Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Briarwood Community Mental Health Center
(NPI: 1770792061),

Petitioner

v.

Centers for Medicare and Medicaid Services.

Docket No. C-09-591

Decision No. CR2338

Date: March 11, 2011

DECISION

The application of Petitioner, Briarwood Community Mental Health Center, to participate in the Medicare program as a community mental health center (CMHC) is denied.

I. Background

Petitioner is located in Houston, Texas, and is represented in this matter by its Chief Executive Officer and Program Director, Shalaish Pathak, LSW. Petitioner seeks to enroll in the Medicare program as a CMHC. The parties do not agree as to the date that Petitioner filed its enrollment application. Petitioner asserts in its letter to me dated October 13, 2009, that the application was "completed" on December 12, 2005. Petitioner asserts in a letter to me dated April 27, 2010, that the application was "filed" on December 12, 2005. The Centers for Medicare and Medicaid Services (CMS) asserts in its "Brief in Opposition to Appeal" at page 1, that Petitioner's enrollment application was filed on July 31, 2006. However, CMS states in its Reply Brief (CMS Reply) at page 3, that the application was filed on February 20, 2006. The copy of the application offered as evidence by Petitioner reflects that it was signed by Mr. Pathak on December 12, 2005, January 6, 2006, and February 20, 2006. Petitioner's Exhibit (P. Ex.) 1, at 6-8.

However, the copy of the application offered by Petitioner does not reflect when it was mailed or received by CMS or its contractor, TrailBlazer Health Enterprises, LLC. The copy of the application offered as evidence by CMS bears date stamps that show it was received in various offices of CMS or TrailBlazer on February 23, 2006 (CMS Exhibit 3, at 6, 8, 13, 15, 17,), July 26, 2006, and July 31, 2006 (CMS Ex. 3, at 1-2). Petitioner also offered a letter dated February 27, 2006, from TrailBlazer, which states that the application date was January 10, 2006. P. Ex. 2, at 1. For purposes of this decision, I accept January 10, 2006 as the date Petitioner's application for enrollment was filed.[1]

TrailBlazer informed Petitioner in its letter dated February 27, 2006, that it recommended approval of Petitioner's enrollment application. TrailBlazer advised Petitioner that the next step of the enrollment process involved a possible site visit or survey. P. Ex. 2. CMS acknowledged receipt of the application by letter dated March 28, 2006, and requested additional information. P. Ex. 4, at 1. Petitioner responded on October 30, 2006. P. Ex. 4, at 2. Petitioner applied for and received a National Provider Identifier (NPI) on May 22, 2007. P. Ex. 4, at 4. On October 9, 2007, a CMS representative advised Petitioner that it had been determined that Petitioner's twenty-four hour emergency service was not available and, based on a visit to the address in the application, it was determined to be the address for a nursing home; the telephone number in the application was for a nursing home; and no one at the nursing home recognized the name of Mr. Pathak. The CMS representative advised Petitioner to reapply when Petitioner resolved the identified issues. P. Ex. 4, at 6. Petitioner requested a hearing by an administrative law judge (ALJ) of the Departmental Appeals Board (the Board) by letter dated October 17, 2007. P. Ex. 5, at 5-6. Petitioner requested review of the denial of its enrollment application. On December 3, 2007, Petitioner's request for hearing was returned with the explanation that the Board did not hear such appeals. P. Ex. 5, at 4.

On December 15, 2008, CMS conducted a survey of Petitioner's facility. CMS notified Petitioner by letter incorrectly dated March 6, 2008, that Petitioner did not meet the requirements for certification to participate in Medicare as a CMHC. CMS Ex. 1; CMS Ex. 2, at 21-22. CMS advised Petitioner by letter dated April 10, 2009, referring to the initial determination letter dated March 6, 2009, that Petitioner could request reconsideration. CMS Ex. 2, at 13. Petitioner requested reconsideration by letter dated April 18, 2009. CMS Ex. 2, at 14. CMS advised Petitioner by letter dated July 8, 2009, that it determined on reconsideration to deny Petitioner's enrollment as a CMHC. CMS Ex. 2, at 26-27.

