

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Sippican Healthcare Center,
Petitioner,

Docket No.: RS-23-0510

v.

**Executive Office of Health and
Human Services,**
Respondent.

Appearances:

For Petitioner: Kathryn Connors Soderberg, Esq.

For Respondent: Lawrence R. Perchick, Esq.

Administrative Magistrate:

Yakov Malkiel

SUMMARY OF DECISION

Periodic surveys of the petitioner nursing facility were delayed by the COVID-19 pandemic. As a result, the survey results used in calculations of the facility's rates of reimbursement for healthcare services were less up-to-date than usual. Nevertheless, the record does not establish that the survey results were so outdated as to produce inadequate, unfair, or unreasonable reimbursement rates.

DECISION

Petitioner Sippican Healthcare Center (Sippican) appeals from rates of reimbursement for healthcare services set by the Executive Office of Health and Human Services (EOHHS). The focus of the appeal is the impact on Sippican's rates of a quality rating assigned to the facility by federal authorities.

In January 2025, the parties agreed to file memoranda, affidavits, and exhibits in lieu of a live evidentiary hearing. They made those submissions in March 2025. In July 2025, Sippican moved successfully to file a supplemental affidavit, and EOHHS moved successfully to cross-

examine the affiant (Kathy Pepe). The cross-examination took place at an August 2025 hearing, at which the parties also presented oral arguments. Before and at the hearing, I admitted into evidence exhibits marked 1-28. I now also admit paragraphs marked 1-40 of the parties' joint statement of facts (SOF).¹

Findings of Fact

I. Background

1. The federal agency known as the Centers for Medicare and Medicaid Services (CMS) publishes ratings of nursing facilities in a database known as "Care Compare." Each facility is assigned both an overall rating and several subsidiary ratings, all expressed as numbers of "stars" from one to five. The primary purpose of these "star ratings" is to inform the public's decision making about where to obtain care. (Pepe testimony; exhibits 4, 5.)
2. Federal CMS personnel do not themselves examine the various nursing facilities. Instead, CMS collects the necessary information from authorized state agencies. The pertinent Massachusetts agency is the Department of Public Health (DPH),² which is required to perform both periodic "recertification" surveys and ad hoc "complaint" surveys. (Messina aff. ¶¶ 3-4; exhibits 26-27.)
3. Each periodic recertification survey culminates in a detailed list of DPH-observed deficiencies. Each deficiency on the list is assigned a point value derived from a CMS-published

¹ Propositions described in the SOF as disputed as to their "relevance" are assumed here to be undisputed as to their accuracy.

² In principle, DPH is a subdivision of EOHHS; but for present purposes, DPH is independent of the EOHHS component that is the respondent in this appeal.

matrix of “scope and severity” criteria.³ A facility’s “score” on each survey is the sum of the points associated with its deficiencies: a lower score denotes fewer or less severe deficiencies, and therefore better performance. A facility’s star rating is derived in substantial part from its scores on its three most recent recertification surveys.⁴ (Pepe testimony; SOF ¶¶ 32-33; exhibits 4-5.)

4. Sippican is a nursing home based in Marion. Like other Massachusetts facilities, Sippican is reimbursed for healthcare services at rates established by EOHHS on an annual basis. Complex EOHHS regulations prescribe the formulas that yield each year’s rates. In large part, the formulas extrapolate each facility’s rates from its costs, as reported in detailed cost reports. But the rates are then adjusted based on other factors, one of which is the facility’s CMS-assigned star rating. (McKenna aff. ¶¶ 2-4; Messina aff. ¶ 2; SOF ¶¶ 1-2, 7; 101 C.M.R. § 206.06(2).)

II. The Impact of COVID-19 on Recertification Surveys

5. CMS’s star ratings depend for their accuracy on the currentness of the underlying survey data. In ordinary times, CMS therefore requires each state agency to “complete a standard survey of each . . . nursing facility not later than 15 months after the previous standard survey.” (Messina aff. ¶ 5; 42 C.F.R. § 488.308(a).)

