

PROVIDER REIMBURSEMENT REVIEW BOARD HEARING DECISION

2001-D52

PROVIDER –
Rapid City Regional Hospital
Rapid City, South Dakota

Provider No. 43-0077

vs.

INTERMEDIARY –
Blue Cross/Blue Shield Administration/
Cahaba Government Benefits Administrators

DATE OF HEARING-

October 31, 2000
August 23, 2001 – On The Record &
Remand

Cost Reporting Periods Ended -
June 30, 1993
June 30, 1994
June 30, 1995

CASE NOS.

97-2064R
97-2148R
98-0474 On The Record

INDEX

	Page No.
Issue.....	2
Statement of the Case and Procedural History.....	2, 4
Provider's Contentions.....	8
Intermediary's Contentions.....	12
Citation of Law, Regulations & Program Instructions.....	15
Findings of Fact, Conclusions of Law and Discussion.....	16
Decision and Order.....	19
Dissenting Opinion of Henry C. Wessman, Esq.....	20
Attachment A	

ISSUE:

Whether, with respect to the Joint Nursing Education Program, the provisions of ' 4004(b) of the Omnibus Reconciliation Act of 1990 (AOBRA 1990") are applicable to the cost years at issue, and if so, whether the Provider meets the criteria set forth in ' 4004(b)(2) of OBRA 1990 for payment of the claimed costs as reasonable costs.

PROCEDURAL HISTORY:

Rapid City Regional Hospital's (AProvider@) fiscal years ending June 30, 1993 ("FY 1993"), June 30, 1994 ("FY 1994") and June 30, 1995 (AFY 1995") are at issue in this appeal. The Provider filed timely appeals with the Provider Reimbursement Review Board (ABoard@) following receipt of its Notices of Program Reimbursement for these fiscal years and has met the jurisdictional requirements of 42 C.F.R. ' 405.1835-.1841. The Provider filed its FY 1993 and FY 1994 Preliminary Position Papers with Wellmark/Blue Cross and Blue Shield of Iowa (AIntermediary@)¹ on March 30, 1998. The Provider filed its FY 1993 and FY 1994 Final Position Papers with the Board on June 30, 1998. The Provider's FY 1993 and FY 1994 appeals were joined for hearing purposes.

In addition, prior to the Hearing, the Provider and Intermediary also agreed that PRRB Case No. 98-0474 shall be decided on the record and in accordance with the Board's decisions in these consolidated cases.² Case No. 98-0474 represents the Provider's appeal for its fiscal year ending June 30, 1995, wherein the remaining issues are identical to those presented in these consolidated cases, i.e., reimbursement for the Provider's Joint Education Program (Issue 1) and Medical Director Part A Hours (Issue 2). (The Deputy Administrator did not address this issue in the remanded decision.)

The Board conducted a hearing on October 12, 1999. The Board considered two issues: whether the Provider was entitled to additional Medicare reimbursement for its Joint Nursing Education Program, and whether the Provider was entitled to additional Medicare reimbursement for costs associated with Medical Director Part A Hours.³

On March 24, 2000, the Board issued its decision, wherein it concluded that the Provider is engaged in the joint operation of the Joint Education Program and granted the Provider pass-through treatment of its costs associated with the Joint Education Program for FY 1993 and FY 1994. The Board also

¹ The current Intermediary is Cahaba GBA.

² See Joint Stipulation dated October 16, 2000.

³ The Provider and the Intermediary reached a partial administrative resolution that resolved all other issues that had been appealed.

concluded that the Provider's time studies, in conjunction with the physician's affidavits submitted by the Provider as documentation for the Medical Director Part A Hours allocated on its FY 1994 cost report, constituted adequate and reliable documentation under the Medicare rules and regulations.

On May 24, 2000, following the receipt of comments, the HCFA Deputy Administrator vacated the Board's decisions and remanded the appeals to the Board for development of the facts and law related to the applicability of the OBRA 1990 (Provider Exhibit P-71).⁴ Specifically, the Deputy Administrator instructed the Board to issue a new decision regarding whether, with respect to the Joint Education Program, the provisions of OBRA 1990 ' 4004(b) are applicable to FY 1993 and FY 1994 and, if so, whether the Provider meets the criteria set forth in OBRA 1990 ' 4004(b)(2) for pass-through reimbursement of the costs related to its Joint Education Program.⁵ The request for a new decision rather than simply supplementing the original decision caused some concern for the Board. Consequently, in this decision, the Board refers to the previous decision, and for completeness of the record, appends the vacated decision.

Prior to the October 31, 2000 hearing, the Provider and the Intermediary entered into a stipulation which was admitted into evidence as Provider Exhibit P-86. The Board conducted a hearing via telephone on October 31, 2000, wherein the parties agreed that the remanded issue could be stated as follows:

Whether, with respect to the Joint Nursing Education Program, the provisions of OBRA 1990 ' 4004(b) are applicable to the cost years at issue [Provider's FY 1993 and FY 1994], and if so, whether the Provider meets the criteria set forth in OBRA 1990 ' 4004(b)(2) for payment of the claimed costs as reasonable costs.

The Provider appealed HCFA's denial of its exception request from the revised January 21, 1993 NPR to the Provider Reimbursement Review Board (ARRB) and has met the jurisdictional requirements of 42 C.F.R. ' 405.1835-.1841.

