PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2023-D30

PROVIDER -
Ellis Hospital

Provider No.-
33-0153

vs.

MEDICARE CONTRACTOR –
National Government Services, Inc.

DATE OF HEARING –
September 8, 2022

Cost Reporting Periods Ended -
December 31, 2010,
December 31, 2012,
December 31, 2013,
December 31, 2014,
December 31, 2015,
December 31, 2016

CASE NUMBERS: 14-3959, 15-3440, 16-1866, 18-1647, 19-0371, 22-0536

INDEX

ISSUE STATEMENT

Whether the Medicare Contractor properly determined the Provider's unweighted direct graduate medical education ("GME") and indirect medical education ("IME") full time equivalent ("FTE") resident caps for the fiscal years ("FYs") 2010 and 2012-2016?[1]

DECISION

After considering Medicare law and regulations, the arguments presented, and the evidence admitted, the Provider Reimbursement Review Board ("Board" or "PRRB") finds that the Medicare Contractor properly determined Ellis Hospital's ("Ellis" or "Provider") unweighted direct GME and IME FTE resident caps for FYs 2010 and 2012-2016.

INTRODUCTION

Ellis is an acute care teaching hospital[2] located in Schenectady, NY.[3] Ellis' assigned Medicare contractor[4] is National Government Services, Inc. ("Medicare Contractor").

In June of 2008, St. Clare's Hospital (assigned to Provider No. 33-0066 ("St. Clare's")) merged with Ellis (assigned to Provider No. 33-0153), with Ellis remaining as the surviving hospital. Upon the merger, the Medicare Contractor established Ellis' new post-merger FTE resident caps for GME and IME.

Ellis is disputing the post-merger GME and IME FTE resident caps that the Medicare Contractor determined and applied in the FY 2010 and 2012 to 2016 cost reports. Ellis contends the GME and IME FTE resident caps "are erroneous because the [Medicare Contractor] unlawfully decreased those caps using a mismatched, hybrid cap determination for a merged hospital that is not authorized by any statute or regulation and is otherwise arbitrary and capricious and unsupported by substantial evidence."[5]

The Medicare Contractor issued Notices of Program Reimbursement ("NPRs") for FYs 2010 and 2012 to 2016, in which they applied the "new" post-merger GME and IME FTE resident caps, as calculated by the Medicare Contractor after the June 2008 merger. Ellis timely appealed this issue from each of the respective NPRs to the Board and met the jurisdictional requirements for a hearing.

On August 15, 2022, Ellis filed an unopposed request for a Record Hearing followed, on August 26, 2022, by stipulations agreed to by the parties. On September 8, 2022, the Board granted Ellis' Request for a Record Hearing. Ellis was represented by Stephanie Webster, Esq. of Ropes & Gray,

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[1] Stipulations for Record Hearing (hereinafter "Stip.") at ¶ 1 (Aug. 26, 2022).
[2] Provider's Final Position Paper (hereinafter "Provider's FPP") at 3 (June 15, 2022).
[3] Medicare Contractor's Final Position Paper (hereinafter "Medicare Contractor's FPP") at 2 (July 15, 2022).
[4] CMS' 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 term "Medicare contractor" refers to both Fis and MACs as appropriate.
[5] Provider's FPP at 1.

LLP, and the Medicare Contractor was represented by Joseph Bauers, Esq. of Federal Specialized Services.

STATEMENT OF FACTS AND RELEVANT LAW:

The Medicare program reimburses teaching hospitals for Medicare's share of costs associated with GME and IME. The GME calculation relates to *direct* costs and is determined, in large measure, based upon the total number of FTE residents in a hospital's teaching program. A teaching hospital's GME reimbursement is calculated by multiplying the average per resident amount, derived from a 1984 base year, by its allowable resident FTE count and Medicare patient load.[6] In addition to GME reimbursement, a provider may receive an additional payment for each Medicare discharge to reflect the higher *indirect* costs of teaching hospitals relative to non-teaching hospitals.[7] This additional payment, known as the IME adjustment, is based on the indirect teaching adjustment factor, which is calculated using the teaching hospital's ratio of FTE residents to beds.[8]

One of the primary factors in determining a teaching hospital's GME and IME payments is the count of resident FTEs. The determination of the FTE counts, to be used in determining the GME and IME payments for a given year, is based on the average number of resident FTEs counted in the current year and each of the prior two years (commonly referred to as the "three-year rolling average"), subject to caps based on the fiscal year ending in 1996.[9]

In § 422 of the Medicare Prescription Drug, Improvement and Modernization Act ("MMA"), Congress adopted legislation reducing the FTE resident caps for hospitals that were not using all of their resident slots as of a specified date.[10] Hospitals with FTE counts that fell below their GME and IME resident caps had their caps permanently reduced by 75 percent of the difference between the cap and the hospital's actual number of resident FTEs. Specifically, the statute provides that a hospital's FTE resident caps would be reduced by 75 percent of the difference between the existing caps and the "reference resident level."[11] The "reference resident level" is defined as "the resident level for the most recent cost reporting period of the hospital ending on or before September 30, 2002, for which a cost report has been settled (or, if not, submitted (subject to audit)), as determined by the Secretary."[12] Those slots were then reallocated to hospitals that exceeded their FTE caps.[13]

