**DEPARTMENT OF HEALTH AND HUMAN SERVICES**
**Centers for Medicare & Medicaid Services**

***Decision of the Administrator***

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| **IN THE CASE OF:** | * | **MGCRB Case No. 24C0542** |
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| **Windham Community Memorial Hospital & Hatch Hospital** | * * | |
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| **Provider No. 07-0021** | * | |
| | * | **Date: January 31, 2023** |
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This case is before the Administrator, Centers for Medicare & Medicaid Services (CMS), for review of the decision entered by the Medicare Geographic Classification Review Board (MGCRB). The review is during the 90-day period in § 1886(d)(10) of the Social Security Act (Act), as amended. The Hospital requested that the Administrator reverse the MGCRB's denial of its reclassification application. Accordingly, this case is now before the Administrator for final agency review.

## ISSUE AND MGCRB DECISION

The issue involves whether the MGCRB properly denied the Hospital's request to reclassify to the urban Nassau County-Suffolk County, New York (NY) Core-Based Statistical Area (CBSA), for purposes of using the area's wage index to determine its payment rate under the Medicare inpatient prospective payment system (IPPS) for the Federal Fiscal Years (FFY) 2024 through 2026. The MGCRB found that requested area is required to be no farther than 35.00 miles under the proximity requirements; and the MGCRB measured the distance as 138.0 miles. The MGCRB approved the Hospital's secondary request to reclassify to the urban Worcester, Massachusetts-Connecticut (MA-CT) CBSA.

## HOSPITAL'S COMMENTS

The Hospital commented, requesting review by the Administrator. The Hospital noted that because it has rural status under 42 C.F.R. § 412.103(b), it is only required to meet the 35 mile proximity requirement. The Hospital stated that it provided map evidence of a route from the Hospital's front door to the Suffolk County line (which is part of the Nassau County-Suffolk County, NY CBSA) via Interstate 395 and State Route 32, then following the overwater ferry route via the Fishers Island Ferry. Using approved mapping software, the distance of this route was 34.9 miles.

The Hospital noted that the regulations at 42 C.F.R. § 412.230(c)(1) require that in order to demonstrate proximity to the area to which a hospital seeks

redesignation, "the hospital must submit evidence of the shortest route over improved roads to the area and the distance of that route." The Hospital pointed out that MGCRB Rule 5.2(A)(1) defines the term "improved road" to mean "any road that is maintained by a local, state, or federal government entity and available for use by the general public", and stated that this definition has been consistent in the MGCRB's Rules and Instructions since at least 2013.

The Hospital noted that while the regulations and the MGCRB Rules are silent with respect to how travel by ferry boat should be treated in this context, the MGCRB has previously interpreted the term "improved road" to include distances traveled by ferry boat when the ferry service satisfies certain criteria. The Hospital pointed out that the MGCRB granted redesignation for Lawrence & Memorial Hospital for FFY 2015 – 2017 based on this same route, and using the same Fishers Island Ferry at issue in this case. The Hospital stated that the MGCRB allowed the use of a ferry on at least five occasions between 1999 and 2016.[1]

For reasons unclear, the Hospital noted, the MGCRB began disregarding years of precedent in 2017, without any apparent change in policy, and denying requests for redesignation that relied on ferry travel. The Hospital stated that the MGCRB is obligated to apply its regulations and policies in a consistent manner and to treat similarly situated hospitals the same way, but has not done so, and has instead acted in an arbitrary and capricious manner. The Hospital pointed out that since 2017, the Administrator has reversed those MGCRB decisions, and allowed for the use of a ferry. In fact, the Hospital stated, the Administrator has previously reversed the MGCRB's decision related to this particular ferry in at least five cases, including a case related to this very Hospital in a previous MGCRB cycle.[2]

## DISCUSSION

The entire record furnished by the MGCRB has been examined, including any correspondence, position papers, exhibits, and subsequent submissions. All comments received timely are included in the record and have been considered.