⁴ In order to avoid bifurcation of the appeal, the HCFA Deputy Administrator also vacated the Board's decision regarding the Medical Director Part A Hours issue and preserved the right to review that issue upon the Board's entering a new decision pursuant to the remand order. However, the Deputy Administrator did not direct the Board to request further evidence on this issue. Accordingly, the Board's decision with respect to the Medical Director Part A Hours issue currently stands.

⁵ The Provider notes that subsequent to returning the acknowledgment of hearing scheduled for October 23, 2000, the Provider noted a typographical error in the Administrator's decision. The Provider called that error to the attention of the Office of Attorney Advisor. The Attorney Advisor then issued a correction to its decision dated August 24, 2000 (Provider Exhibit P-73).

The Provider was represented at the remanded hearing by Daniel F. Miller, Esquire, of vonBriesen, Purtell & Roper, s.c. The Intermediary was represented by Bernard M. Talbert, Esquire, of the Blue Cross and Blue Shield Association.

STATEMENT OF FACTS:

The Provider is a 417-bed tertiary care facility located in the Western part of South Dakota. It services a 300-mile radius of a five-state area, including the Western part of South Dakota. Tr. at 35.⁶ Beginning in 1972, the Provider operated a hospital-based nursing education program. Tr. at 34, 88. After graduation, the students were eligible to take the examination for a registered nursing ("RN") license. Tr. at 33. The Provider's program was approved by the South Dakota Board of Nursing and accredited by the National League for Nursing. Tr. at 34, 55. The program was located on the Provider's campus. The program offered classroom instruction in the School of Nursing, a Provider owned building, and clinical training at the Provider's facility and other area health care facilities. Tr. at 33. The Provider claimed and was reimbursed on a reasonable cost basis for both the direct and indirect costs associated with its nursing education program from the program's inception until 1983.

In 1983, HCFA established a prospective payment system (PPS) for Medicare payment of inpatient hospital services. Under PPS, Medicare payment is made based on a predetermined specific rate for each discharge. All discharges are classified according to a list of diagnosis related groups. In determining the initial PPS rates, HCFA specifically excluded the costs of approved educational activities. These costs were not included in the calculation of PPS rates. Instead, these costs were given pass-through treatment and paid on a reasonable cost basis.

Accordingly, with the inception of PPS, the Provider's costs associated with its nursing education program were specifically excluded from its base year operating costs for purposes of determining its PPS hospital specific rate. The Provider received pass-through reimbursement for these costs.

In 1989, in an attempt to reduce costs, the Provider entered an agreement with the South Dakota State Board of Regents (Agreement) to establish the Joint Education Program. The Agreement provided for both a two and a four year nursing degree program to be offered by the University of South Dakota (USD), South Dakota State University (SDSU) and the Provider (the Joint Education Program), and the phase out of the Provider's three year diploma program. All of these events were to occur during a three year transition period starting in the fall of 1988. Tr. at 44-47.

Both Universities are State supported schools and are under the control of the State Board of Regents. Tr. at 42-44. USD is located in the Southeastern part of South Dakota approximately 400-miles away

⁶ All references to Tr. in the Statement of Facts refer to the transcript of the original hearing the Board conducted for this case on October 12, 1999.

from Rapid City. SDSU is located in the Eastern part of South Dakota, approximately 350-miles away from Rapid City. Tr. at 36.

The students that have been accepted into the Joint Education Program are typically nontraditional students, approximately twenty-seven years of age, usually with a family. They generally live within 30 to 50 miles of Rapid City. The students take all of their nursing courses in the School of Nursing, a Provider owned building in Rapid City, and they do not take any of their courses on the USD or SDSU campuses. In addition, all of their clinical experiences are provided in Rapid City and the surrounding area. The students do not receive any clinical experiences in the cities in eastern South Dakota, where the Universities are located. Generally, the students are well ingrained into the Rapid City community. Tr. at 48-49.

Pursuant to the Agreement, the Provider, among other things:

- provides ongoing clinical experiences, with both Medicare and non-Medicare patients, for students of the Joint Education Program and participates in the development of the clinical aspects of the Joint Education Program, Tr. at. 48-50, 53, 56-58;
- assists in the coordination of the scheduling and assignment of clinical experiences, Tr. at. 53, 56-58;
- provides parking spaces to the Joint Education Program's instructors and the students, Tr. at. 61-62;
- allows students and instructors the same access to its cafeteria as provided to its employees, Tr., at. 62;
- participates with the School of Nursing in periodic evaluations of the Joint Education Program and any changes to the Program are recommended to the Board of Regents jointly, Tr. at 54-55,72;
- allows students access to its medical library and education departments, Tr. at. 62-63;
- actively engages employees in working with students to coordinate the clinical experiences offered as part of the Joint Education Program, Tr. at. 75-76;
- recruits a substantial number of its nurses from the Joint Education Program, Tr. at. 63-66;
- contributes ongoing use of approximately 25,000 square feet of classroom and office space and equipment in the School of Nursing - a building that is owned by the Provider and located approximately three miles from the Provider's campus - for instruction and clinical experiences, Tr. at 47-48 and 59-61.

In its FYE June 30, 1993 and FYE June 30, 1994 cost reports, the Provider claimed the indirect costs associated with the School of Nursing and maintenance of the School of Nursing, the building that the Provider contributes to the Joint Education Program, in a pass-through cost center. The Intermediary reclassified the costs and statistics for the School of Nursing from a pass-through cost center to a non-pass-through cost center because the Intermediary concluded that the Provider was not the legal operator of the Joint Education Program. Tr. at 90-98.