³ The matrix appears in the record within exhibit 5.

⁴ The results of any ad hoc complaint surveys also affect the star-rating process, and a facility may gain or lose an extra star based on staffing information and other non-survey data. (Pepe testimony.)

6. The COVID-19 pandemic disrupted the work and priorities of national and state public health authorities. In March 2020, CMS placed a hold on all standard surveys, directing the state agencies to focus instead on acute infection-control issues. The hold was relaxed several months later, by which time CMS was hoping “to transition States to more routine oversight and survey activities.” (SOF ¶ 14; exhibits 21, 22.)

7. Twenty months into the pandemic, in November 2021, CMS took more concrete action. A memo released by CMS that month instructed state agencies to “resume the normal survey schedule moving forward.” The memo specified:

[R]ecertification surveys must be conducted no later than 15 months after the previous recertification survey If [a state agency] . . . now conducts [a] survey in August 2021, the next annual recertification survey would be due by the end of October 2022.

(Exhibit 23.)

8. Public health conditions as of November 2021 had not returned to normal. CMS recognized that state agencies would need to continue to devote more than the usual amount of work to non-standard “investigations.” Its memo said:

[T]his may make it challenging for [state agencies] to meet the requirement[] to conduct a standard survey not later than 15 months after the date of the previous standard survey for each facility CMS will work with [state agencies] to establish reasonable expectations for when these requirements should be met

In subsequent “performance standards” for 2022 and 2023, CMS called on each state agency to “reduce the number of past-due . . . recertification surveys by at least 50%.” CMS eventually confirmed that DPH in Massachusetts had complied with the 50% backlog-reduction standard in both pertinent years. (Exhibits 23-27.)

*III. Recertification and Other Surveys
at Sippican*

9. During 2017-2023, DPH conducted three recertification surveys of Sippican. In December 2017, the facility's total score was 116. By March 2019, its score was much better, at 36. In August 2021, Sippican again scored 36. (SOF ¶ 9; exhibits 14-16.)

10. Sippican is voluntarily accredited by the nongovernmental organization known as the Joint Commission.⁵ The Joint Commission performs its own surveys of the facilities it accredits, intending for those surveys to be comprehensive and reliable. In some contexts, government bodies allow Joint Commission surveys to be used as substitutes for state-agency surveys. (Pepe aff. ¶¶ 5-6; Arcidi aff. ¶¶ 3-4; SOF ¶¶ 22-26.)

11. The Joint Commission surveyed Sippican in March 2022, identifying thirteen patient-care-related deficiencies.⁶ Two experienced, knowledgeable Sippican employees recently attempted to assign DPH-style point values to each Joint-Commission-identified deficiency, using CMS's scope-and-severity matrix. According to those employees, the results of the Joint Commission's survey were the equivalent of a total score of 40 on a DPH survey. EOHHS has not identified any errors in the employees' arithmetic or in their application of CMS's matrix. (Pepe testimony; Pepe aff. ¶¶ 7-13; Arcidi aff. ¶ 5; SOF ¶¶ 28, 30, 34-36; exhibit 12.)

⁵ Formerly known as the Joint Commission on Accreditation of Healthcare Organizations.

⁶ The reports of Joint Commission surveys also address matters unrelated to patient care, which are not material for present purposes. (Pepe testimony; Pepe aff. ¶ 9; SOF ¶ 29.)

12. Fourteen months later, in May 2023, DPH conducted a targeted “complaint” survey at Sippican. Within the very limited scope of the survey, DPH identified no deficiencies. (Pepe aff. ¶ 17; SOF ¶¶ 20-21; exhibit 8.)