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[1] The date the application was filed has no impact upon my decision in this case.

Petitioner requested a hearing before an ALJ by letter dated July 15, 2009. CMS Ex. 2, at 28. The case was assigned to me for hearing and decision on July 22, 2009. An Acknowledgement and Prehearing Order dated July 22, 2009 (Prehearing Order), was issued at my direction. Petitioner waived an oral hearing and requested an expedited decision on the written record pursuant to 42 C.F.R. § 498.66, by letter dated August 7, 2009. On September 21, 2009, the parties filed an "Agreed Motion for Disposition by Written Submission and Briefing Schedule" that was received on September 29, 2009. On October 1, 2009, I issued an order granting the parties' agreed motion and directing that they file and serve their evidence and briefs not later than October 17, 2009. Petitioner submitted a thirteen-page letter dated October 13, 2009, with no certificate of service and 500 pages of documents, none of which were marked as exhibits and with no exhibit list. Petitioner's submissions did not conform to and were in violation of my Prehearing Order.[2] On October 15, 2009, CMS filed an agreed motion for a one-week extension to file its brief and exhibits. I granted CMS's motion by order dated October 19, 2009. CMS filed its brief and CMS Exs. 1 through 14 on October 26, 2009.

In an email on November 4, 2009, Petitioner's representative indicated to the Attorney Advisor assigned to assist me that he intended to file a reply to the CMS brief or objections to the CMS evidence. No reply was received by February 12, 2010, and the Attorney Advisor inquired of Petitioner by email whether he requested that the record continue to be held open. Petitioner responded by email on February 13 and March 3, 2010, expressing confusion about the procedure for filing a reply or objections and indicating a desire for more time to reply or object. On April 2, 2010, I issued an Order to File Reply Briefs that directed that each party file a reply brief and any evidentiary objections not later than April 30, 2010. Copies of Petitioner's exhibits as marked by staff and the exhibit list compiled by staff were provided to CMS and Petitioner with the Order. The parties timely filed their reply briefs. Petitioner filed a three-page letter to which it attached various documents, again not marked as exhibits. The documents attached to Petitioner's reply-letter were numbered 1 through 18 and I have marked them collectively P. Ex. 22. On May 18, 2010, Petitioner filed a letter requesting permission to submit a news article printed from the internet, also not marked as an exhibit. I have marked the article P. Ex. 23.

Petitioner has not objected to my consideration of the exhibits submitted by CMS, and CMS Exs. 1 through 14 are admitted. CMS asserts in its Reply Brief that Petitioner's exhibits, specifically P. Exs. 10, 11, 12, 13, 15, 18, and 19, contain patient medical records dated after the December 15, 2008 survey. CMS argues that I should decline to

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[2] Rather than penalize Petitioner for violating my Prehearing Order, my staff marked Petitioner's documents and compiled an exhibit list.

consider any documents dated after the July 8, 2009, reconsideration decision. CMS argues that the issue before me is whether the reconsideration determination was correct. CMS argues, without explanation, that Petitioner's compliance after the December 15, 2008 survey has no bearing upon whether or not the reconsideration determination was correct on July 8, 2009. CMS Reply at 1-2, 8. Pursuant to the Secretary's regulations applicable to provider and supplier enrollment appeals, I am to examine any new documentary evidence submitted by the provider or supplier to determine whether the provider or supplier had good cause for submitting the evidence for the first time at the ALJ level. If I find good cause, than I am to accept the evidence and consider it in reaching a decision. If I do not find good cause, than I am to reject the evidence. 42 C.F.R. § 498.56(e). In this case, the reconsideration decision does not list what evidence was considered and I cannot determine, with one exception, whether Petitioner's evidence was considered at the reconsideration level. The exception is the evidence dated after the reconsideration date of July 8, 2009 – clearly, if the evidence did not exist at the time, it could not be considered. Thus, absent a showing of good cause, evidence dated after July 8, 2009, is new and should not be considered.