The Provider and Intermediary entered into a joint stipulation prior to the hearing for the remanded case. The stipulation, admitted into evidence as Provider Exhibit P-86, states in part:

- A. The Provider's most recent cost reporting period that ended on or before October 1, 1989 is the Provider's cost reporting period from July 1, 1988 to June 30, 1989 (fiscal year end June 30, 1989).
- B. The joint nursing education program is conducted on the Provider's premises. Clinical experiences take place on the Provider's hospital campus, and the School of Nursing is located in a building the Provider owns which is approximately 3 miles from the Provider's main campus.
- C. During its cost reporting period ending June 30, 1989, the Provider claimed and was reimbursed \$689,890 of costs after step-down related to the School of Nursing.
- D. The proportion of the Provider's fiscal year 1989 total allowable costs that are attributable to the nursing education program was 1.5%.
- E. The proportion of the Provider's fiscal year 1993 total allowable costs that are attributable to the joint nursing education program was 0.16%.
- F. The proportion of the Provider's fiscal year 1994 total allowable costs that are attributable to the joint nursing education program was 0.11%.
- G. The proportion of the Provider's total allowable costs that were attributable to the joint education program, and allowable under OBRA 1990 ' 4004(b)(1) during fiscal year 1993 and fiscal year 1994 do not exceed the proportion of total allowable costs that were attributable to the nursing education program during fiscal year 1989.
- H. The Provider's claimed costs related to the joint nursing education program for fiscal year 1993 and fiscal year 1994 are reasonable in amount.
- I. In fiscal year 1993, the Provider retained approximately 81% of the students who graduated from the joint nursing education program to work in its facilities.

- J. In fiscal year 1994, the Provider retained approximately 87% of the students who graduated from the joint nursing education program to work in its facilities.
- K. The Provider recruits at least 80% of the students who graduate from the joint nursing education program each year for full-time employment at its facilities.
- L. The students of the joint nursing education program actively participate in the treatment, care and management of the Provider's Medicare and non-Medicare eligible patients.
- M. The Provider receives a benefit for the support it furnished to the joint nursing education program through the provision of clinical services to its patients by nursing students participating in the joint education program.
- N. The amount of costs related to the joint nursing education program that the Provider incurred during fiscal year 1993 (\$145,466) and fiscal year 1994 (\$107,871) do not exceed the amount of costs that the Provider incurred when it operated its own nursing education program during fiscal year 1989 (\$689,890).
- O. It would cost substantially more than one million dollars a year for the Provider to solely operate a nursing education program that is equivalent to the joint nursing education program.
- P. If the Provider's costs are determined to be related to clinical training as that term is used in OBRA 1990 ' 4004(b)(1), then the Provider satisfies all of the conditions for reimbursement set forth in OBRA 1990 ' 4004(b)(2).

In addition to the stipulated facts set forth above, in the course of the hearing for the remanded decision, the Board requested additional information as to whether the Provider's employees are involved in teaching clinical nursing courses as part of the Joint Education Program. Rem. Tr. at 27.⁷ In response to the Board's inquiry, the Provider submitted Provider Exhibits P-87 and P-88. Provider Exhibit 87 is the Affidavit of Kay Foland, Ph.D., RN, CS, who is employed as the Department Head of South Dakota State University's West River Nursing Program. Dr. Foland's Affidavit identifies fifteen (15)

⁷ References to the transcript of the remanded hearing held on October 31, 2000 will be referred to as ARem. Tr. at ...@

employees of the Provider who have taught clinical classes at the School of Nursing in conjunction with the Joint Education Program. In addition, Dr. Foland's Affidavit includes a list of the courses Provider's employees have taught at the School of Nursing, together with the academic years in which the courses were taught. See Provider Exhibit P-87, Tabs A and B. Provider Exhibit 88 is the Affidavit of Kathy Hankel, RN, who is the Director of the University of South Dakota's West River Nursing School. Ms. Hankel states that eight (8) of the Provider's employees have been involved in teaching clinical nursing courses at the School of Nursing in conjunction with the Joint Education Program. The Provider submitted these exhibits in response to the Board's inquiry regarding the extent to which the Provider's staff is involved in teaching clinical nursing courses as part of the Joint Education Program. Rem. tr. at 27.

PROVIDER'S CONTENTIONS :

The Provider contends that with respect to its FY 1993 and FY 1994 costs related to the joint education program, the provisions of OBRA 1990 ' 4004(b) are applicable, and that the argument outlined below, supports this contention. The argument contained herein does not address the second part of the issue in this remanded case, that being, whether the Provider meets the criteria set forth in ' 4004(b)(2) of OBRA 1990 for payment of the claimed costs as reasonable costs.⁸ The Provider points out that the Intermediary has stipulated that, A(I)f the Provider's costs are determined to be related to clinical training as that term is used in OBRA 1990 ' 4004(b)(1), then the Provider satisfies all of the conditions for reimbursement set forth in OBRA 1990 ' 4004(b)(2).@

The Provider notes that in November of 1990, Congress enacted OBRA 1990. Further, the Provider points out that section 4004(b) of OBRA 1990 contains several provisions affecting Medicare policy for payment of nursing and allied health education costs on a reasonable cost basis (See Provider Exhibit P-74).

