PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2004-D27

PROVIDER –
Baptist Memorial Medical Center

Provider No.: 04-0036

vs.

INTERMEDIARY –
BlueCross BlueShield Association/
BlueCross BlueShield of Arkansas

DATES OF HEARINGS -
Live Hearing Held - 4/27/2000
Record Hearing Held - 1/3/2001
Remand Hearing Held – 11/8/2001

Cost Reporting Periods Ended -
December 31, 1991; December 31, 1992;
December 31, 1993 and December 31, 1994

CASE NOs.: 95-2033R; 96-1979R; 97-1498R and 98-2049R

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ISSUES:

1. Does the Provider meet the criteria set forth at Section 4004(b) of Omnibus Budget Reconciliation Act (OBRA) 1990?

2. Do the costs at issue meet the definition of clinical training costs?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

In 1983, the Health Care Financing Administration (HCFA), now the Centers for Medicare and Medicaid Services (CMS), established a prospective payment system (PPS) for Medicare payment of inpatient hospital services. Under PPS, Medicare payment is made on the basis of a predetermined rate for each discharge. All discharges are classified into diagnosis related groups. In determining the initial PPS rates, HCFA specifically excluded the costs of approved educational activities in the calculation. Instead, these costs were given pass-through treatment, that is, providers were allowed to claim these costs on their Medicare cost reports and be reimbursed on a reasonable cost basis. Under CMS regulations, 42 C.F.R. §413.85(d)(6), a provider must be the operator of the educational program to receive pass-through treatment of its education costs.

Congress revisited the nursing education cost issue in §4044(b) of OBRA 1990. That section contains several provisions affecting Medicare Part A reimbursement of education costs incurred by approved nursing and paramedical education programs. Section 4004(b) also governs reimbursement for clinical training conducted on the premises of a hospital under approved nursing and paramedical education programs that are not operated by the hospital. Paragraph (1) of §4004(b) provides that, effective for cost reporting periods beginning on or after October 1, 1990, if certain conditions are met, the costs incurred by a hospital (or by an educational institution related to the hospital by common ownership or control) for clinical training (as defined by the Secretary) conducted on the premises of the hospital under an approved nursing or allied health education program that is not operated by the hospital, are also treated as pass-through costs and paid on the basis of reasonable costs. The conditions to be met are set forth at paragraph (2) of §4404(b) of OBRA.

Baptist Medical System, Inc. owns and leases hospitals.[1] In addition to Baptist Memorial Medical Center (Provider), the hospitals owned and operated by the corporation during the cost years at issue included Baptist Medical Center (BMC), Baptist Rehabilitation Institute (BRI), the Provider, and Baptist Medical Center–Arkadelphia (Arkadelphia or BMC-A).[2]

The Provider owns and operates the Baptist Medical System School of Nursing (BMSSN or School of Nursing), and reimbursement of the educational costs of its School of Nursing during the 1991-94 cost years is the disputed issue in this remanded case.

This case was originally decided by the Provider Reimbursement Review Board (Board) on April 3, 2001. See Baptist Memorial Medical Center v. Blue Cross and Blue Shield Association/Blue Cross and Blue Shield of Arkansas, PRRB Dec. No. 2001-D13, April 3, 2001,

[1] Exhibit P-6 (Roberts Dec. at ¶ 5); Tr. at 28-31.
[2] Exhibit P-6 (Roberts Dec. at ¶ 5); Tr. at 30.

Medicare & Medicaid Guide (CCH) ¶ 80,650, rev'd and remanded, HCFA Administrator, June 7, 2001, Medicare & Medicaid Guide (CCH) ¶ 80,720 (Baptist). In that decision, the Board unanimously determined that the Provider was engaged in the operation of the nursing program and, therefore, was entitled to pass-through treatment of the costs. Id. In his decision reversing the Board, the Administrator found that the Provider did not operate the nursing program and was not entitled to pass-through treatment of the costs unless they were "clinical costs" reimbursable as pass-through under OBRA 1990. Id. The Administrator remanded the case to the Board to consider whether the Provider qualified for pass-through treatment of its nursing education costs under OBRA 1990. Id.