St. Clare's received notice from its Medicare Contractor dated May 6, 2005 ("the May 2005 Notice"), of *reductions* to its GME and IME FTE resident caps, calculated pursuant to MMA § 422. This Notice stated that "[t]his computation was based on the . . . cost report" identified as St. Clare's FY 2001 NPR and using therefrom GME and IME FTE resident caps of 35.41 FTEs and 34.30 FTEs respectively (NOTE – the parties state in the Stipulations that this was based on

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[6] 42 U.S.C. § 1395ww(h). *See also* 42 C.F.R. § 413.76.
[7] 42 U.S.C. § 1395ww(d)(5)(B).
[8] 42 C.F.R. § 412.105.
[9] 42 C.F.R. § 413.79(d). *See also* 42 C.F.R. § 412.105(f)(1)(v)(B).
[10] *See* 42 U.S.C. § 1395ww(h)(7)(A). *See also* 42 C.F.R. § 413.79(c)(3).
[11] *Id.*
[12] 42 U.S.C. § 1395ww(h)(7)(A)(ii)(I)
[13] *See* 42 U.S.C. § 1395ww(h)(7)(B). *See also* 42 C.F.R. § 413.79(c)(4).

the *as-filed* as opposed to the FY 2001 NPR (also referred to as the FY 2001 *settled* cost report)[14]). The Notice then listed the MMA § 422 cap *reductions* for St. Clare's as -7.13 FTEs for GME and -6.29 FTEs for IME. Thus, this Notice contained, "the DGME and IME FTE cap *reductions* [for St. Clare's] pursuant to section 422 of Public Law 108-173."[15] Finally, the Notice confirmed that administrative and/or judicial review, with respect to the determination, was precluded by 42 U.S.C. § 1395ww(h)(7)(D) (as added by MMA § 422, but which has since been relocated to § 1395ww(h)(7)(E) (2010)).

After merging with St. Clare's in 2008, Ellis was the surviving hospital. Accordingly, under the Medicare rules for cost reporting periods after the June 2008 merger (including all of the cost reporting years at issue here), Ellis' GME and IME FTE resident caps would be the sum of the pre-merger relevant FTE resident caps for Ellis and St. Clare's (*e.g*.., the post-merger GME FTE resident cap for Ellis = the pre-merger GME FTE resident cap for Ellis + the pre-merger GME FTE resident cap for St. Clare's).[16] Ellis does not dispute this method or formula to calculate the post-merger GME and IME FTE resident caps but rather disputes the *values* for the pre-merger caps that were used to make this calculation. More specifically, Ellis contends the Medicare Contractor used the incorrect pre-merger GME and IME FTE resident caps for St. Clare's.

The parties' Stipulations set forth the essential facts at the heart of these appeals.

> 8. For the 2010 and 2012-2016 cost years at issue, as reflected in the Provider's settled cost reports for those years, the [Medicare Contractor] determined that the merged Provider's FTE caps were 34.05 for GME and 34.05 for IME.
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> * * * *
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> 9. The parties further stipulated that "[t]The [Medicare Contractor] then applied the previously determined Section 422 reductions for the pre-merger St. Clare's Hospital of 7.13 to the merged Provider's GME cap and 6.29 to the merged provider's IME FTE cap, resulting in an adjusted GME cap of 26.92 and IME cap of 27.76. . . .
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> 10. The Provider contends that its FTE caps for the fiscal years at issue should be 33.03 FTEs for GME and 32.76 for IME. The Provider contends that its FTE caps should be calculated combining (i) St. Clare's FTE caps of 35.41 GME FTEs and 34.30 IME FTEs in the 2005 notice, reduced by the 7.13 GME FTEs and 6.29 FTEs cap reductions in the 2005 notice (28.28 FTEs for GME and 28.01 FTEs

[14] *See* Stip. at ¶ 6; Exhibit (hereinafter "Ex.") C-5 at 3-4 (copy of the settled cost report after Second Reopening dated Aug. 17, 2009, listing the GME and IME FTE resident caps as 35.41 FTEs and 29.30 FTEs, respectively). It is unclear when the FY 2001 NPR was issued as there is no copy in the record and it is unclear how that fiscal year was scoped for audit.

[15] (Emphasis added.)

[16] *See* 63 Fed. Reg. 26318, 26329 (May 12, 1998) ("[W]here two or more hospitals merge after each hospital's cost reporting period ending during FY 1996, the merged hospital's FTE cap will be an aggregation of the FTE cap for each hospital participating in the merger").

> for IME) with (ii) Ellis Hospital's undisputed pre-merger cap of 4.75 FTEs for GME and IME.[17]

Fundamentally, Ellis maintains the Medicare Contractor used the incorrect values or numbers for St. Clare's GME and IME FTE resident caps because those values/numbers did not match or agree with the "final" GME and IME FTE resident caps that it alleges were "determined" in the May 2005 Notice pursuant to MMA § 422.[18] Thus, Ellis contends that the Medicare Contractor significantly understated Ellis' post-merger GME and IME FTE caps for the fiscal years at issue.[19]

DISCUSSION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

As previously noted, the parties do not dispute[20] that Ellis' post-merger FTE resident cap for GME and IME is based on the following formula used for both GME and IME caps:

Ellis' post-merger FTE resident cap	=	Ellis' pre-merger FTE resident cap	+	St. Clare's pre-merger FTE resident cap