The other CMS argument is that I cannot consider evidence that is not relevant to the issue of whether Petitioner meets the requirements for a CMHC. 5 U.S.C. § 556(c)(3) and (d). The CMS position is that only evidence that tends to show Petitioner was or was not qualified at the time of the survey on December 15, 2008, is relevant to my determination. However, CMS cites no authority to support this argument, and I find the argument is unpersuasive. Accordingly, I will admit and consider all evidence bearing a date prior to July 8, 2009, that has any tendency to show whether or not Petitioner met the requirements to participate as a CMHC. P. Ex. 10 includes records for the period April 2009 through July 7, 2009, and accepting Petitioner's representation that they reflect services delivered by Petitioner, the documents are relevant and admitted. P. Ex. 11 includes documents with dates of October 2008 through December 2008, and accepting Petitioner's representation that they reflect services delivered by Petitioner, the documents are relevant and admitted. P. Ex. 12 includes documents dated June 2009 through August 3, 2009. The documents included in P. Ex. 12 dated after July 8, 2009, specifically pages 18 and 32 through 41, are not consider relevant and not admitted. I accept Petitioner's representation that the remainder of the documents in P. Ex. 12 reflects services delivered by Petitioner, and the documents are relevant and admitted. P. Ex. 13 includes documents with dates in March 2009 through April 2009, and accepting Petitioner's representation that they reflect services delivered by Petitioner, the documents are relevant and admitted. P. Ex. 15 includes documents from January 2009 through March 2009, and accepting Petitioner's representation that they reflect services delivered by Petitioner, the documents are relevant and admitted. P. Ex. 18 includes documents dated in March 2009 and April 2009, and accepting Petitioner's representation that they reflect services delivered by Petitioner, the documents are relevant and admitted. The documents in P. Ex. 19 are all dated in March 2009, and accepting Petitioner's representation that they reflect services delivered by Petitioner, the

documents are relevant and admitted. No objection has been interposed to the remainder of Petitioner's exhibits, and P. Ex. 1 through 9, 14, 16 and 17, and 20 through 23 are also admitted.

II. Discussion

A. Issue

The issue in this case is whether CMS had a basis to deny Petitioner enrollment in the Medicare program as a CMHC providing partial hospitalization services.

B. Applicable Law

Title XVIII of the Social Security Act (Act) establishes the Medicare program that reimburses health care organizations and practitioners for covered medical items and services they provide to Medicare beneficiaries. Act §§ 1811-12, 1831-32.[3] A provider or supplier of medical items or services must be approved for enrollment in Medicare to be eligible for reimbursement from Medicare. Act § 1866; 71 *Fed. Reg.* 20,754 (Apr. 21, 2006). A CMHC is a "provider" (42 C.F.R. § 400.202), and a provider's enrollment is documented by a properly executed "provider agreement" (42 C.F.R. § 489.11). Under the Act, a CMHC may have a provider agreement but only for the purpose of providing "partial hospitalization services." Act § 1866(e)(2).

According to the Act, a CMHC is an entity that:

> (i)(I) provides the mental health services described in section 1913(c)(1) of the Public Health Service Act; or (II) in the case of an entity operating in a State that by law precludes the entity from providing itself the service described in subparagraph (E) of such section, provides for such service by contract with an approved organization or entity (as determined by the Secretary);
> (ii) meets applicable licensing or certification requirements for community mental health centers in the State in which it is located; and

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[3] Citations in this decision are to the sections of the Act rather than the United States Code (U.S.C.) sections. Title 18 of the Act may be found at www.ssa.gov/OP_Home/ssact/title18/1800.htm, and that resource includes both the section of the Act and the correct U.S.C. section.

> (iii) meets such additional conditions as the Secretary shall specify to ensure (I) the health and safety of individuals being furnished such services, (II) the effective and efficient furnishing of such services, and (III) the compliance of such entity with the criteria described in section 1931(c)(1) of the Public Health Service Act.