Pursuant to the remand by the Administrator, the Board issued a Notice of Reopening and Board Order dated June 18, 2001. Two issues were specified for consideration by the Board: whether the Provider meets the criteria set forth at §4004(b) of OBRA 1990 and whether the costs at issue meet the definition of clinical training costs.[3]

Prior to the hearing on the remand, counsel for the parties stipulated that three of the four tests of OBRA 1990 were met by the Provider, and that the remaining test under OBRA 1990 (subsection (b)(2)(B)) was also met if the costs on which the Provider's calculations were based indeed constituted "clinical costs." The Intermediary agreed to the calculations and underlying data utilized by the Provider in presenting its evidence. The only issue that was before the Board in the remand hearing was whether the costs claimed by the Provider are costs of "clinical training" as that term is used in OBRA 1990. The relevant provision, paragraph (b)(1) §4004 states:

> The reasonable costs incurred by a hospital (or by an educational institution related to the hospital by common ownership or control) during a cost reporting period for clinical training (as defined by the Secretary) conducted on the premises of the hospital under approved nursing and allied health programs that are not operated by the hospital shall be allowed as reasonable costs under Part A of title XVIII of the Social Security Act and reimbursed under such part on a pass-through basis. (emphasis added).

The Provider was represented by Dan M. Peterson, Esquire, of Fulbright & Jaworski, LLP. The Intermediary was represented by Bernard Talbert, Esquire, of the Blue Cross and Blue Shield Association.

PARTIES' CONTENTIONS:

The Provider continues to assert that it is entitled to both classroom and clinical costs as the operator of the educational program. It points out that the evidence showed that the Schools of Nursing and Allied Health, as well as all of the hospitals that are part of BMS, are all a single

[3] Pursuant to a stipulation between the Provider and the Blue Cross and Blue Shield of Arkansas (the Intermediary), three other appeals involving the same issue were heard "on the record" on January 3, 2001. Those three appeals were case numbers 95-2033, 96-1979, and 98-2049, involving the 1991, 1992, and 1994 cost years, respectively. In all four cases, the issue was the same, involving the propriety of adjustments by the Intermediary disallowing pass-through reimbursement for nursing education costs. Under the terms of the stipulation, the decision in all four cases would be identical.

corporation.[4] Even the Administrator found that the School of Nursing, BMC, and the Provider are all under a common Board of Trustees. See Baptist. In discussing the relationship between the School of Nursing, BMC, and the Provider, the Administrator also observed that "the parties are related . . . ." Id., n.33. In fact, the School of Nursing is simply a d/b/a of Baptist Medical System, Inc., as is Baptist Memorial Medical Center.[5]

In accordance with the Administrator's remand decision, however, the Provider maintains that the evidence presented on remand demonstrates, without contradiction, that the costs in question were for clinical training conducted on the premises of the hospital, Baptist Memorial Medical Center.

The Provider points out that there was no regulation in effect during the four years in issue, 1991-94, defining clinical costs. The regulation that was promulgated as a final rule in the year 2001 was not even proposed until 1992, and because it was not final during the cost years in issue, it does not apply. That regulation states:

> *Classroom instruction costs* are those costs associated with formal, didactic instruction on a specific topic or subject in a class that meets at regular, scheduled intervals over a specific time period (for example, semester or quarter), and for which a student receives a grade.
>
> *Clinical training costs* means costs of training for the acquisition and use of the skills of a nursing or allied health profession or trade in the actual environment in which these skills will be used by the student upon graduation. Clinical training may involve occasional or periodic meetings to discuss or analyze cases, critique performance, or discuss specific skills or techniques; it involves no classroom instruction.

66 Fed. Reg. 3358, 3374 (Jan. 12, 2001). Similar definitions appear in CMS Pub. 15-2 §1102.3.G,[6] and CMS Pub. 15-2 §2807,[7] but these definitions were not added until November 1995 and June 1993, respectively.[8]

The Provider vigorously disputes the applicability of these provisions arguing that Congressional statutes mandating pass-through reimbursement for all educational costs cannot be reversed by a manual provision or a non-final rule. The Provider contends, however, that the testimony at the remand hearing verified that in making its computations of clinical costs, the Provider's approach nevertheless followed these definitions quite closely.

The evidence presented by the Provider showed that clinical costs were computed at the following amounts for the four cost years in question:[9]

1991: $425,029

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[4] Exhibit P-6 (Roberts Dec. at ¶¶ 5, 6).
[5] Exhibit P-6 (Roberts Dec.), ¶¶ 5, 6.
[6] Exhibit P-54.
[7] Exhibit P-55.
[8] Tr. 2. 17-18.
[9] See Exhibits P-49 and P-50.