Rather, the dispute in this case centers on the *values* used for the pre-merger caps that were used for this calculation. Both parties agree that Ellis had a pre-merger FTE resident cap of 4.75 FTEs for both GME and IME and that the Medicare Contractor properly used those values when calculating Ellis' post-merger FTE resident caps.[21] However, Ellis contends that the Medicare Contractor used the wrong value for St. Clare's pre-merger FTE resident caps.[22] Ellis bases its contention on the Medicare Contractor's May 2005 Notice that notified St. Clare's of the MMA § 422 cap reductions to its GME and IME FTE resident caps.[23]

In addition, the parties agree that, pursuant to MMA § 422 (as implemented at 42 C.F.R. § 413.79(c)(3) (2010)[24]), St. Clare's "was subject to a permanent *reduction* of its [FTE] resident caps calculated based on 75 percent of the difference between its otherwise applicable resident limit ([FY] 1996 caps) and its FTE resident counts for a reference period (cost reporting period ending on or before September 30, 2002), its fiscal year ending in 2001."[25] Accordingly, the Medicare Contractor issued the May 2005 Notice entitled "Notification of [GME] and/or [IME] Cap Reduction(s)" which the parties describe as follows:

> On May 6, 2005, the MAC issued a notification to St. Clare's Hospital regarding its GME and IME cap reductions under section 422 of the MMA. The MAC first calculated the difference between 35.41 FTEs for GME and 34.30 FTEs for IME (*the caps as reported in the as-filed 2001 cost report*) and St. Clare's FTE

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[17] Stip. at ¶¶ 8-10.
[18] Provider's FPP at 2. *See also* Ex. P-3.
[19] Provider's FPP at 2.
[20] *See* Stip. at ¶ 7.
[21] Stip. at ¶ 3.
[22] Provider's FPP at 4.
[23] Provider's FPP at 3-4.
[24] *See* 69 Fed. Reg. 48916 (Aug. 11, 2004).
[25] Stip. at ¶ 5.

> resident counts of 25.91 for GME and IME for the fiscal year ending in 2001 [*i.e.,* the reference resident levels]. The MAC then multiplied each of those differences by 0.75 to arrive at the cap reductions of 7.13 FTEs for GME and 6.29 FTEs for IME.[26]

Thus, the May 2005 Notice notified St. Clare's that its GME and IME FTE resident caps would be reduced by 7.13 FTEs and 6.29 FTEs respectively.[27] It further stated: "Please notify us within ten business days of the date of the letter if you believe that there is a clerical error in the above computations. Please note that § 1886(h)(7)(d) of the Act precludes administrative of [*sic* or] judicial review with respect to this determination."[28]

Ellis asserts that, for the cost years at issue in these appeals, the Medicare Contractor used pre-merger GME and IME FTE resident caps for St. Clare's that do not reconcile with those derived from the four-corners of the May 2005 Notice issued to St. Clare's. Ellis contends that, when the Medicare Contractor calculated Ellis' GME and IME reimbursement for the fiscal years at issue, it improperly calculated the post-merger/combined FTE resident caps of 26.92 for GME and 27.76 for IME. Ellis bases its contention on its belief that the Medicare Contractor calculated the post-merger/combined FTE resident caps by adding Ellis' pre-merger FTE resident caps of 4.75 FTEs for both GME and IME (which are not in dispute) to pre-merger GME and IME caps for St. Clare's of 22.17 FTEs and 23.01 FTEs, respectively (values which are in dispute).[29] Ellis maintains that the Medicare Contractor should have used what it characterizes as St. Clare's "final adjusted FTE caps" from the May 2005 Notice when calculating Ellis' post-merger/combined GME and IME FTE resident caps for the cost report years at issue in these appeals because those caps were "final" and not subject to further review.[30] Ellis maintains St. Clare's pre-merger GME and IME FTE resident caps should have bene calculated using the information in the May 2005 Notice which would result in GME and IME FTE resident caps of 28.28 FTEs (*i.e*., 35.41 – 7.13) and 28.01 FTEs (*i.e.*, 34.30 – 6.29), respectively. If these values are substituted for what the Medicare Contractor used for St. Clare's pre-merger GME and IME resident FTE caps, then it would result in post-merger/combined FTE resident caps for the cost years at issue of 33.03 (28.28 + 4.75) GME FTEs and 32.76 (28.01 + 4.75) IME FTEs.[31] Thus, Ellis contends that the Medicare Contractor "used different caps for these cost years that do not tie [*i.e*., reconcile] to the final revised caps from the 2005 notice."[32]

Ellis continues its argument, stating that:

> [t]he Medicare Contractor's erroneous determinations for these cost years are the product of new and significantly understated FTE caps for St. Clare's Hospital that stray from the final, revised FTE caps determined in 2005 and are, therefore, not authorized by

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[26] Stip. at ¶ 6 (emphasis added).
[27] Ex. P-3.
[28] *Id.*
[29] Provider's FPP at 5-6.
[30] *Id*. at 6.
[31] *Id.*
[32] *Id.* at 6-7.