Section 4004(b)(1) provides:

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 education programs that are not operated by the hospital shall be allowable as reasonable costs under part A of title XVIII of the Social Security Act and reimbursed under such part on a pass-through basis.

⁸ For the Provider's argument on whether it satisfies all the requirements of OBRA 1990 ' 4004(b)(2), see Provider's Position Paper at 10-13.

Id.

In this case, the Provider contends that the fact that the Joint Education Program was conducted on its premises in Rapid City under an approved nursing education program is undisputed. The Provider further contends that in his original decision, the HCFA Deputy Administrator concluded that the costs incurred by the Provider during FY 1993 and FY 1994 are costs related to clinical training (Provider Exhibit P-71). In the decision, the Deputy Administrator states:

The regulation implementing PPS at 42 CFR 412.113(b) [Provider Exhibit P-85] provides that the costs of "approved education activities," including training programs for nurses will be paid on a reasonable cost basis, as defined in 42 CFR 413.85 [Provider Exhibit P-85] The regulation at 42 CFR 413.85 sets forth the applicable principles for reimbursing the reasonable cost of educational activities under the Medicare program, and explicitly defines the types of approved educational activities which are within the scope of these reimbursement principles.

The regulation at 42 CFR 413.85(d) [Provider Exhibit P-85] lists several types of activities which HCFA does not recognize as within the scope of approved educational activities. These activities are reimbursed on the inpatient side as operating costs rather than as pass-through costs. Specific to the facts in this case, 42 CFR ' 413.85(d)(6) excludes clinical training of students not enrolled in an approved education program operated by the provider. [Emphasis added]

Applying the provisions of 42 CFR ' 413.85(d)(6), to the facts of this case, the Administrator finds that, the Provider was not entitled to be reimbursed on a pass-through basis for the costs of the nursing education program. [Emphasis added]

However, Congress enacted special provisions which allow for the reimbursement of certain costs as reasonable pass-through costs if certain conditions are met. Specifically, Section 4004(b)(2) [of OBRA 1990] sets forth conditions that a hospital must meet to receive payment on a reasonable cost basis.

See Order of the Administrator, May 24, 2000, pp. 7; 11-12 (Provider Exhibit P-71).

The Provider contends that the Deputy Administrator, by applying the exception set forth in 42 C.F.R. ' 413.85(d)(6) to this case and finding that the Provider was not entitled to pass-through reimbursement, concluded that the Provider's claimed costs associated with the Joint Education Program are costs related to clinical training of nursing students.

The Provider contends that under 42 C.F.R. ' 413.85, the general rule is that payment for approved educational activities are allowable as pass-through costs, except for those activities described in 42 C.F.R. ' 413.85(d). The term Approved educational activities@ is defined in 42 C.F.R. ' 413.85(b) as:

formally organized or planned programs of study usually engaged in by providers in order to enhance the quality of patient care in an institution. These activities must be licensed if required by State law. If licensing is not required, the institution must receive approval from the recognized national professional organization for the particular activity.

Id.

The Provider asserts that since its revision in 1984, section 413.85(d)(6) only excludes from the general rule "[c]linical training of students not enrolled in an approved education program operated by the provider." [Emphasis added]. Therefore, in order to conclude that the Provider is not entitled to pass-through reimbursement for its costs associated with the Joint Education Program under 42 CFR ' 413.85(d)(6) because the Provider is not the legal operator of the Joint Education Program, the Deputy Administrator first had to conclude that the Provider's costs were related to clinical training.

The Provider points to the Intermediary's position paper which states in part that:

OBRA 1990, Section 4004(1) [sic], allows for the cost of clinical training conducted on the premises of the hospital to be reimbursed as pass-through. If the Provider can supply support for the portion of the cost that is for clinical training, then the Intermediary agrees this should be allowed as pass-through. However, the cost related to the classrooms, building, and other costs not related to clinical training, are clearly not allowed to be reimbursed as pass-through.

Intermediary's Position Paper at 7.

However, the Provider argues that the Intermediary fails to reconcile this statement with the Deputy Administrator's decision, which necessarily concluded that the costs the Provider claimed were related to clinical training. The Provider asserts that this is the requirement of Section 4004(b)(1), i.e., that the costs be reasonable and that they be incurred for clinical training. The Provider contends that the Intermediary has never challenged the reasonableness of its claimed costs, and has now stipulated that

they are reasonable. Furthermore, the Provider believes that it is not disputed that the clinical training component of the Joint Education Program is integrally related to and wholly dependent upon the classroom instruction the students receive on the Provider's premises in the School of Nursing. Thus, the Provider believes that ' 4004(b)(1) supports the Provider's claim that these costs are eligible for pass-through treatment.

Moreover, the Provider believes that it is evident that the Deputy Administrator knew what costs the Provider claimed, but points out that the decision remanding this case to the Board does not raise the issue of whether these costs are related to clinical training. The Provider contends that if the Deputy Administrator was concerned about the nature of these costs, which relate to the costs of the building the Provider uses to house the Joint Education Program, surely the remand order would have emphasized this point. The Provider points out that the costs that are at issue in this appeal were discussed specifically on page 11 of the Deputy Administrator's decision, yet no objection or concern was raised that they are not related to the clinical training that unquestionably does take place on the Provider's premises (see Provider Exhibit P-71, p. 11).