IV. Rate-Calculation Proceedings

13. EOHHS calculated and published Sippican’s reimbursement rates for 2023 in October of that year. The pertinent regulations required the rates to be adjusted based on a facility’s overall star rating as appearing in the Care Compare database in June 2023. Sippican’s June 2023 rating was three stars, derived in substantial part from DPH’s surveys of December 2017, March 2019, and August 2021.⁷ (SOF ¶ 8-9; exhibits 13, 18; 101 C.M.R. § 206.06(2).)

14. Sippican’s three-star rating resulted in the facility receiving no upward adjustment to its rates. In practical terms, Sippican’s reimbursement for 2023 equaled approximately \$142,000 less than the facility would have earned with a four-star rating. Upon being notified of its rates, Sippican timely appealed. (McKenna aff. ¶¶ 5-8; Messina aff. ¶ 7; SOF ¶ 40; exhibit 13.)

Analysis

I. Introduction

EOHHS is statutorily responsible for establishing “rates of payment for health care services.” G. L. c. 118E, § 13C. The rates are required to be “adequate to meet” the costs of

⁷ Sippican’s rating dropped from 4 stars to 3 stars in 2023 because of an update by CMS to its calculation formula; under the new formula, certain non-survey, staffing-related data no longer entitled facilities to an extra star. (Pepe testimony; SOF ¶ 11-12.)

efficiently operated facilities compliant with applicable “laws,” “regulations,” and “quality and safety standards.” *Id.*

“[EOHHS] performs this duty by annually promulgating . . . a general and comprehensive regulation which sets forth the rate-setting formula. It then calculates a rate of payment for each individual provider by applying the formula to the provider’s . . . information.” *Perkins Sch. for Blind v. Rate Setting Comm’n*, 383 Mass. 825, 828 (1981). An aggrieved facility may appeal to DALA, where “the rate determined . . . shall be adequate, fair and reasonable . . . based upon the costs of such provider, but not limited thereto.” G. L. c. 118E, § 13E. “[T]he burden of proof lies with the provider to demonstrate that the rate established by [EOHHS] is inadequate or unreasonable.” *Medi-Cab of Massachusetts Bay, Inc. v. Rate Setting Comm’n*, 401 Mass. 357, 366 (1987).

Sippican’s argument here may be described as follows. The facility underwent no new DPH recertification surveys during the 22 months between the August 2021 survey and the June 2023 star rating. Under CMS’s COVID-era guidance, Sippican became “past due” for a new survey in late 2022. If a new survey had been performed around that time, its results would have displaced Sippican’s December 2017 survey score in CMS’s calculations. Sippican theorizes that, on a hypothetical late-2022 survey, its score would have resembled the results of the Joint Commission’s survey from March of that year (i.e., 40 points). There is no dispute that, still hypothetically speaking, such a score would have boosted Sippican’s overall CMS

rating to four stars.⁸ Sippican deduces that its adequate, fair, reasonable rates would be those recalculated based on a four-star rating.

II. Jurisdiction

EOHHS first presents a threshold argument to the effect that Sippican's appeal exceeds DALA's jurisdiction. The argument relies on the test commonly associated with *Salisbury Nursing & Rehab. Ctr., Inc. v. Division of Admin. L. Appeals*, 448 Mass. 365 (2007).

The *Salisbury* test is designed to prevent individual rate-setting appeals from indirectly invalidating "regulations of general applicability." *Beth Israel Hosp., Inc. v. Rate Setting Comm'n*, 24 Mass. App. Ct. 495, 502 (1987). The Superior Court is the proper forum for any "industry-wide" concerns about EOHHS's formulas. *See Rate Setting Comm'n v. Baystate Med. Ctr.*, 422 Mass. 744, 749 (1996). The administrative appellate process is designed specifically for facility-level issues with the formulas' practical applications. *Salisbury* thus asks in pertinent part whether any "special circumstances [made] application of [a rate regulation] to a particular provider different from its application to all others." 448 Mass. at 375.⁹

In support of its jurisdictional argument, EOHHS points out that DPH was contending in 2023 with a notable "backlog." It does appear to follow that various facilities other than Sippican were also overdue for new recertification surveys.