> any statute or regulation and *ultra vires*.... [N]o statute authorizes the [Medicare Contractor] to revisit its prior, *final* 2005 determination of the FTE caps made pursuant to the MMA and the [Medicare Contractor's] redetermination of [its] caps here is contrary to the GME and IME statutes and must be reversed….The [Medicare Contractor's] adjustments must also be reversed because they are inconsistent with the Medicare rules governing how to calculate resident caps for merged hospitals.[33]

Ellis concludes that the manner in which the Medicare Contractor determined the newly-merged hospital's resident caps for both GME and IME, "exceed[ed] its legal authority, is inconsistent with the governing statute and rules . . . and is otherwise arbitrary and capricious."[34]

In its Response to the Medicare Contractor's Final Position Paper, Ellis further explains that:

> [A]ny reasonable person receiving the notice would interpret it to mean that A (the hospital's 1996 cap) minus B (the cap reduction) equals C (the adjusted cap), even if C is not specifically identified in the determination. Here, for St. Clare's Hospital, that translates to 28.28 FTEs for GME and 28.01 FTEs for IME. When combined with Ellis Hospital's pre-merger cap of 4.75 FTEs, [its] FTE caps should be 33.03 FTEs for GME and 32.76 FTEs for IME. [35]

Ellis contends that 42 U.S.C. § 1395ww(h)(7)(E) (2010) precludes it from challenging the May 2005 adjusted cap determination under the MMA § 422 and that, similarly, it precludes the Medicare Contractor from revising the cap.[36] Ellis asserts the Medicare Contractor improperly applied lower post-merger GME and IME FTE resident caps during the cost years at issue because the post-merger FTE resident cap calculation did not use St. Clare's final May 2005 FTE resident caps, which were based on St. Clare's FY 1996 FTE caps as reported in St. Clare's FY 2001 cost report.[37]

The Medicare Contractor asserts that St. Clare's filed its FY 2001 through FY 2006 cost reports consistently, but improperly, listing the FY 1996 base year GME and IME FTE resident caps as 35.41 FTEs and 34.30 FTEs, respectively.[38] Rather, the FY 1996 base year GME and IME FTE resident caps are both 29.30 FTEs as documented in Exhibits P-4 and P-5.[39] The Medicare Contractor documents that, for FYs 2001 to 2006, St. Clare's submitted FTE caps improperly included 5.0 dental IME FTEs and 6.11 outside rotation GME FTEs and argues that these FTEs should not be included in the FY 1996 base year FTE count.[40] For cost reporting periods prior to FY 2006, the Medicare Contractor:

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[33] *Id.* at 7 (citations omitted).
[34] *Id.* at 6.
[35] Provider's Response to Medicare Contractor's FPP at 3 (Aug. 15, 2022).
[36] *Id.*
[37] *Id.* at 3-4.
[38] Medicare Contractor's FPP at 8.
[39] *Id.*
[40] *Id.*

> adjusted the IME FTE cap to 29.30, which removed the 5.0 dental FTEs, but did not remove the 6.11 FTEs for the outside rotations from the DGME FTEs. In [FY] 2006, the [Medicare Contractor] corrected the submitted FTE caps for both IME and DGME to 29.30 FTEs.[41]

In May 2005, the Medicare Contractor computed the GME and IME cap reductions, in accordance with MMA § 422. Notwithstanding, it acknowledges that it "should have used 29.30 FTEs from the ***settled*** cost report for the IME [FY] 2001 cap amount."[42] Instead, it used the 34.30 IME FTEs from the FY 2001 *as-filed* cost report and argues that, "[t]he difference between the [FY] 2001 cap amounts and the [FY] 2001 actual FTEs resulted in cap reduction totals of 6.29 FTEs and 7.13 FTEs for IME and DGME respectively."[43]

The Medicare Contractor argues that, in accordance with MMA § 422, the May 2005 Notice stated that clerical errors in the cap *reduction* "computations" must be reported to the Medicare Contractor within 10 days of the notice.[44] Because the initial reduction was effective on July 1, 2005, only 50 percent of the cap reduction was reflected in St. Clare's adjusted FTE caps for FY 2005.[45] However, starting with the FY 2006 cost report:

> [T]he [Medicare Contractor] corrected the DGME FTE cap to remove the 6.11 FTEs for the outside rotations. The FTE caps reported on the [FY] 2006 settled cost report for St. Clare's Hospital were 29.30 for both IME and DGME, with the adjusted FTE cap amounts reflecting a decrease of 6.29 FTEs for IME and 7.13 FTEs for DGME. *Since the merger of the two hospitals*, the [Medicare Contractor] has consistently used the same FTE caps that were reported on the [FY] 2006 settled cost report for St. Clare's Hospital… a total cap amount of 34.05 FTEs for IME and DGME (29.30 FTEs for St. Clare's plus 4.75 FTEs for Ellis Hospital) and reduction amounts of 6.29 FTEs for IME and 7.13 FTEs for DGME.[46]

The Medicare Contractor "does not dispute the fact that the calculation of the Section 422 cap reduction for St. Clare's Hospital may have used incorrect total [FY] 1996 FTEs for the unadjusted cap amounts" and recognizes that "the amounts do agree with the caps submitted by [St. Clare's] each year through [FY] 2006."[47] The Medicare Contractor also notes that any "[e]rrors in the calculation of the reductions is not an issue that can be appealed … [because] there was a 10-day window after the notice of the cap reduction was issued for St. Clare's

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[41] *Id.*
[42] *Id.* at 9.
[43] *Id.*
[44] *Id.* at 10.
[45] *Id.*
[46] *Id.* (emphasis added).
[47] *Id.* at 11.