Section 1886(d)(10)(C)(iii)(II) of the Social Security Act and the Medicare regulations at 42 C.F.R. § 412.278 provide for the CMS Administrator's review of the MGCRB decisions. In exercising its authority under § 1886(d)(10) of the Act, the MGCRB must comply with all of the provisions of Title XVIII of the Act and the regulations issued there under, including the regulations at 42 C.F.R. § 412.230, *et seq*. Likewise, the regulations promulgated by the Secretary establishing procedures and criteria for the MGCRB are binding on the agency and on the Administrator in reviewing MGCRB decisions.[3]

Section 1886(d)(10) of the Act provides for the MGCRB to consider the application of any subsection (d) hospital requesting that the Secretary change the hospital's geographic classification for purposes of determining for a fiscal year its wage index. Further, § 1886(d)(10)(D)(i)(I) requires the Secretary to publish guidelines for comparing wages, taking into account to the extent

[1] The Hospital cited to MGCRB Dec. Nos. 99C0452, 04C0067, 07C0055, 15C0156, and 16C0088.
[2] The Hospital cited to the Administrator's Decision in MGCRB Dec. No. 21C0294.
[3] *United States v. Nixon*, 418 U.S. 683, 694-96 (1974). *See also* K. Davis and R. Pierce, Administrative Law Treatise §6.5 at 251 (3rd ed. 1994).

the Secretary determines appropriate, occupational mix in the area in which the hospital is classified and the area in which the hospital is applying to be classified.

In 1999, ten years after the MGCRB was established, Congress enacted § 401 of the Medicare, Medicaid, and SCHIP Balanced Budget Refinement Act of 1999 (Pub. Law 106-113), which established a separate procedure from the MGCRB process whereby urban hospitals can be reclassified from urban to rural status if they meet certain criteria. This provision was set forth at § 1886(d)(8)(E) of the Act and promulgated at 42 C.F.R. § 412.103. Under section. 1886(d)(8)(E) of the Act, the Secretary shall treat the hospital as being located in the rural area (as defined in paragraph (2)(D)) of the State in which the hospital is located if:

> (ii) For purposes of clause (i), a subsection (d) hospital described in this clause is a subsection (d) hospital that is located in an urban area (as defined in paragraph (2)(D)) and satisfies any of the following criteria:
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> (I) The hospital is located in a rural census tract of a metropolitan statistical area (as determined under the most recent modification of the Goldsmith Modification, originally published in the Federal Register on February 27, 1992 (57 Fed. Reg. 6725)).
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> (II) The hospital is located in an area designated by any law or regulation of such State as a rural area (or is designated by such State as a rural hospital).
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> (III) The hospital would qualify as a rural, regional, or national referral center under paragraph (5)(C) or as a sole community hospital under paragraph (5)(D) if the hospital were located in a rural area.
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> (IV) The hospital meets such other criteria as the Secretary may specify.

Consistent with the statute, the Medicare regulations at 42 C.F.R. §412.103, provides special treatment for hospitals located in urban areas that apply for reclassification as rural. Hospitals with § 412.103 rural status are eligible to use distance and average hourly wage criteria designated for rural hospitals at § 412.230(b)(1) and (d)(1).

The regulation at 42 C.F.R. § 412.230 sets forth criteria for an individual hospital seeking redesignation to another rural area or an urban area, stating in part at (a)(1)(ii) that:

> Effective for fiscal year 2005 and subsequent fiscal years, an individual hospital may be redesignated from an urban area to another urban area, from a rural area to another rural area, or from a rural area to another urban area for the purposes of using the other area's wage index value.

A hospital must demonstrate that it meets certain proximity criteria to be redesignated to the requested area. 42 C.F.R. § 412.230(a) provides that:

> *(2) Proximity.* Except as provided in paragraph (a)(3) of this section, to be redesignated to another rural area or an urban area, a hospital must demonstrate a close proximity to the area to which it seeks redesignation by meeting the criteria in paragraph (b) of this section, and submitting data requested under paragraph (c) of this section.

The regulation at 412.230(b) states:

> *Proximity criteria.* A hospital demonstrates a close proximity with the area to which it seeks redesignation if one of the following conditions applies: (1) The distance from the hospital to the area is no more than 15 miles for an urban hospital and no more than 35 miles for a rural hospital. (2) At least 50 percent of the hospital's employees reside in the area.