Act § 1861(ff)(3)(B).

A CMHC must provide the following mental health services under the Public Health Service Act:

> (A) Services principally to individuals residing in a defined geographic area (hereafter in this subsection referred to as a "service area").
> (B) Outpatient services, including specialized outpatient services for children, the elderly, individuals with a serious mental illness, and residents of the service areas of the centers who have been discharged from inpatient treatment at a mental health facility.
> (C) 24-hour-a-day emergency care services.
> (D) Day treatment or other partial hospitalization services, or psychosocial rehabilitation services.
> (E) Screening for patients being considered for admission to State mental health facilities to determine the appropriateness of such admission.

42 U.S.C. § 300x-2(c)(1) (Public Health Service Act § 1913(c)(1)).

According to the Secretary's regulations, a CMHC:

> (1) Provides outpatient services, including specialized outpatient services for children, the elderly, individuals who are chronically mentally ill, and residents of its mental health service area who have been discharged from inpatient treatment at a mental health facility;
> (2) Provides 24-hour-a-day emergency care services;
> (3) Provides day treatment or other partial hospitalization services, or psychosocial rehabilitation services;
> (4) Provides screening for patients being considered for admission to State mental health facilities to determine the appropriateness of this admission; and

> (5) Meets applicable licensing or certification requirements for CMHCs in the State in which it is located.

42 C.F.R. § 410.2.

Section 1861ff(3)(A) of the Act defines partial hospitalization services as a program furnished either by a hospital to its outpatients, or by a CMHC. 42 C.F.R. §§ 410.27, 410.172. Partial hospitalization is an intensive ambulatory outpatient treatment program that offers less than twenty-four hour psychiatric services to mentally ill patients as an alternative to inpatient psychiatric care. *Green Hills Enters., LLC*, DAB No. 2199, at 2 (2008); 42 C.F.R. §§ 410.2, 410.43. The partial hospitalization services that may be reimbursed by Medicare are described at 42 C.F.R. § 410.43(a). Services that are separately covered by Medicare are not compensable as partial hospitalization services, including services furnished to skilled nursing facility residents. 42 C.F.R. §§ 410.43(b)(5), 411.15(p). Therefore, services provided by a CMHC to a skilled nursing facility resident may not be reimbursed to the CMHC.

To participate in and receive payment from the Medicare program, a provider, such as a CMHC, or supplier must submit an enrollment application and meet the enrollment requirements set forth in the regulation. 42 C.F.R. § 424.510(a) and (d). CMS may conduct an on-site review to verify enrollment information and compliance with enrollment requirements. 42 C.F.R. § 424.510(d)(8). CMS may deny a provider's or supplier's enrollment in the Medicare program for failure to comply with any of the enrollment requirements. 42 C.F.R. § 424.530(a). The denial by CMS of a provider's or supplier's enrollment in the Medicare program may be based upon an unsatisfactory on-site review, if that review finds that the provider or supplier is not operational or meeting enrollment requirements. 42 C.F.R. § 424.530(a)(5).

Pursuant to 1866(h)(1) and (j)(8) of the Act, a provider or supplier denied enrollment is entitled to a hearing and judicial review. The procedures applicable to a hearing by an ALJ and review by the Board are set forth in 42 C.F.R. Part 498. 42 C.F.R. § 424.545(a). The burden is upon the provider or supplier to demonstrate that it meets enrollment requirements and to produce evidence that satisfies that burden. 42 C.F.R. § 424.545(c).

C. Findings of Fact, Conclusions of Law, and Analysis

My conclusions of law are in bold followed by my statement of pertinent facts and analysis. I have carefully considered all the evidence and the arguments of both parties, though not all may be specifically discussed in this decision. I discuss in this decision the

credible evidence given the greatest weight in my decision-making.[4] The fact that evidence is not specifically discussed should not be considered sufficient to rebut the presumption that I considered all the evidence and assigned such weight or probative value to the credible evidence that I determined appropriate within my discretion as an ALJ. There is no requirement for me to discuss the weight given every piece of evidence considered in this case, nor would it be consistent with notions of judicial economy to do so.