Hospital to request changes due to clerical errors."[48] Thus, the 10-day timeframe to dispute an error in the calculations/computations of the MMA § 422 cap reductions expired in 2005. The Medicare Contractor admits that "[while] it is unfortunate that possible errors in the [MMA § 422 cap reduction] calculation were not discovered at the time the notice was issued, it is not within [its] authority to change the reduction amounts that were issued in the notice."[49] Finally, the Medicare Contractor also points out that neither the Board nor the Administrator has jurisdiction to change the cap *reductions* since 42 U.S.C. § 1395ww(h)(7)(E) (2010) precludes administrative or judicial review of the MMA § 422 cap *reductions*.[50]

The Medicare Contractor contends that the *values* it used for the FY 1996 GME and IME FTE resident caps for both St. Clare and Ellis (*i.e*., the pre-merger caps), in determining Ellis' adjusted post-merger GME and IME FTE resident caps for the cost reporting periods at issue in these appeals, are correct and proper. In support of its position, the Medicare Contractor explains that:

> [T]he Section 422 cap *reduction* amounts used (7.13 for GME and 6.29 IME) are in accordance with the notice issued to the Provider in 2005.
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> The May 2005 letter gave notice of the IME and DGME "cap *reductions*." This letter did not give notice of "revised caps" . . . . The cap *reductions* are to be applied to a provider's [FY] 1996 FTE caps. In fact, a provider could have its [FY] 1996 FTE cap revised as a result of a reopening or appeal, but that would not change any determination of a Section 422 reduction. The established cap reduction would still be applied to any subsequently revised [FY] 1996 FTE cap.
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> The Provider in this appeal has no basis for relief with regard to the application of the Section 422 cap reduction that was determined for St. Clare's Hospital.[51]

The regulation implementing MMA § 422 is located at 42 C.F.R. § 413.79(c)(3) and states in pertinent part:

> [i]f a hospital's reference resident level is less than its otherwise applicable FTE resident cap as determined under paragraph (c)(2) of this section or paragraph (e) of this section in the reference cost reporting period . . . for portions of cost reporting periods beginning on or after July 1, 2005, the hospital's otherwise applicable FTE resident cap is reduced by 75 percent of the

[48] *Id.*
[49] *Id.* at 12.
[50] *Id.*
[51] *Id.*

> difference between the otherwise applicable FTE resident cap and the reference resident level.[52]

As discussed above, on May 6, 2005, St. Clare's received notification from the Medicare Contractor entitled "Notification of Direct Graduate Medical Education (DGME) and / or Indirect Medical Education (IME) FTE Cap Reduction(s)" advising that it was subject to a permanent *reduction* of its GME and IME FTE resident caps under MMA § 422. Specifically, the May 2005 Notice provided the following figures, stating: "We are notifying you of the DGME and IME FTE cap ***reductions*** pursuant to section 422 of Public Law 108-173 for the provider [St. Clare's] identified above."[53]

	FTE Cap (adjusted for new programs, if applicable)	Reduction to Cap pursuant to MMA section 422
DGME	35.41	7.13
IME	34.30	6.29

The Notice indicated that the above computation "was based on the [St. Clare's] NPR for FYE 12/31/2001." It also stated:

> Please notify us in writing within ten business days of the date of the letter if you believe that there is a clerical error in the above *computations*. Please note that § 1886(h)(7)(d) of the Act precludes administrative of [*sic*] judicial review with respect to this determination.[54]

Both parties stipulate that, in the May 2005 Notice issued to St. Clare's, the Medicare Contractor:

> calculated the difference between 35.41 FTEs for GME and 34.30 FTEs for IME (the caps as reported in the as-filed 2001 cost report) and St. Claire's FTE resident counts of 25.91 for GME and IME for the fiscal year ending in 2001. The [Medicare Contractor] then multiplied each of those differences by 0.75 to arrive at the cap reduction of 7.13 FTEs for GME and 6.29 FTEs for IME.[55]

In June 2008, St. Clare's merged with Ellis and Ellis remained as the surviving hospital.[56] The parties do not dispute the following Medicare's policy on determining the resident FTE caps for a merged hospital: "[W]here two or more hospitals merge after each hospital's cost reporting

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[52] *See also* 42 U.S.C. § 1395ww(h)(7)(A)(i)(I).
[53] Ex. P-3; Ex. C-17 (emphasis added).
[54] *Id.* (emphasis added).
[55] Stip. at ¶ 6.
[56] *Id.* at ¶ 2.

period ending during FY 1996, the merged hospital's FTE cap will be an aggregation of the FTE cap for each hospital participating in the merger."[57]

Ellis maintains that the Medicare Contractor improperly used brand new, and significantly understated, pre-merger FTE resident cap values for St. Clare's that differ from the final FTE resident caps stated in the May 2005 Notice.[58] It is undisputed that, for the cost years at issue (*i.e*., FYs 2010 and 2012-2016), the Medicare Contractor used post-merger/combined FTE resident caps [after adjustment for the § 422 reduction] of 26.92 GME FTEs and 27.76 IME FTEs.[59] Ellis contends that the Medicare Contractor calculated those combined caps by adding Ellis's pre-merger GME and IME FTE caps (each 4.75 FTEs, which is not in dispute) with improperly-low pre-merger GME and IME FTE resident caps for St. Clare's (22.17 FTEs and 23.01 FTEs respectively).[60] Ellis states that the caps used for St. Clare's "do not square with the caps reflected in the [May] 2005 notification."[61] Ellis argues that:

> Using the [May] 2005 notice's figures for St. Clare's Hospital, the combined caps for Ellis Hospital's cost years at issue should be 33.03 FTEs for GME and 32.76 FTEs for IME…. [which] is calculated by adding the adjusted caps for St. Clare's Hospital, as indicated in the 2005 notice (28.28 FTEs for GME and 28.01 FTEs for IME), to Ellis Hospital's pre-merger cap of 4.75 FTEs.[62]

The table below reflects the details of Ellis' position regarding the combined caps.