⁸ At the pertinent point in time, to obtain a four-star rating, a facility needed to remain at or below an average of 45.33 "points" on its last three surveys. (Pepe Aff. ¶ 8.)

⁹ The phrase "different from . . . all others," 448 Mass. at 375, arguably may be read as requiring an appellant facility's situation to be literally unique. But the Supreme Judicial Court has reached the merits of rate-setting issues presented simultaneously by more than a single facility. *See Rate Setting Comm'n v. Faulkner Hosp.*, 411 Mass. 701 (1992); *Pentucket Manor Chronic Hosp., Inc. v. Rate Setting Comm'n*, 394 Mass. 233 (1985).

But Sippican’s challenge to its rates builds on another key factual prong: the allegation that, precisely during the longer-than-usual lull between Sippican’s recertification surveys, its quality improved enough to merit another CMS star. If not for this factual feature, there would be nothing potentially inadequate, unfair, or unreasonable about Sippican’s rates.

The record offers no reason to believe that this key aspect of Sippican’s situation was widespread. No exhibit, testimony, or other evidence points to even one other facility that shared a similar predicament. By a preponderance of the evidence, “special circumstances” caused EOHHS’s regulations to apply differently to Sippican than to other facilities. *Salisbury*, 448 Mass. at 375.¹⁰

III. Merits

A. Staleness as Unfairness

Turning to the merits, the question presented is whether Sippican’s rates for 2023 were “adequate,” “fair,” and “reasonable.” G. L. c. 118E, § 13E. In the abstract, these tests may be elastic and wide-ranging.

Realistically speaking, the expert on nursing facilities and their costs is not DALA but EOHHS. EOHHS must remain “the ground level rate setter.” *Baystate Med. Ctr., Inc. v. Rate Setting Comm’n*, 36 Mass. App. Ct. 345, 348 (1994). DALA’s appellate intervention is likely to be appropriate only when a problem with a facility’s rates is concrete and readily recognizable.

¹⁰ EOHHS does not develop a jurisdictional argument under the second part of the *Salisbury* test, which asks whether a facility’s special circumstances “were . . . the result of something other than voluntary business decisions.” *Salisbury*, 448 Mass. at 375.

See Jewish Nursing Home of W. Mass. v. Executive Off. of Health and Hum. Servs., No. RS-22-467, 2024 WL 5658903, at *2 (Div. Admin. Law App. Oct. 25, 2024).

The essence of Sippican's claim is that its rates for 2023 rested on outdated survey data. The claim fits comfortably into a familiar mold. As information ages, its reliability tends to decline. At some point, information becomes so stale that a government agency's reliance on it becomes a form of arbitrariness. *See Doe v. Sex Offender Registry Bd.*, 470 Mass. 102, 114-16 (2014); *Dow AgroSciences LLC v. Nat'l Marine Fisheries Serv.*, 707 F.3d 462, 473 (4th Cir. 2013); *Sierra Club v. U.S. E.P.A.*, 671 F.3d 955, 963 (9th Cir. 2012).

In principle, EOHHS does not deny the validity of this type of argument; it recognizes that at some point, survey data could become so excessively outdated or stale as to result in inadequate, unfair, unreasonable rates.

B. Staleness in the Circumstances

The briefs and the authorities they cite do not suggest that, to remain fair and reasonable, governmental determinations such as rates of payment must rely on perfectly up-to-date, flawless information. *See District Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 56-57 (D.C. Cir. 2015). The pivotal task in situations like this is to identify when the staleness of gradually aging data becomes excessive.

The parties do not attempt to assess the reliable lifespan of survey data through expert opinions or similar evidence. They adopt a practical shortcut instead. State agencies like DPH conduct their surveys for the benefit of CMS and at its direction. Both parties therefore view CMS's guidance as offering the authoritative test of when survey data becomes excessively

outdated. The dispute comes down to divergent interpretations of that CMS guidance. On close examination, neither party's approach exactly fits the factual and regulatory context.