1992:	$577,966
1993:	$280,335
1994:	$242,562

Consistent with the 2001 regulatory definition, the operative principle was that only costs relating to training of students in hands-on patient care at the Provider were considered as "clinical." The Provider's witness, Mr. Watson, a CPA consultant with BKD, LLP, testified that the calculation of clinical costs submitted into evidence was for hands-on training at the hospital, on the floors, for patient care.[10] The Director of the nursing school, Dr. Harris, testified that the clinical hours furnished to BKD for use in its computations of clinical costs represent the actual contact hours that the students spent in the hospital setting, giving hands-on care at actual patients' bedsides.[11]

The Provider contends that an approved Medicare allocation statistic (clinical hours spent) and audited cost report figures approved by the Intermediary were utilized to compute the clinical costs for each of the cost years at issue.[12]

The Provider also points out that the testimony of Dr. Harris showed in considerable detail why the types of costs identified as "clinical" by the above methodology are costs for the actual training of student nurses in the Provider's hospital setting. According to Dr. Harris's testimony, the "clinical laboratory," as that term is used in the nursing education program at Baptist, refers to "the hospital area." It means that "the hospital units are . . . serving as a clinical laboratory where students learn and where they practice their nursing skills under the direct supervision of a faculty member."[13] The clinical hours that she and her staff furnished to BKD for the calculation of clinical costs (as described by Mr. Watson) "represent the actual contact hours that the students spend in the hospital setting clinical laboratory, in this case Memorial, and giving hands-on care at actual . . . patients' bedside."[14] Those are the hours—the students' patient contact hours—on which Mr. Watson's exhibits are based.[15] Those student hours are where the nursing school is actually conducting the clinical training on the premises of a hospital, Dr. Harris testified.[16]

Dr. Harris distinguished these hands-on, patient care hours by the students on the premises of the hospital from the "skills lab." In the skills lab, the students practice in a simulated hospital unit with beds and mannequins to learn skills before going to the hospital to render actual patient care.[17] The skills lab hours were counted in the classroom hours, not in the clinical hours.[18] Dr. Harris testified that salaries are the largest component of the costs of the nursing and allied health education programs.[19] During the years in question, she had about 35 full-time faculty (whose responsibilities included both classroom teaching and clinical supervision of students),

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[10] Tr 2. 91; see also Tr 2. 94.
[11] Tr 2. 105-106; see also Tr 2. 105, 111.
[12] Tr 2. 59.
[13] Tr 2. 106.
[14] Tr. 2. 106.
[15] Tr. 2. 107.
[16] Tr. 2. 107.
[17] Tr. 2. 104.
[18] Tr. 2. 105.
[19] Tr. 2. 107-08.

and an average of 7 to 10 adjunct faculty who were performing only clinical supervision.[20] There were no faculty members whose jobs were solely to teach in the classroom.[21] Salaries also included herself as Director, two coordinators who supervised the faculty, and some support staff such as secretaries, the school counselor, bookkeepers and recruiters.[22]

Student clinical contact hours are directly related to faculty hours and therefore to salary costs spent at the hospital in the clinical setting. Both the Arkansas State Board of Nursing and the National League for Nursing Accrediting Commission require that faculty be on the premises of the hospital, supervising the student nurses, when they are learning and practicing their skills in the clinical area.[23] Instructors go with students from room to room, observing and assisting the student.[24] Whenever there are students at the hospital, there are automatically faculty with them.[25] An acceptable ratio of faculty to students is about 1 to 10.[26] When courses are in session, faculty will spend probably 50 to 75 percent of their time in the clinical areas.[27] The clinical adjunct faculty spend 100% of their time in clinical settings.[28] Accordingly, the dollars used to pay for faculty salaries are mostly for time spent in the hospitals.[29] The Directors of the allied health schools also go out and supervise students in the clinical setting at the hospital.[30]

Dr. Harris testified that, for classroom courses, class sizes may be as high as 200 students for which there is only one faculty member teaching the course. Because of the 1 to 10 ratio needed for clinical supervision, there is less faculty time spent per student hour in the classroom than per student hour in the clinical setting.[31] Accordingly, allocating costs consisting principally of faculty salaries on the basis of student hours would tend to somewhat understate the salary and benefit dollars applicable to clinical supervision. In other words, the methodology employed in Exhibit P-50 is somewhat conservative in allocating costs to the clinical component of the education programs.