1. Petitioner has not shown that it was a CMHC within the meaning of section 1861(ff)(3)(A) of the Act.

2. Petitioner has not shown that it has provided the core services of a CMHC required by section 1913(c)(1) of the Public Health Service Act and 42 C.F.R. § 410.2.

a. Facts

Petitioner's application to enroll as a CMHC reflects that Petitioner's legal business name as reported to the Internal Revenue Service is "Shalaish Pathak" doing business as "Briarwood CMHC" and that the business was started on December 8, 2005. CMS Ex. 3, at 4. The address for Petitioner was entered as Briarwood Healthcare, 7633 Bellfort, Houston, Texas, and the application indicated that Petitioner owned or leased the location. CMS Ex. 3, at 5. Petitioner's representative in this proceeding, Shalaish Pathak, LSW was listed as having an ownership interest of five percent or greater (CMS Ex. 3, at 6, 14; P. Ex. 1, at 3), but the organizational structure was noted to be a sole proprietorship (CMS Ex. 3, at 4) consistent with Petitioner's tax status (P. Ex. 2, at 2). Lakesia Smith, LVN, was listed as the Managing Employee effective December 12, 2005. CMS Ex. 3, at 7, 13; P. Ex. 1, at 4. Mark S. Moeller, MD, was listed as Medical Director effective December 12, 2005. CMS Ex. 3, at 8; P. Ex. 1, at 2. Petitioner's representative, Mr. Pathak, signed the application as "CEO." CMS Ex. 3, at 9, 17-18; P. Ex. 1, at 6.

CMS offered as evidence copies of what appear to be a tri-fold brochure for Briarwood CMHC that is undated. The brochure lists Petitioner's address as 7633 Bellfort, Houston, Texas. The brochure lists hours of operation of 9:00 a.m. to 5:00 p.m., Monday through Friday and states weekend and evening appointments are available. The brochure lists

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[4] "Credible evidence" is evidence that is worthy of belief. *Black's Law Dictionary* 596 (18th ed. 2004). The "weight of evidence" is the persuasiveness of some evidence compared to other evidence. *Id*. at 1625.

the following services: partial hospitalization program, counseling, inpatient referral, outpatient therapy, intensive outpatient therapy, placement services, clinical assessment for mental health warrants, assistance with medical appointments, case management, medication management, and transportation. The second page or verso lists outpatient services to children, elderly, chronically mentally ill, and patients discharged from psychiatric inpatient hospital; twenty-four hour emergency care; referral screening for state mental hospital admission assessments; and "PHP level of care." CMS Ex. 3, at 29-30.

Petitioner introduced as evidence a letter dated February 7, 2006 addressed to Mr. Pathak, as the "Program Director" for "The Briarwood Health Care Center" at 7633 Bellfort in Houston from the Mental Health and Mental Retardation Authority (MHMRA) of Harris County Texas. P. Ex. 3, at 1-2. The letter acknowledged that Mr. Pathak had inquired about obtaining an agreement with MHMRA as part of providing partial hospitalization services. The letter instructed Mr. Pathak to submit materials for review. Mr. Pathak sent the requested information with a letter dated August 28, 2006, on Briarwood Health Care Center stationary. Mr. Pathak indicated in his letter that Petitioner's "[p]hone is available 24/7 and is answered by facility staff and directed to mental health staff if necessary;" that out-patient services are provided to "elderly resident as ordered by physician;" and that children and adolescent services are provided at the facility during the evening and at the local school next door to the facility if needed. P. Ex. 3, at 3-4. On April 11, 2007, Mr. Pathak sent a letter to MHMRA acknowledging their recent visit to Briarwood CMHC and PHP (partial hospitalization program). P. Ex. 2, at 5. On May 15, 2007, MHMRA of Harris County offered Petitioner a provisional memorandum of understanding effective for 180 days with a regular twelve month memorandum of understanding being contingent upon CMS approving Petitioner as a CMHC. The provisional memorandum allowed Petitioner to send patients to MHMRA for screening for admission to state mental health facilities. P. Ex. 3, at 7 to 18; CMS Ex. 14.