	GME	**IME**
1996 FTE Cap per the May 2005 Notice	35.41	34.30
Reference Resident Level from 2001 Cost Reporting Period	25.91	25.91
Difference	9.50	8.39
75% = Cap Reduction Amount	7.13	6.29
Revised Cap After Reduction for St. Clare's pre-merger	28.28	28.01
Ellis' pre-merger Cap	4.75	4.75
Combined Cap post-merger	33.03	32.76

[57] 63 Fed. Reg. at 26329.
[58] Provider's FPP at 2.
[59] *Id*. at 5-6.
[60] *Id*. at 6.
[61] *Id*. at 5-6.
[62] *Id.* at 6.

The Board finds that, for the 2010 and 2012-2016 cost years at issue, as reflected in Ellis' settled cost reports for those years, the Medicare Contractor properly combined Ellis' and St. Clare's pre-merger FTE caps and properly determined that Ellis' post-merger FTE resident caps were 34.05 for GME and 34.05 for IME (29.30 FTEs for both of St. Clare's pre-merger FTE resident caps *plus* 4.75 FTEs for both of Ellis' pre-merger FTE resident caps).[63] The Medicare Contractor then consistently applied St. Clare's pre-merger, previously determined MMA § 422 *reductions* of 7.13 to the merged Provider's GME FTE cap and 6.29 to the merged provider's IME FTE cap, resulting in an adjusted GME FTE resident cap of 26.92 and an adjusted IME FTE resident cap of 27.76.[64] Thus, the Medicare Contractor calculated the GME and IME FTE resident caps for Ellis in accordance with the Final Rule at 63 Fed. Reg. at 26329, and the statute and regulation at §1395ww(h)(7)(A) and § 413.79(c)(3) for the cost years at issue in these appeals. The table below reflects the details of the Medicare Contractor's calculation of the combined caps for St. Clare's and Ellis.

Combined St. Clare's and Ellis FTEs after merger:		**IME**	**GME**
2010	**1996 FTE Cap- Settled**	34.05	34.05
	Sec. 422 Reduction	(6.29)	(7.13)
	Total Adjusted FTE Cap	27.76	26.92
2012	**1996 FTE Cap- Settled**	34.05	34.05
	Sec. 422 Reduction	(6.29)	(7.13)
	Total Adjusted FTE Cap	27.76	26.92
2013	**1996 FTE Cap- Settled**	34.05	34.05
	Sec. 422 Reduction	(6.29)	(7.13)
	Total Adjusted FTE Cap	27.76	26.92
2014	**1996 FTE Cap- Settled**	34.05	34.05
	Sec. 422 Reduction	(6.29)	(7.13)
	Total Adjusted FTE Cap	27.76	26.92
2015	**1996 FTE Cap- Settled**	34.05	34.05
	Sec. 422 Reduction	(6.29)	(7.13)
	Total Adjusted FTE Cap	27.76	26.92
2016	**1996 FTE Cap- Settled**	34.05	34.05
	Sec. 422 Reduction	(6.29)	(7.13)
	Total Adjusted FTE Cap	27.76	26.92

[63] Stip. at ¶ 8; For 2010, see Ex. C-11 (GME at 4, Line 3.01 and IME at 3, Line 3.04); for 2012, see Ex. C-13 (GME at 4, Line 1 and IME at 3, Line 5); for 2013, See Ex. C-14 (GME at 4, Line 1 and IME at 3, Line 5); for 2014, see Ex. C-15 (GME at 4, Line 1 and IME at 3, Line 5); for 2015, see Ex. C-21 (GME at 4, Line 1 and IME at 3, Line 5); for 2016, see Ex. C-22 (GME at 4, Line 1 and IME at 3, Line 5).

[64] Stip. at ¶ 9; For 2010, see Ex. C-11 (GME at 4, Line 3.04 and IME at 3, Line 3.07); for 2012, see Ex. C-13 (GME at 4, Line 5 and IME at 3, Line 9); for 2013, see Ex. C-14 (GME at 4, Line 5 and IME at 3, Line 9); for 2014, see Ex. C-15 (GME at 4, Line 5 and IME at 3, Line 9); for 2015, see Ex. C-21 (GME at 4, Line 5 and IME at 3, Line 9); for 2016, see Ex. C-22 (GME at 4, Line 5 and IME at 3, Line 9).