Dr. Harris set forth in detail the types of tasks performed by faculty members in supervising students in the clinical setting.[32] She cited as another example of conservatism in allocating costs to the clinical component because the use of student clinical contact hours to allocate faculty costs. Dr. Harris testified that faculty generally arrive before the students, stay later, and perform a variety of tasks such as conducting pre- and post-conferences, and evaluations (using a twelve page form for each student, each day). These faculty hours were not counted in the student contact hours.

Most of the tasks and duties performed by Dr. Harris and her administrative staff, including her two coordinators, support both the classroom and the clinical components. Hiring faculty,

[20] Tr. 2. 146.
[21] Tr. 2. 146.
[22] Tr. 2. 127, 133-34.
[23] Tr. 2. 108.
[24] Tr. 2. 109.
[25] Tr. 2. 113.
[26] Tr. 2. 112.
[27] Tr. 2. 109-10.
[28] Tr. 2. 110.
[29] Tr. 2. 111-12.
[30] Tr. 2. 114.
[31] Tr. 2. 114-116.
[32] Tr. 2. 116-125.

ensuring accreditation, preparing annual reports to the licensing and accrediting bodies, making certain that standards are met, giving direction in unusual student-patient situations, enforcing policies, reviewing and revising handbooks and catalogs, and recruitment of students, all relate both to the clinical and classroom components. The two coordinators assign faculty and make out rotation schedules for them, make out student rotation schedules, and go out to the hospitals and supervise faculty. Time spent relating to the Nursing Council, which coordinates with the clinical setting, is related to clinical issues.[33]

According to Dr. Harris, the support staff (secretaries, school counselor, bookkeepers, recruiters) also support both clinical and classroom components. For example, the preparation of a transcript relates to both clinical and classroom courses. The daily twelve-page evaluations relating to student clinical experiences are processed by instructors and support staff.[34]

The Provider therefore contends that because most of the costs support both the clinical and classroom components, an allocation of shared costs based on hours spent by students in each setting is an appropriate method of deriving clinical costs. By identifying the costs related to the clinical laboratory component of the curriculum, in which students train to acquire those skills, and do so in the actual hospital environment, Memorial maintains it has accurately set forth the clinical costs reimbursable on a pass-through basis under OBRA 1990.

The Intermediary stipulated that the Provider has met and satisfied three of the four tests under OBRA 1990 §4004(b)(2). The Intermediary further stipulated that, if the Board found that the costs described by Memorial as "clinical" are in fact clinical in nature, then "the costs described by the provider as 'clinical costs'" in Exhibits P-47, and P-49 through P-53 shall be considered to be the amount of clinical costs reimbursable on a pass-through basis to the provider, Baptist Memorial Medical Center, for the cost years 1991 through 1994."

The Intermediary did not present any testimony but argued that the costs identified by the Provider are not clinical costs. Rather, they are simply an allocation of costs incurred by the nursing school as part of the classroom education program. It noted that the costs that the Provider is presenting as clinical costs all relate to the conduct of the nursing school as an educational unit. That is, the costs were incurred by the nursing school for its staff and associated overhead, and the breakdown is made between the percentage of time spent in classroom training at the school and clinical training that took place at the hospitals. Once this breakdown is made, the "clinical costs" are merely allocated to the various providers using a statistic for clinical hours spent at each facility. The Intermediary indicates that there is no real controversy over the Provider's calculation assuming the Provider's interpretation of clinical costs is proper. But the Intermediary views clinical costs for nursing as being more like compensation costs it claims are recognized for training doctors. These would be, for example, a stipend for working in the hospital and delivering patient care. Another example would be the cost of a nursing supervisor overseeing the conduct of students or providing patient care with students in attendance.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

[33] Tr. 2. 127-141.
[34] Tr. 2. 133-141.

The Board, after consideration of the Medicare law and guidelines, parties contentions, evidence presented, and the Administrator's decision, concludes that its original decision finding that the Provider operated the School of Nursing was correct.[35] Assuming for purposes of the remand that the Provider did not operate the School of Nursing, the Board further concludes that OBRA 1990 §4004 applies to the facts of this case and that the costs identified by the Provider represent clinical training.