Petitioner introduced as evidence a copy of an email dated October 9, 2007, from Sheryl Barrett-Bowie at CMS advising Mr. Pathak that: CMS intended to deny the CMHC application because the twenty-four hour emergency service was not operational; Petitioner's address was actually a nursing home; and when the number Petitioner provided was called, it was the nursing home and the person who answered reported they did not know Mr. Pathak. Mr. Pathak responded by email on October 12, 2007, that he was the on-call twenty-four hour emergency service and that the telephone is shared during regular working hours with the nursing home. P. Ex. 4, at 26.

Petitioner sent CMS a letter dated November 8, 2007, forwarding patient records as of October 25, 2007, with a list of ten patients attached to the letter, seven listed as out-patient (two of whom are noted to be children) and three partial hospitalization patients who had been discharged from inpatient hospitalization. P. Ex. 4, at 9-10. However,

Petitioner has not provided me copies of the patient records forwarded to CMS in November 2007.

On December 15, 2008, a CMS surveyor, Thomas Scheidel, RN, made an unannounced visit to Petitioner's facility to conduct a survey. Surveyor Scheidel provided sworn testimony by affidavit that based on his observations, Petitioner's records, staff interviews, [5] and his experience surveying CMHC applicants, he determined that Petitioner did not meet the requirements of a CMHC. CMS Ex. 4. Surveyor Scheidel's findings were: (1) Petitioner was located inside a skilled nursing facility named "Briarwood Health Care Center" and did not present itself to the public or other health care professionals as a distinct entity offering partial hospitalization services to the public – staff at the front desk of the nursing facility could not identify the location of the CMHC in the building and there was no signage on or inside the property informing the public of the existence of the CMHC or CMHC-related literature in the nursing home's lobby or the single conference room purportedly used by the CMHC; (2) Surveyor Scheidel found no evidence that the CMHC advertised itself as serving the community; (3) no schedule for operations of the CMHC was posted, and Surveyor Scheidel concluded that Mr. Pathak was not even going to be at the facility the day of the survey until Surveyor Scheidel contacted him by telephone; (4) the only clinical records for review were those of the skilled nursing facility, and there were no discrete CMHC clinical records; (5) based on his interview with Mr. Pathak, the surveyor concluded that the CMHC did not have alternate sites for operating other than the nursing facility conference room and client's homes; and (6) there were no discrete CMHC interdisciplinary treatment plans and goals. CMS Ex. 4, at 2-3. Copies of clinical records obtained by Surveyor Scheidel during the survey are in evidence as CMS Exs. 5 through 12. CMS Ex. 4, at 2 n.1.

b. Analysis

A CMHC may participate in and be reimbursed by Medicare, but only for the limited purpose of providing partial hospitalization services. Act § 1866(e)(2). Section 1861(ff)(3)(B) of the Act is clear that to qualify as a CMHC, an entity must be providing, directly or by contract, the services specified by section 1913(c)(1) of the Public Health Service Act (42 U.S.C. § 300x-2(c)(1)). Section 1913(c)(1) requires that a CMHC provide all the following: (1) services within its geographic service area; (2) outpatient services for children, the elderly, individuals with a serious mental illness, and residents

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[5] Surveyor Scheidel does not provide the name of Petitioner's representative who he interviewed during the survey. But it is clear from the evidence that it was Mr. Pathak who met with Surveyor Scheidel. P. Ex. 6.