The Provider believes that the Intermediary's protest that these are not ~~A~~clinical training@costs also does not square with the provisions of OBRA 1990, which merely requires that the costs be reasonable, and that they be related to clinical training that is conducted on the premises of the hospital as part of an approved nursing and allied health education program. The Provider asserts that this particular section of OBRA 1990 was a Congressional directive to HCFA to reinstate its previous treatment of these costs as pass-through costs. This Congressional amendment to HCFA reimbursement policy was tailored to the exception set forth in ' 413.85(d)(6), which only excepts clinical training in non-provider operated programs from the general rule of pass-through reimbursement, and it was designed to prevent HCFA from denying reimbursement to hospitals engaged in nursing education in conjunction with university nursing programs. The Provider notes that the Intermediary cites to a definition of clinical training set forth in the Provider Reimbursement Manual.⁹ However, the Provider contends that Medicare Manuals are not legal authority, rather they are merely policy guides which set forth HCFA's policy interpretations related to the Medicare program. The Provider asserts they do not have the force of law.

Additionally, the Provider points out that the policy interpretation to which the Intermediary cites has never been published as a final rule in the *Federal Register*, nor is it part of the Medicare regulations. The Provider notes that HCFA did publish a proposed rule regarding payment for nursing and allied health education in the *Federal Register* on September 22, 1992, 57 FR 43659. This proposed rule sets forth a proposed definition of clinical training, which is similar to the definition that the Intermediary cites. However, more than eight years have passed since publication of this proposed rule, and the proposed rule has never been finalized. Consequently, the definition of clinical training set forth in the proposed rule remains merely proposed, not adopted.

⁹ Intermediary Position Paper at 8.

Moreover, the Provider contends that the definition of clinical training that the Intermediary proffers must be rejected because it is inconsistent with the governing Medicare regulations. As noted above, the general rule set forth in ' 413.85 provides for pass-through reimbursement of nursing education expenses unless the expenses fall within one of the exceptions set forth in ' 413.85(d). The only exception to this rule that has been properly promulgated and implemented is the one which the Deputy Administrator cited in his original decision concerning clinical costs of programs not operated by a provider. Any attempt to further limit the pass-through treatment of nursing education expenses through an expansive interpretation set forth in the Provider Reimbursement Manual must be rejected because such a change can only be implemented through notice and comment rule-making procedures that have not been completed as of this date.

Furthermore, as noted above, the Provider asserts that the Deputy Administrator has already concluded that the Provider's costs related to the Joint Education Program are costs related to clinical training by applying the provisions of ' 413.85(d)(6) to this case. Consequently, it would be inconsistent to say that the Provider's costs related to the Joint Education Program are clinical for purposes of ' 413.85(d)(6) but not for purposes of ' 4004(b)(1) of OBRA 1990.

Finally, the Provider notes that if it did not incur the costs related to the School of Nursing, the clinical component of the Joint Education Program could not and would not exist. OBRA 1990 simply requires that the costs be reasonable and that they be incurred for purposes related to clinical training. Accordingly, the Provider believes that the requirements of ' 4004(b)(1) are satisfied.

INTERMEDIARY'S CONTENTIONS:

The Intermediary believes that the purpose of the remand was that the HCFA Deputy Administrator saw a provision of OBRA as relevant to this case and wanted a complete finding from the Board included in the record prior to proceeding further in the decision.¹⁰ It is the Intermediary's position that the basic question to be addressed in this case is whether costs associated with the building, and maintenance of the building are in fact clinical education costs.¹¹ The Intermediary argues that clinical training is defined in the Provider Reimbursement Manual, Part 2, (HCFA Pub. 15-2) ' 1102.3.G. (Intermediary Exhibit 1-5) and HCFA Pub. 15-2 ' 2807 (Intermediary Exhibit 1-6),

Clinical training is defined as involving 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. While it may involve occasional or periodic meetings to

¹⁰ Rem. tr. at 15. Also, exhibits referenced in the Intermediary's contentions refer to exhibits included in its position paper for case No. 97-0264R.

¹¹ Id.

discuss or analyze cases, critique performance, or discuss specific skills or techniques, it involves no class room instruction. (Emphasis added.)

Id.

HCFA Pub. 15-2 ' 2807 also states in pertinent part:

For cost reporting periods beginning on or after October 1, 1990, if you do not operate the program, the classroom portion of the costs are not allowable as pass through costs and therefore not reported on lines 21 and 24 of the Form HCFA-2552-92. They may, however, be allowable as routine service operating cost...

Id.

The Intermediary believes that the above sections make the distinction between classroom and clinical, which the Intermediary believes is the correct determination in the long run, and consequently, the Provider does not qualify for relief under OBRA because the costs themselves do not meet the tests for clinical education costs.¹²

The Intermediary also argues that its adjustment to reclassify the School of Nursing costs and statistics was made in accordance with:

- C Omnibus Budget Reconciliation Act (OBRA) of 1990 C Section 4004
- C Medicare regulation 42 C.F.R. ' 413.85C Cost of Educational Activities
- C HCFA Pub. 15-1' 404 C Approved Programs
- C Blue Cross Association (BCA) Administrative bulletin No. 834.