Regarding the "proximity" criteria, MGCRB Rule 5.2 notes:

> (A) A hospital must demonstrate a close proximity to the area to which it seeks redesignation or qualify for special access by meeting one of the following conditions:
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> (1) Proximity – Distance. The distance from the hospital to the requested area must be no more than 15 miles for an urban hospital and no more than 35 miles for a rural hospital. To demonstrate proximity, the provider must submit map evidence (using a nationally recognized electronic mapping service (e.g., Google Maps, Bing Maps, MapQuest) showing the shortest route over improved roads from the front entrance of the hospital to the county line of the requested area and the distance of that route. An improved road is any road that is maintained by a local, state, or federal government entity and available for use by the general public.
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> An improved road includes the paved surface up to the front entrance of the hospital. For further information, see 66 Fed. Reg. 39874-75 (Aug. 1, 2001), which discusses the definition of mileage for purposes of meeting the proximity requirements.

In this case, the MGCRB found that the Hospital met all the criteria to be reclassified to the Nassau County-Suffolk County, NY CBSA, except for the 35 mile proximity requirement.[4] The purpose of the MGCRB reclassification process is to allow Hospitals to compete with neighboring labor markets. Based upon the Hospital's designated public access route to the county line, the Hospital clearly meets the 35 mile proximity requirement using the ferry. The MGCRB and the Administrator have both allowed the use of a ferry in previous MGCRB cases.[5] The Administrator

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[4] As the Hospital is considered "rural" under 42 C.F.R. § 412.103, it may use the rural criteria of 35 miles for proximity, despite its geographical location in an urban area.

[5] *See Lawrence & Memorial Hospital*, MGCRB Case No. 15C0187-1, in which the MGCRB found that Lawrence & Memorial Hospital, located in the Norwich-New London, CT CBSA (the same CBSA as the Hospital in the present case) was 7.7 miles from the Suffolk County, NY line and

notes the Fishers Island Ferry is owned by a government entity, open to the public, and available year-round. As noted by the U.S. Department of Transportation:[6]

> Ferry boats offer a valuable option for people living near waterways across the nation traveling to jobs, schools, medical services, grocery stores, and other important destinations. As FHWA Administrator Victor Mendez said, "Ferry service represents a key transportation link for certain communities--much like highways and bridges do in other areas."

As the Hospital meets the criteria, the Administrator approves the Hospital's request to reclassify to the Nassau County-Suffolk County, NY CBSA for purposes of using the area's wage index to determine its payment rate under the Medicare IPPS for the FFY 2024 through 2026. The MGCRB's decision approving the Hospital's secondary request for reclassification to the Worcester, MA-CT CBSA is hereby vacated.

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allowed it to reclassify to the Nassau County-Suffolk County, NY CBSA based on it being the closest CBSA. The 7.7 mile distance was using the same Ferry at issue in the present case. *See also* Administrator's Decisions in *Adirondack Medical Center*, MGCRB Case No. 22C0178 and 19C0277; *Beebe Medical Center*, MGCRB Case Nos. 22C0296 and 19C0212; *Backus Medical Center*, MGCRB Case Nos. 21C0293 and 18C0195; *Lawrence + Memorial Hospital*, MGCRB Case No. 21C0289, and *Windham Community Memorial Hospital & Hatch Hospital*, MGCRB Case No. 21C0294.

[6] *See* "DOT support for improved ferry service boosts another transportation option", published Feb. 5, 2013. *Available online at* http://usdotblog.typepad.com/secretarysblog/2013/02/dot-support-for-improved-ferry-service-boosts-another-transportation-option.html.

DECISION

The Administrator reverses the MGCRB's decision in accordance with the foregoing opinion.

**THIS CONSTITUTES THE FINAL ADMINISTRATIVE DECISION OF THE SECRETARY OF HEALTH AND HUMAN SERVICES**

Date: April 26, 2023

/s/
Jonathan Blum
Principal Deputy Administrator
Centers for Medicare & Medicaid Services