of the service areas of the centers who have been discharged from inpatient treatment at a mental health facility; (3) twenty-four emergency care services; (4) day treatment or other partial hospitalization services, or psychosocial rehabilitation services; and (5) screening for patients being considered for admission to state mental health facilities to determine the appropriateness of such admission. The clear intent of section 1861(ff)(3)(B) of the Act, based upon the plain meaning of its language, is that an entity qualifies as a CMHC only if it actually provides the services listed in section 1913(c)(1) of the Public Health Service Act. Furthermore, section 1913(c)(1) clearly states that all the services must be provided by a CMHC. The Secretary included the requirements of section 1913(c)(1) of the Public Health Service Act in his regulations and added the requirement that a CMHC must meet applicable licensing requirements. 42 C.F.R. § 410.2. It is not sufficient for an entity to show that it is ready, willing, and able to provide the required services or less than all of the required services. *Comprehensive Behavioral Healthcare*, DAB CR890 (2002); *Psychstar of Am.*, DAB CR645, at 6 (2000). In this case, Petitioner has failed to show that it has consistently provided all the services to eligible individuals in its service area.

I conclude based upon my review of all the evidence that Petitioner has failed to meet its burden to show that it has ever met the requirements of the Act, the Public Health Service Act, or the Secretary's regulations to be a CMHC. Petitioner does not dispute that its "facility" is located within a single conference room of a nursing facility. Petitioner does not dispute the surveyor's testimony that there was no signage or schedule posted inside or outside the nursing facility to alert the public or potential clients of the location of Petitioner within the nursing facility. Petitioner also does not dispute that nursing facility staff members were either unaware of or unable to state where Petitioner operated within the facility. Petitioner's evidence shows that Petitioner did not have an agreement for screening for psychiatric admissions with MHMRA of Harris County until May 15, 2007, and the agreement was only effective for 180 days and subject to extension only if CMS accepted Petitioner as a CMHC. I could infer from these facts that Petitioner never operated as a CMHC. However, I need not rely only upon that inference as Petitioner has failed to submit evidence that it provided the services required by the Public Health Service Act. I note first that the evidence Petitioner has submitted shows that its only twenty-four hour emergency service was Mr. Pathak being on call. There is no evidence that Mr. Pathak ever actually provided emergency care services, during regular business hours or at other times. Other than the brochure I have described, there is no evidence that Petitioner ever held itself out to the public as being available to provide any mental health services within its geographic service area. There is also no evidence that the brochure was ever distributed outside the nursing facility in which Petitioner was located.

Both Petitioner and CMS have offered clinical records for my consideration. Surveyor Scheidel obtained from Petitioner during the survey copies of clinical records for nine patients. The nine patients Petitioner alleged it served included a 70-year-old man who was discharged from a psychiatric hospital to Briarwood Health Care Center on

September 9, 2008. CMS Ex. 5, at 1-2. The records obtained during the survey included those of an 18-year-old man who was assessed by MHMRA of Harris County on October 16, 2008. CMS Ex. 6. The records for a third patient, a female, include a document that purports to be a "Master Treatment Plan" and progress notes dated in October and November 2007. The records do not reflect the age of the patient but do indicate recent release from inpatient psychiatric hospitalization. CMS Ex. 7. CMS Ex. 8 is records of a 66-year-old man from 2007 and 2008. The records indicate that he was a resident of Briarwood Health Care Center. CMS Ex. 8, at 9, 15. The fifth patient was a 75-year-old female, who was a resident of Briarwood Nursing & Rehabilitation,[6] and her records are from September 2008. CMS Ex. 9. CMS Ex. 10 is records of a 74-year-old female. CMS Ex. 11 is records of a 79-year-old female. CMS Ex. 12 is records of a 13-year-old female from 2005, 2006, and 2007. The child's consent for treatment/counseling services is dated October 5, 2005, before Petitioner applied to be a CMHC, and the provider of services is listed as Briarwood Healthcare. CMS Ex. 12, at 23.