OBRA 1990, ' 4004(b)(1) (Intermediary Exhibit 1-4) states:

In General C 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 education programs that are not operated by the hospital shall be allowable as reasonable costs under part A of title XVIII of the Social Security Act and reimbursed under such part on a pass-through basis.

OBRA 1990, ' 4004(b)(1) (Emphasis added.)

¹² Rem. tr. at 17.

42 C.F.R. ' 413.85(b) states (Intermediary Exhibit 1-7):

Approved educational activities means formally organized or planned programs of study usually engaged in by providers in order to enhance the quality of patient care in an institution.

42 C.F.R. ' 413.85(c) states, in pertinent part:

Although the intent of the program is to share in the support of educational activities customarily or traditionally carried on by providers in conjunction with their operations, it is not intended that this program should participate in increased costs resulting from redistribution of costs from educational institutions or units to patient care institutions or units.

HCFA Pub. 15-1, ' 404.2 states (Intermediary Exhibit 1-8):

The responsibility for operating and supporting approved educational programs which are necessary to meet the community's needs for nursing and paramedical personnel should be borne by the community. Where the community has not yet recognized and accepted this responsibility, the Medicare program does participate appropriately in the support of such approved programs as are operated by providers in conjunction with their patient care activities. However, it is not intended that Medicare should be responsible for expenditures by a provider in subsidizing such programs that are operated by other organizations where the provider receives no, or disproportionately little, benefit for the amount it expends.

Id.

The Intermediary contends that BCA Administrative bulletin No. 834 (Intermediary Exhibit 1-9) mandates that Medicare will not reimburse nursing education programs that are not under the control and on the premises of a provider. The Intermediary asserts that, since the nursing program is now conducted at the colleges, it cannot allow the payments made by the Provider in support of this program to be reimbursed by Medicare as pass-through costs.

OBRA 1990, Section 4004(1), allows for the cost of clinical training conducted on the premises of the hospital to be reimbursed as pass-through. It is the Intermediary's position that if the Provider can supply support for the portion of the cost that is for clinical training, then the Intermediary agrees this

should be allowed as pass-through. However, the cost related to the classrooms, building, and other costs not related to clinical training, are clearly not allowed to be reimbursed as pass-through.¹³

Intermediary Exhibit I-10 contains the HCFA Administrator's Decision dated April 7, 1978 for PRRB Case Number 78-D7, Butler County Memorial Hospital v. Blue Cross Association, et al., Medicare & Medicaid Guide (CCH) & 29,031 which reversed the Board's decision. The Intermediary points out that in this decision the HCFA Administrator held that the intermediary's disallowance was proper as the provider was not entitled to reimbursement by Medicare for any payments it made to Butler County Community College in support of the nursing education program. The Intermediary contends that the facts in these cases are similar, if not exactly the same and the Board should follow the HCFA Administrator's ruling in the current appeal.

In summary, the Intermediary disagrees with the Provider's position that as long as you can connect nursing students in a Provider facility, receiving clinical training in a classroom situation three or four miles away which help them prepare for their clinical training, it is a synonym for clinical training.¹⁴ The Intermediary submits that the above is still classroom training and therefore is not reimbursable as a pass through cost under the remand.

CITATIONS OF LAW, REGULATIONS AND PROGRAM INSTRUCTIONS:

1. Regulations 42 C.F.R.:
 - ' 405.1835-.1841 - Board Jurisdiction
 - ' 412.113(b) - Reduction to Capital Related Payments
 - ' 413.85 et. seq. - Cost of Educational Activities
2. Provider Reimbursement Manual, Part 1 (HCFA Pub. 15-1):
 - ' 404 et seq. - Cost of Approved Nursing and Paramedical Education Programs
3. Provider Reimbursement Manual, Part 2 (HCFA Pub. 15-2):
 - ' 1102.3.G. - Instructions for Form HCFA-339 Provider Cost Report Reimbursement Questionnaire

¹³ Intermediary Position Paper at 7.

¹⁴ Tr. at 30.

' 2807

-

Worksheet A

3. Cases

Butler County Memorial Hospital v. Blue Cross Association, et al, Medicare & Medicaid Guide (CCH) & 29,031.

Rapid City Regional Hospital v. Blue Cross and Blue Shield Association/Blue Cross and Blue Shield of Iowa, PRRB Dec. No. 2000-D34 & 2000-D35, March 24, 2000, Medicare & Medicaid Guide (CCH) & 80,424-80,425.

Community Care Foundation, F/K/A Northwest Medical Center, Inc. D/B/A Northwest Medical Center v. Tommy Thompson, Civil Action No. 99CV02947 (D.D.C. June 18, 2001).

4. Other:

Omnibus Reconciliation Act of 1990 (OBRA 1990"), ' 4004(b)
Blue Cross Association (BCA) Administrative bulletin No. 834.
57 Fed. Reg. 43659 September 22, 1992

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

The Board, after consideration of the facts, parties' contentions, evidence presented, testimony elicited at the hearing, and the Provider's posthearing brief, is split in its analysis of whether the provisions of OBRA 1990 ' 4004 would apply to the facts of this case. The Board's original decisions in this case, Rapid City Regional Hospital v. Blue Cross and Blue Shield Association/Blue Cross and Blue Shield of Iowa, PRRB Dec. No. 2000-D34 & 2000-D35, March 24, 2000, Medicare & Medicaid Guide (CCH) 80,424-80,425, rem'd HCFA Admin. May 24, 2000, were vacated by the HCFA Administrator and remanded to the Board for further proceeding to allow for additional development of the facts and the law on the applicability of OBRA 1990. The HCFA Administrator asked the Board to issue new decisions addressing two specific provisions of OBRA ' 4004, those being, whether, with respect to the Joint Nursing Education Program, the provisions of ' 4004(b) are applicable to the cost years at issue, and if so, whether the Provider meets the criteria set forth in ' 4004(b)(2) for payment of the claimed costs as reasonable costs.

