmation, that ACE was listed as a hospice client for Axxess, and that the surveys for Q3 were submitted and successfully transmitted by Axxess.[44] However, outside of testimony, there is no documentation to confirm how and when ACE submitted the form to CMS.[45]

Here, it is important to set forth a clear timeline of requirements and events relative to this appeal for Q3 2021 and Q4 2021:

---

[39] Medicare Contractor Ex. C-9 at C-0054 (bold and italics emphasis added).
[40] Provider Ex. B at 2.
[41] Provider Ex. B at 2; *See also* Tr. at 26.
[42] Tr. at 34:2235:7.
[43] Tr. at 22:9 – 21.
[44] Tr. at 40:19-41:9; *see also* Medicare Contractor Ex. C-9 at C-0054.
[45] See Provider Ex. C at 7 (Note: this is an email from Axxess dated November 5, 2021 (sent at 12:44 pm) which indicates that the notarized form did ***not*** include the "CCN#" and that failure to include it "could cause issues." It is unclear whether this was corrected prior to the initial submission of the form to CMS.)

Q3 Vendor Authorization Due (per Authorization Form)	October 2021[46]
Q3 Authorization Form Executed and Notarized	November 5, 2021[47]
Q3 Sample Surveys sent to survey recipients	Between November 5, 2021 – November 10, 2021[48]
Axxess notifies ACE that CMS has not added ACE to the Axxess hospice client list for Q3 (and that they received a copy of the authorization form and "pending official authorization")	November 10, 2021[49]
Q4 Authorization Form Due	January 2022[50]
Q3 Survey Data Submission Deadline	February 9, 2022[51]
Axxess notifies ACE for the 2nd time that CMS has not added ACE to the Axxess hospice client list for Q3	February 9, 2022 at 7:56am[52]
CAHPS Hospice Survey Team provides ACE confirmation of receipt of vendor authorization form	February 9, 2022 at 11:09am[53]

Despite the execution and notarization of the vendor authorization form after both the Q3 and Q4 deadlines for authorization form submission, the Provider argues that it "diligently completed its responsibilities"[54] with respect to the reporting requirements, and instead, that Axxess is at fault for failing to submit the Q4-2021 CAHPS Survey for the following reasons:

- Axxess "failed in its contractual obligation as an approved CMS survey provider;"
- The fact that Axxess did timely submit the CAHPS Survey data for Q3-2021 "misled [ACE] to believe that [Axxess] was providing this service on an ongoing basis."
- Axxess "continued to bill [ACE] for CAHPS Survey data collection . . . during the months in question;" and

[46] *See* Provider Ex. B at 3.
[47] *Id.* at 4.
[48] *See* Provider Ex. C at 11 (where Axxess indicates that it had pulled data and sent sample surveys "in a timely manner.")
[49] *Id.*
[50] *See* Provider Ex. B at 3.
[51] *See* Medicare Contractor Ex. C-5 at C-0024.
[52] *See* Provider Ex. C at 12.
[53] *See* Provider Ex. C at 17.
[54] Appeal Request, identified as Issue Statement at 4.

- Axxess "did not provide sufficient nor timely notice to [ACE] that this service was halted until it was too late to make the correction actions."[55]

The Medicare Contractor argues that it was ACE's responsibility to ensure that the required files were timely and accurately submitted, even if using a third-party vendor.[56] Particularly, the Medicare Contractor argues that ACE failed to properly monitor its vendor to ensure that data was timely submitted[57] and that it would have be aware of submission issues had it utilized the Hospice Final Validation Report feature available in the Certification and Survey Provider Enhanced Reports application, to which ACE had access.[58]

To offer support for its position, the Medicare Contractor points to *PAMC, Ltd. v. Sebelius*,[59] wherein the Ninth Circuit Court of Appeals held that the Secretary may impose the two percentage-point payment reduction "even when the provider's failure to submit data was due to a third party's error."[60] Citing the Federal Register, the Court explains:

> CMS has not held a hospital responsible for data processing and communication errors that were clearly under the control of CMS or its contractors. However, CMS does hold the hospital responsible for its own errors in data processing and communication. If the error is by the hospital's contracted vendor, the hospital is held responsible.[61]

At the hearing, the Medicare Contractor cited the 2015 Hospice Final Rule which states: "Hospice providers are responsible for making sure that their vendors are submitting data in a timely manner."[62] Further, guidance states: "After contracting with an approved survey vendor, the hospice will need to complete and submit a CAHPS® Hospice Survey Vendor Authorization Form" and instructs providers to "maintain close contact with their vendors to ensure that they are meeting quarterly deadlines and to ensure data submitted by the vendor has been **ACCEPTED** by CMS."[63]