Section 4004(b) of OBRA is entitled, "University Hospital Nursing Education." The Board believes that this phrase was purposely used to limit the statute's provisions to university-based nursing programs associated with hospitals and not to nursing school programs otherwise operated by providers. This interpretation is consistent with the underlying intention of the legislation to avoid academic costs being shifted to the Medicare program and with the Board's original decision. The nursing program in the instant case is not a university-based program but rather a nursing school owned and operated by BHS and its constituent providers.

The Board is bound to apply the assumption imposed on remand that the nursing school was not operated by the Provider. OBRA nevertheless permits pass through costs for clinical training provided other terms are met. Stipulations have eliminated all disputes, including the Provider's method of allocation and its calculations, except whether the costs claimed qualify as "clinical training costs."

The only definition of "clinical training" is in the regulations and manual sections issued after the years in question. While the Provider does not agree that these definitions are applicable, it nevertheless calculated its claims on remand using these definitions to segregate clinical from classroom costs.

The evidence showed that all Nursing School courses have a predetermined number of hours of classroom instruction and on-site clinical training at provider sites.[36] All clinical training is carried out at provider sites under the direct supervision of faculty members.[37] Thus, the cost represents the direct and indirect cost of faculty time spent at the provider sites engaged in

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[35] The Board notes that the Administrator found that the Board used the wrong standard in analyzing this matter; that is, it used the "engaged in" standard instead of the new standard of "operated by." The Board believes that the facts in the instant case support the same decision under the "operated by" standard. Without reiterating every detail, the Board notes that all of the entities at issue in this case are part of one health care system called BHS. BHS operates the nursing school and the four hospitals where the nurses are clinically trained. The Provider serves on the Baptist Medical System Nursing Council, which is a forum that recommends policies on nursing and nursing education issues subject to the approval of the BHS Senior Leadership Team. It is BHS, of which the Provider is an intricate part, that owns and operates the School of Nursing. The Board is aware of the fact that the Provider has a separate agreement with the School of Nursing to serve as a clinical laboratory for nursing students, but serving in this role does not convert the Provider into a party that is merely "engaged in" the operation of a nursing training program. All of the providers in BHS have an interest in training nursing personnel and later employing these nurses in their institutions, and all of them, by agreement, jointly participate in the direction and operation of the school. The Board agrees with the Provider that Medicare regulations do not specify the degree to which a provider must participate in a program operated by another provider to also be considered as an "operator" and to qualify for pass-through reimbursement. The Board also notes that since the costs are allowable at Baptist Medical Center, the allocation of these costs to all of the Providers in this group does not undermine the stated purpose of the Secretary to not have otherwise academic costs be subsidized by the Medicare program.

[36] Tr. 2 at 71 and 101-103.

[37] Tr. 2 at 105-106.

clinical training. The Board is satisfied that the methodology used by the Provider only captured "clinical training" as defined in the regulation because it only included training "in the actual environment in which these skills will be used by the student upon graduation;" that is, onsite at provider facilities. In addition, the Board notes that the Provider made every effort to identify and remove all classroom costs and to make adjustments for tuition revenues and other items that the Intermediary determined were not reimbursable so that these costs were not included in clinical training.[38]

The Board concludes that the Provider accurately identified and claimed only costs of clinical training and has, therefore, met all the statutory requirements to claim those costs on a pass-through basis under OBRA 1990.

DECISION AND ORDER

The Board restates its original holding in this case and finds that the Intermediary's adjustments to reclassify the Provider's nursing education costs as operational costs rather than pass-through costs were not proper and should be reversed. The Provider properly claimed the nursing program costs, both clinical and classroom, as Medicare pass-through costs under PPS. Pursuant to the Administrator's remand, the Board also finds that the Provider qualifies for pass-through reimbursement of clinical costs under §4004 of OBRA 1990, that the costs it identified in Exhibit P-49 as clinical costs constitute clinical costs for purposes of OBRA 1990, and that the Provider is entitled to reimbursement of those amounts.

Board Members Participating:

Suzanne Cochran, Esquire
Dr. Gary B. Blodgett
Martin Hoover, Esquire
Elaine Crews Powell, CPA
DATE: July 7, 2004

For the Board:

Suzanne Cochran,
Chairman

[38] Tr. 2. at 62.