If the Board were to literally interpret the Administrator's orders, the Board would simply rule that, 1) the cost years at issue are applicable to the provisions of ' 4004(b) noting that subsection ' 4004(b)(5) outlines the effective date for this section as, "cost reporting periods beginning on or after October 1, 1990", and 2) the Provider meets the criteria set forth in ' 4004(b)(2) for payment of the claimed costs as reasonable costs because the Intermediary has stipulated as such. However, the Board feels the real issue to be addressed in these remanded cases relative to OBRA ' 4004 is the issue of what are clinical training costs, and whether the costs related to the classrooms, building and maintenance of the Joint Education Program should be included as clinical training costs and receive the more favorable pass-through treatment.

The Board notes that its previous decision in these cases (PRRB Dec. No. 2000-D34 & 2000-D35) did not specifically address the OBRA ' 4004 aspect in the instant cases. The prior decision focused on the operation of the approved nursing education program. The Board concluded that the facts in the record clearly demonstrated that the Provider did operate, to a significant extent, the nursing education program, and was therefore entitled to pass-through treatment of its nursing program costs. To be perfectly clear, the Board stands unified in its original analysis and decision that the programs at issue in this case are operated by the Provider. The Board notes that the OBRA ' 4004 issue in the instant cases is being reviewed strictly to complete the record.

To determine the applicability of the OBRA provisions in these cases, however, the Board examined the instant cases as if the approved nursing programs at issue were not operated by the Provider, a key point in ' 4004(b)(1), and then proceeded to make a determination of whether OBRA 4004 would apply. It is under this type of analysis that the Board is split in its determination. For the reasons outlined below, the Board majority, assuming the Provider did not operate the nursing programs (which it steadfastly believes the Provider does), feels that the provisions of OBRA would not apply to the Provider.

The Board notes that the parties have stipulated that if the Provider's costs are determined to be related to clinical training as that term is used in OBRA 1990 ' 4004(b)(1), then the Provider satisfies all of the conditions for reimbursement set forth in OBRA 1990 ' 4004(b)(2).¹⁵ Therefore, the Board focused its review on the provisions of ' 4004(b)(1). The Board notes that the language in section (b)(1) specifically addresses reasonable costs for clinical training conducted on the premises of the hospital under approved nursing programs that are not operated by the hospital. It is the Board's opinion that there are three key phrases under ' 4004(b)(1) that must be addressed, those being,

- 1) clinical training as defined by the Secretary,
- 2) conducted on the premises of the hospital, and
- 3) not operated by the hospital.

¹⁵ See Stipulation at Provider Exhibit P-86.

The Board has already addressed 3), not operated by the hospital, in its earlier assumptions. Regarding clinical training, the Board finds that the best evidence in the record is the definition noted in the Intermediary's Position Paper which states:

Clinical training is defined as involving 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. While it may involve occasional or periodic meetings to discuss or analyze cases, critique performance, or discuss specific skills or techniques, it involves no class room instruction.

HCFA Pub. 15-2 ' 1102.3.G. (Intermediary Exhibit 1-5) and HCFA Pub. 15-2 ' 2807 (Intermediary Exhibit 1-6).

Regarding the Aon the premises@phrase in ' 4004(b)(1), the Board simply notes that the building in question, which was a Provider owned building where clinical experiences take place, is located approximately 3 miles from the Provider's main campus.¹⁶

Based on the above assumptions and analysis, the Board majority finds that 1) the costs in question are not clinical training costs as defined since that definition specifically excludes classroom instruction and requests skill acquisition (training) to be in the Aactual environment,@ and 2) the training did not occur on the premises of the hospital- it occurred 3 miles away from the hospital. Therefore , the Board majority concludes that the provisions of OBRA ' 4004(b)(1) do not apply since,

- the provisions are for programs not operated by the hospital and in this case the Board, as a whole, believes the programs are operated by the hospital,
- the programs were not conducted on the premises of the hospital, and
- classroom training costs are not clinical training costs as defined.

To put these cases in perspective, the Board notes that its previous decision was based on the overwhelming evidence in the record which convinced it that the Provider was a joint operator of the nursing education program. In that decision, the Board rejected the Intermediary's argument that the Provider must be the Alegal operator@ of the program in order for it to receive the favorable pass-through treatment. The Board noted that it found nothing in the statute, regulations, or program instructions requiring the Provider to be the Alegal operator@ of the program. The Board notes that additional evidence presented in the instant cases, Provider Exhibits P-87 & 88, reinforces the conclusion by the Board in its previous decision.

¹⁶ See Stipulation at B.