Combined Cap Details:	**IME**	**GME**
1996 FTE Cap-Settled St. Clare's	29.30	29.30
Sec. 422 Reduction	(6.29)	(7.13)
Revised Cap after reduction for St. Clare's pre-merger	23.01	22.17
Ellis' pre-merger Cap	4.75	4.75
Combined Cap post-merger	27.76	26.92

The Board further finds that the May 2005 Notice is a final determination only as to the GME and IME FTE "*cap reductions*."[65] The notification *did not* give notice of "revised caps." Rather, the May 2005 Notice specifically provided that "[w]e are notifying you of the DGME and IME FTE *cap reductions* pursuant to section 422 of Public Law 108-173."[66] Indeed, in its Response to the Medicare Contractor's Final Position Paper, Ellis acknowledges that the revised cap is *not* specifically identified in the May 2005 Notice, when it makes the argument that "any reasonable person receiving the notice would interpret it to mean that A (the hospital's 1996 cap) minus B (the cap reduction) equals C (the adjusted cap), even if C is not specifically identified in the determination."[67] The Board finds that the May 2005 Notice makes no mention of the resulting revised FTE caps and, thus, is *not final* as to the revised FTE caps which resulted from the cap reductions. The May 2005 Notice is only final as to the cap *reductions*. As the Medicare Contractor discussed in its Final Position Paper, a provider could have its FY 1996 FTE cap revised as a result of a reopening or appeal, but that would not change the determination of an MMA § 422 reduction (indeed, this type of scenario is discussed and recognized in the preamble to the final rule implementing the MMA § 422 reductions[68]). Accordingly, the established cap

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[65] *See infra* note 68 (quoting 69 Fed. Reg. at 49116-17 confirming that the notice is "a final determination as to whether and by how much a hospital's FTE resident cap will be reduced").

[66] (Emphasis added.)

[67] Provider's Response to Medicare Contractor's FPP at 3.

[68] 69 Fed. Reg. at 49116-17 stating:

> [I]n the proposed rule we stated that we realize that there may be instances where a hospital's FTE resident cap or a hospital's FTE resident count for the reference cost reporting period might be under appeal. We believed that appeals related to these issues should be resolved through the normal course of business. In the event that an appeal that may affect determinations made under section 1886(h)(7)(A) of the Act is not resolved by May 1, 2005, we proposed that we would estimate the number of FTE residents by which a hospital's FTE resident cap should be reduced (or not reduced, as applicable) by May 1, 2005.
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> ****
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> *Comment:* Numerous commenters were concerned about how to determine possible cap reductions in instances where a hospital's FTE resident count for the reference cost reporting period is under appeal. . . .
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> ****
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> *Response*: In the May 18, 2004 proposed rule (69 FR 28294), we stated that we realize there may be instances where a hospital's FTE resident cap or a hospital's FTE resident count for the reference cost reporting period might be under appeal. We further stated that we believe appeals related to these issues should be resolved through the normal course of business. In the event an appeal that may affect determinations made under section 1886(h)(7)(A) of the Act is not resolved by May 1, 2005, we proposed that we would estimate the number of FTE residents by which a hospital's FTE resident cap should be reduced (or not reduced, as applicable) by May 1, 2005.
>
> Since the publication of the proposed rule, and after considering the detailed and thoughtful comments we received on the issue of cost reports that are under appeal, we believe that it is in the best interest of the Medicare program, CMS, the fiscal intermediaries, and the hospitals, to adopt an approach that allows

reduction would still be applied to any subsequently revised FY 1996 FTE cap. Based on the above, the Board concludes that the imputed revised caps advocated by Ellis from the four-corners of the May 2005 Notice are not a determination nor are they final/permanent *for purposes of the preclusion provision at 42 U.S.C. § 1395ww(h)(7)(E) (2010)*.

The Board also recognizes that the May 2005 Notice provides that "§1886(h)(7)(d) [*sic*] of the Social Security Act precludes administrative [*sic* or] judicial review with respect to this determination." However, such review is precluded only with respect to the determination regarding the *cap reductions,* not the caps to which the reductions are being applied, as recognized in the preamble to the final rule implementing the MMA § 422 reductions.[69] The Board concludes this finality is necessary due to the subsequent redistribution of the *pool* of FTEs "taken" (*i.e.*, reduced) from various providers (specifically, this FTE pool was redistributed to other providers who exceeded their caps, based on a specific process and methodology. Thus, the 10-day window to address any computation errors was necessary to ensure corrections could be made, as necessary and relevant, before the redistribution of the final FTE pool was completed.

Finally, the Board notes that the parties stipulate that "St. Clare's Hospital's IME and GME FTE caps (prior to the merger) from its [FY] 1996 cost report, as first reported in the [FY] 1997 cost report for IME and in the [FY] 1998 cost report for GME, were both 29.30."[70] Accordingly, in determining the Ellis' post-merger GME and IME FTE resident caps, the Medicare Contractor correctly used a 29.30 revised FTE resident cap for both GME and IME for St. Clare's plus 4.75 FTEs for both GME and IME for Ellis. The Board finds that the Medicare Contractor's cap determinations for the cost years at issue corrected the erroneous GME and IME FTE caps (35.41 FTEs for GME and 34.30 FTEs for IME) to a corrected cap for GME and IME of 29.30 (35.41-6.11 outside rotation FTEs for GME and 34.30 - 5.0 dental FTEs for IME, both of which were