Petitioner submitted clinical records for eleven patients. P. Ex. 10 is records of a 78-year-old female from April through July 2009. P. Ex. 11 is records from October through December 2008, of a 56-year-old female who was discharged from the psychiatric hospital to Briarwood Nursing Home on November 14, 2008. P. Ex. 11, at 1-2. P. Ex. 12 includes records of a 32-year-old female for the period June through August 2009. P. Ex. 13 includes records for an 82-year-old female nursing home resident for March and April 2009. P. Ex. 14 is records for a 79-year-old male for the period October to November 2007. The clinical records of an 84-year-old male nursing home resident from January, February, and March 2009 are P. Ex. 15. P. Ex. 16 is records of a 58-year-old male resident of Briarwood Health Care Center dated in October and November 2006, and November 2009. P. Ex. 17 is the records of a 72-year-old female Briarwood Health Care Center resident dated September through November 2007. P. Ex. 18 includes records of an 85-year-old female resident of Briarwood Health Care Center dated in March and April 2009. The records of a 52-year-old male resident of Briarwood Health Care Center for the period March 2009 are in evidence as P. Ex. 19. P. Ex. 20 is the records of a 54-year-old female resident of Briarwood Health Care Center from 2006, 2007, and 2008.

The parties have provided me records for twenty of Petitioner's patients from October 2005 through August 2009. Nine of those records are for residents of Briarwood Health Care Center or Briarwood Nursing and Rehabilitation and two are for residents of

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[6] The evidence shows that Briarwood Health Care Center, Briarwood Nursing & Rehabilitation, and Briarwood Nursing Home are different names for the same facility. There is no dispute that Briarwood Health Care Center, Briarwood Nursing & Rehabilitation, and Petitioner all share the same address at 7633 Bellfort, Houston, Texas.

unspecified nursing facilities. Petitioner may have provided partial hospitalization services[7] to all eleven residents but none are compensable by Medicare as the individuals are residents of nursing facilities. 42 C.F.R. §§ 410.43(b)(5), 411.15(p). Seven of the records are for individuals who may not have been nursing facility residents. One of the seven was 18-years-old, and, therefore, not a child, for as a general rule, one must be under the age of eighteen to be considered a child under the Act. Act §§ 202(d), 216. The records include only one child, a 13-year-old. I conclude that evidence that Petitioner provided treatment to one child in nearly four years is insufficient to show that Petitioner was providing services to children, a core service required to qualify as a CMHC. I also conclude that Petitioner has failed to show that it provided twenty-four hour emergency services, also a core service required to qualify as a CMHC. Finally, I have received no evidence that Petitioner provided screening for patients being considered for admission to a state mental health facility and the evidence shows that Petitioner only had an agreement with MHMRA of Harris County effective for only a period of 180 days from May 15, 2007 to about November 11, 2007. Accordingly, Petitioner has failed to show that it ever provided all the core services required by the Public Health Service Act for a CMHC and Petitioner has failed to show that it qualified to be enrolled in Medicare as a CMHC.[8]

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[7] I make no judgment regarding the quality of any services provided by Petitioner or whether those services actually satisfy the requirements for partial hospitalization services under the Act and regulations. My decision turns upon the failure of Petitioner to provide all the core services it needed to in order to qualify as a CMHC. Contrary to Petitioner's arguments in its request for hearing and letters, it cannot qualify as a CMHC simply by providing partial hospitalization services, no matter the quality of those services.

[8] Petitioner's arguments regarding the delayed processing of its application fails to acknowledge the delays caused by Petitioner's failure to submit the completed application or to respond to requests for documents in a timely fashion. Further, even if all the delay was the fault of CMS or its contractor, I have no authority to fashion a remedy for Petitioner. Petitioner also suggests that there may have been some retribution or retaliation by the agency due to complaints Petitioner made to Congress and the Vice President. I have no authority or jurisdiction to review such allegations. My review is *de novo* and my decision is based only upon the evidence presented and the law applicable. The fact that Mr. Pathak may have exercised his right to complain to his elected representatives has no impact upon my decision.

III. Conclusion

For the foregoing reasons, the application of Petitioner to participate in the Medicare program as a CMHC is denied.

/s/
Keith W. Sickendick
Administrative Law Judge