The Board finds that the 2015 Hospice Final Rule and the HQRP guidance are clear—even if a provider is relying on a third-party vendor to submit its quality data, as is the case here with Axxess submitting the CAHPS Survey data on behalf of ACE, it is still a provider's responsibility to ensure that the data is timely and accurately submitted. In this case, ACE failed to properly monitor its vendor relationship and it failed to utilize readily available reporting tools

---

[55] *See id*.
[56] Medicare Contractor's Preliminary Position Paper (hereinafter "Medicare Contractor's PPP") at 13 (Feb. 27, 2024).
[57] *See id.* at 15.
[58] *Id.* at 13*;* see also Medicare Contractor Ex. C-7 at C-0036.
[59] 747 F.3d 1214 (9th Cir. 2014).
[60] Medicare Contractor's PPP at 14.
[61] 747 F.3d 1214 at 1219, *citing* 71 Fed. Reg. 47870, 48041 (Aug. 18, 2006) (related to the Reporting Hospital Quality Data for Annual Payment Update (RHQDAPU) program, which is similar to the Hospice Quality Reporting program in that providers are required to submit quality of care information or face a two percentage-point reduction to its annual payment update).
[62] Medicare Contractor Ex. C-11 at C-0068.
[63] Medicare Contractor Ex. C-6 at C-0032 (bold and capitalization emphasis in original); *see also* Tr. at 13:15-14:6.

to check the status of required survey data submissions before the deadlines. Thus, ACE's detrimental reliance arguments are unpersuasive and fail here before the Board.

Additionally, the Board recognizes that the record is unclear about how ACE failed to submit its CAHPS Survey data, or which quarter (or quarters) failed, or whether there was a problem was with the authorization form that was submitted. Similarly, the notices of initial non-compliance and the decision to uphold the non-compliance both reference the whole year of January 2021 through December of 2021, not a specific quarter.[64] However, what is clear from the record is that for Q3, at the latest, the vendor authorization form would have had to be submitted to the CAHPS Hospice Survey Team by October 2021 for a vendor to submit survey data on the February 9, 2022 deadline. But, as noted *supra*, outside of testimony,[65] the record does not include any documentation on when Ace submitted its authorization to CMS. Rather, the record only includes a CAHPS Hospice Survey Team confirmation of initial receipt on February 9, 2022 (over 3 months after the October 2021 deadline), which states, in pertinent part:

> Dear [Administrator],
>
> Thank you very much for sending. We will process this form, and inform your survey vendor that we have received it.
>
> Can you please confirm you will also send the hard copy of the form to the address listed on the form (listed below, if needed)?
>
> RAND Corporation
> ATTN: Survey Research Group - Data Reduction CAHPS Hospice Survey
> 1776 Main Street
> Santa Monica, CA 90401
>
> Best,
>
> The CAHPS Hospice Survey Team
> cahpshospicetechsupport@rand.org | 703-413-1100 x5599[66]

Moreover, this confirmation email does not indicate that submission of the authorization form on the Q3 survey data deadline meets HQRP requirements for Q3 or Q4 (*i.e.*, that a waiver of the authorization form submission deadline had been granted). Specifically, it does not indicate that the contact information on the form was verified for both the hospice and the vendor and that ACE had been added the list of hospices authorizing Axxess as its surveyor for Q3 or Q4—despite the fact that the latest possible dates for its submission had already passed in October 2021 and January 2022, respectively. Indeed, ACE's witness recognized that "[i]t was a late

[64] Tr. at 45:5–47:8.
[65] *See, e.g.*, Tr. at 22:2 - 21.
[66] Provider Ex. C at 17.

submission."[67] In short, ACE needed to have an authorized vendor in place prior to the Q3 deadline in order for the vendor to properly and timely submit the survey data on its behalf and ACE failed to do so, notwithstanding multiple prompts and reminders from Axxess to do so.

Thus, based on the foregoing, ACE has not met its burden of proof, by a preponderance of substantial, relevant evidence, that it met the Hospice QRP requirements for FY 2023.

DECISION:

After considering the Medicare law and regulations, the arguments presented, and the evidence admitted, the Board finds that CMS' decision to reduce the ACE Home Health & Hospice, Inc.'s APU by two (2) percentage points for FFY 2023 was proper.

BOARD MEMBERS:

Kevin D. Smith, CPA
Ratina Kelly, CPA
Nicole E. Musgrave, Esq.
Shakeba DuBose, Esq.

FOR THE BOARD:

7/17/2026

X Kevin D. Smith, CPA

Kevin D. Smith, CPA
Board Chair
Signed by: KEVIN D. SMITH -A

[67] Tr. at 22:9 – 21.