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> for finality as early as possible during the process of implementing this provision. We believe that Congress gave some consideration to the challenges we would encounter in implementing a provision as complex as section 422 in such a short timeframe by providing the Secretary with the discretion to distinguish between the FTE counts that are used to estimate the number of FTE resident slots that are available for redistribution (that is, the ''redistribution pool''), and the actual number of FTE residents by which hospitals' FTE resident caps are ultimately reduced. We therefore had proposed to interpret the language at section 1886(h)(7)(B)(i) of the Act to mean that the aggregate number of FTE residents by which we increase the FTE resident caps of qualifying hospitals under section 1886(h)(7)(B) of the Act must not be more than the estimated aggregate number of FTE residents by which we would reduce the FTE resident caps of hospitals whose reference resident levels are less than their otherwise applicable FTE resident caps.
>
> ****
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> Consistent with Congressional intent and in response to comments, we believe it would be disruptive to CMS, the fiscal intermediaries, and the hospitals if we do not establish a framework that encourages determinations under section 1886(h)(7)(A)(i) of the Act to be made final by July 1, 2005. Therefore, we are not finalizing our proposed policy to wait for reference period cost reports that are under appeal to be resolved before making **a final determination** as to whether and by how much a hospital's FTE resident cap will be reduced. Therefore, we are not finalizing our proposed policy to wait for reference period cost reports that are under appeal to be resolved before making **a final determination** as to whether and by how much a hospital's FTE resident cap will be reduced.

(Italics emphasis in original and bold and underline emphasis added.)

[69] *See supra* note 68.

[70] Stip. at ¶ 4; *See also* Ex. P-4 (FY 1997 Worksheet E part A, Line 3.04); Ex. P-5 (FY 1998 Worksheet E-3, part 4, Line 3.01).

improperly included in St. Clare's filed cost reports for FYs 2001-2006). The Final Rule at 63 Fed. Reg. 26318, 26329 (May 12, 1998) provides "where two or more hospitals merge after each hospital's cost reporting period ending during FY 1996, the merged hospital's FTE cap will be an aggregation of the FTE cap for each hospital participating in the merger." Thus, the Medicare Contractor properly combined Ellis' and St. Clare's FTE caps and arrived at the correct revised GME and IME caps of 34.05 FTEs (St. Clare's 29.30 FTEs + Ellis' 4.75 FTEs). The revised caps are not stated in the May 2005 Notice, and there is no authority establishing the May 2005 Notice as final *with regard to the revised caps and/or the preclusion provision at 42 U.SC. § 1395ww(h)(7)(E) (2010)*. Rather, that May 2005 Notice was to "notify[] . . . of the DGME and IME cap *reductions* pursuant to section 422 of Public Law 108-173," is entitled "Notification of [DGME] and/or [IME] FTE Cap *Reduction(s)*," and lists the "Reduction to Cap Pursuant to MMA section 422" but does ***not*** determine any new cap resulting from the stated reduction. Thus, the Medicare Contractor is required to use the *reductions* but not required to use the caps imputed by Ellis from the cap reductions identified in the May 2005 Notice. The imputed, revised caps, which Ellis derives from the May 2005 Notice, do not have to be applied to future cost reporting periods, including the cost reports at issue in these appeals, because the Medicare Contractor is not bound by the imputed caps for purposes of 42 U.S.C. § 1395ww(h)(7)(E) (2010). Thus, the Board finds the Medicare Contractor's post-merger GME and IME FTE resident cap determinations for the cost years at issue in these appeals are not arbitrary nor capricious, are supported by evidence, and are consistent with the Final Rule. Further, the Medicare Contractor's GME and IME FTE resident cap determinations for the cost years at issue are not contrary to the GME and IME statutes and the Medicare Contractor's action is not *ultra vires*.[71]

The Board finds that Ellis' dissatisfaction, in essence, stems from the Medicare Contractor's error in computing the MMA § 422 cap reductions in May 2005, not the *actual* caps of the two merged facilities (Ellis and St. Clare's). Indeed, the parties stipulate that St. Clare's used 29.30 FTEs for both the GME and IME FTE resident caps prior to the merger, as evidenced by their FY 1997 (IME) and FY 1998 (GME) cost reports (which Ellis attached to its appeal requests and included in the record as Exhibits P-4 and P-5). Ellis's GME and IME pre-merger FTE resident cap of 4.75 FTEs for both GME and IME are also undisputed and stipulated to by the parties. Thus, the 34.05 FTE resident cap used by the Medicare Contractor for GME and IME in all of the fiscal years at issue is essentially stipulated to by both parties. The reduction to this cap is clearly supported by the May 2005 Notice to St. Clare's that it would have permanent cap *reductions* of 7.13 FTEs for GME and 6.29 FTEs for IME.

While Ellis' dissatisfaction relates to the errors in the MMA § 422 cap *reduction* computations, the Board finds that the applicable May 2005 Notice included notification to St. Clare's that clerical errors in the MMA § 422 cap reduction computations should be reported to the Medicare Contractor within 10 days of the notice. There is no evidence before the Board that St. Clare's disputed the FTE cap amount listed in the May 2005 Notice for computation of the GME and IME MMA § 422 cap reductions within the 10-day timeframe. Thus, the Board concludes the time to dispute an error in the computations of the MMA § 422 cap *reductions* expired in May 2005.

[71] *See* 42 U.S.C. § 1395ww(d)(5)(B), (h).

DECISION:

After considering Medicare law and regulations, the arguments presented, and the evidence admitted, the Board concludes that the Medicare Contractor properly determined Ellis' unweighted direct GME and IME FTE resident caps for FYs 2010 and 2012-2016.

BOARD MEMBERS:

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FOR THE BOARD:

8/31/2023

X Clayton J. Nix

Clayton J. Nix, Esq.
Chair
Signed by: PIV