Starting with EOHHS's position, EOHHS maintains that recertification surveys remain adequately reliable as long as DPH maintains compliance with the minimum demands that CMS poses to state agencies at a given time. Specifically with respect to 2023, EOHHS emphasizes that DPH satisfied CMS's backlog-reduction standard for that year.

The problem is that CMS relaxed its usual requirements during the pertinent stretch. Facing an emergency, CMS refrained from acting against or even criticizing state agencies who were successfully reducing their "backlogs" of "past due" surveys. But these characterizations—especially the term "past due"—tend to suggest that CMS viewed the pertinent surveys as less recent than CMS would have liked. It is clear from the record that CMS was willing to tolerate delays among state agencies facing impossible conditions. But it is less clear whether that tolerance reflected a view that the data maintained by the struggling agencies remained reliable, either for CMS's purposes or for those of downstream users like EOHHS.

Turning to the other side of the debate, Sippican focuses on CMS's more optimistic expectations. In routine times, CMS directs state agencies to conduct recertification surveys every fifteen months. CMS reinstated that guidance in November 2021, with the result that Sippican was indeed overdue for a survey by the time EOHHS calculated its rates for 2023.

But this approach faces a mirror-image problem: the standard pace of one survey per fifteen months may or may not mark the bare minimum pace that, in CMS's view, enables survey data to remain usable. On the record presented, it may be that CMS's routine standards

seek to achieve better than rock-bottom floors of accuracy and currentness. Perhaps CMS was willing to relax the fifteen-month timeframe during the pandemic precisely because a slower pace than usual would continue to yield reliable-enough data.

To summarize these points, Sippican's challenge to the soundness of the information used by EOHHS here relies on CMS's guidance to the state agencies; but carefully considered, that guidance does not demonstrate one way or another whether the pertinent information was current enough to merit reliance. Sippican's evidence therefore fails to prove that its rates were inadequate, unfair, or unreasonable. *See Medi-Cab*, 401 Mass. at 366.

Remaining focused on the reliability or unreliability of aging DPH surveys, a datapoint just as powerful as CMS's guidance to the state agencies was skirted by the briefs but discussed at the hearing. When it publishes ratings in the Care Compare database, CMS thereby formulates and announces its factual conclusions about the quality of the nursing homes it regulates. As of June 2023, CMS was announcing to the public that Sippican was a three-star facility. Otherwise put, at that point in time, CMS remained willing to draw published conclusions about Sippican's quality from the three DPH surveys that Sippican had undergone most recently. As much as any other evidence in the record, this point of fact supports the inference that, in CMS's expert view, Sippican's three most recent surveys as of June 2023 continued to provide data worthy of being relied upon. By extension, this point supports EOHHS's position that its reliance on Sippican's June 2023 star ratings would not have yielded inadequate, unfair, or unreasonable rates.¹¹

¹¹ This paragraph's intuition that CMS would refrain from publishing ratings that it views as unreliable appears to be neither proven by record materials nor belied by them.

All in all, it is fair to acknowledge that Sippican's rate calculations for 2023 drew on older-than-usual survey data. But rates of reimbursement are not required to rest on perfectly current information. The record does not demonstrate that the information used by EOHHS here was so outdated as to produce inadequate, unfair, or unreasonable rates.

Conclusion and Order

For the foregoing reasons, the rates established by EOHHS in this matter are AFFIRMED.

Dated: October 17, 2025

/s/ Yakov Malkiel

Yakov Malkiel

Administrative Magistrate

DIVISION OF ADMINISTRATIVE LAW APPEALS

14 Summer Street, 4th floor

Malden, MA 02148

Tel: (781) 397-4700

www.mass.gov/dala