Additionally, the Board notes that the decision in Community Care Foundation, F/K/A/ Northwest Medical Center, Inc, D/B/A Northwest Medical Center v. Tommy Thompson, Civil Action No. 99CV02947 (D.D.C. June 18, 2001), also reinforces its original decision in these cases. In this decision in which the district court ruled for the provider, it found that the provider, Acommitted substantial resources on a daily basis to the education program in which it was either a joint operator or, at least, a most significant collaborator.@ Accordingly, the Board stands united in its original decision that the Provider in this case also, Acommitted substantial resources on a daily basis to the education program in which it was either a joint operator or, at least, a most significant collaborator.@ Therefore, the Provider is entitled to pass-through treatment of the subject costs.

DECISION AND ORDER:

1. For purposes of completing the record in accordance with the HCFA Administrator's remand order dated May 24, 2000, the Board majority finds that the provisions of OBRA ' 4004(b) are not applicable to these cases. The Board, however, remains joined in its original decision in the cases (see attached), and restates this decision and order, that being, the Provider has an appropriate approved nursing program as defined under C.F.R. ' 413.85. The Provider's treatment of its nursing program costs as Medicare pass-through costs under PPS is correct. The Intermediary's adjustment is reversed.
2. The Board restates its prior decision dated March 24, 2000 with respect to the Provider's entitlement to reimbursement for Medical Director Part A hours.

Board Members Participating:

Irvin W. Kues
Henry C. Wessman, Esquire, Concurrence/Dissent in Part
Stanley J. Sokolove

Date of Decision: September 27, 2001

FOR THE BOARD:

Irvin W. Kues
Chairman

Dissenting Opinion of Henry C. Wessman:

I write this Opinion in the form of a Concurrence with the Majority's rather tortuous logic that ultimately upholds our prior full-majority decisions (PRRB 2000-D34, PRRB 2000-D35) which reversed the Intermediary adjustments on two (2) issues: the elimination of Part A hours for the Medical Director, and reclassification of costs and statistics for the Nursing School from a pass-through cost center to a non-pass-through cost center.

This Concurrence also responds directly to the CMS (formerly HCFA) Deputy Administrator's rather curious vacation and remand of these Decisions back to the PRRB. The remand reframes and significantly narrows the Issue to read: A. . . the Board will issue new decisions addressing whether, with respect to Issue No. 1, the provisions of ' 4004(b) of OBRA 1990 are applicable to the cost years at issue and, if so, whether the Provider meets the criteria set forth in ' 4004(b)(3) [sic] of OBRA 1990 for the payment of the claimed costs as reasonable costs . . .@ Hash Remand of PRRB 2000-34, 2000-35, 5/24/2000.

The short answer is no, OBRA 90 ' 4004(b) does not apply in this case. But the vacation of PRRB Decisions 2000-34 and 2000-35, together with the narrowness of the Deputy Administrator's arbitrary rewrite of the Issue leaves the Provider without a remedy.

Following a progeny of PRRB (78-D7, Butler County Hospital v. Blue Cross Ass'n., etal, Feb. 8, 1978; 93-D61, St. Ann's Hospital (Westerville, Ohio) v. BCBSA/Community Mutual Ins. Co., July 21, 1993; 94-D61, Barberton Citizens Hospital (Barberton, Ohio) v. BCBSA/Community Mutual Ins. Co., July 28, 1994; 97-D82, St. Mary's Medical Center (Duluth, MN) v. BCBSA/BCBSMinnesota, July 15, 1997; 99-D55, Northwest Medical Center v. BCBSA/BCBSArkansas, June 30, 1999; 2000-D34, Rapid City Regional Hospital v. BCBSA/BCBSIowa, March 24, 2000; 2000-D35, Rapid City Regional Hospital v. BCBSA/BCBSIowa, March 24, 2000; 2001-D13, Baptist Memorial Medical Center v.

BCBSA/BCBSArkansas, April 3, 2001) and Court (Butler County Memorial v. Califano, U.S. District Court, W.D.Pennsylvania, No. 78-83-C, October 17, 1978; Community Hospital of Indianapolis, Inc. v. Califano, U.S. District Court, S.D.Indiana, No. IP78-83-C, Aug. 21, 1979; Cleveland Memorial Hospital, Inc. v. Cellophane, U.S. District Court, E.D.North Carolina, No. 78-83-CIV-8, Dec. 20, 1979; St. John's Hickey Memorial Hospital, Inc. v. Cellophane, 559 F.2nd 803 (7th Cir. 1979); The Archbishop Bergan Mercy Hospital v. Cellophane, U.S. District Court, D.Nebraska, No. 76-0-446, May 23, 1980; Washington Adventist Hospital, Inc. v. Cellophane, 512 F.Supp. 932 (D.MD. 1981); Los Alamitos General Hospital, Inc. v. Donnelly, 558 F.Supp. 1141 (D.D.C. 1983); Community Care

Foundation, F.K.A. Northwest Medical Center, Inc., D.B.A. Northwest Medical Center v. Tommy Thompson, U.S. District Court, D.D.C., Civ. No. 99CV02947, June 18, 2001) Decisions, the Provider meets the test and definition of Operator, and is entitled to reasonable Medicare pass-through reimbursement under 42 C.F.R. ' 413.85(b). Thus, there is no need to venture into OBRA 1990 territory, Deputy Administrator Hash's invitation notwithstanding. That was the full PRRB Decision in vacated 2000-D34 and 2000-D35, and that remains, correctly so, the decision following remand. With this logic, I fully concur.

But the Majority of the Board, in the instant decision, chooses to go down the slippery slope of an Assuming arguendo scenario, and with that Assuming opinion, I dissent.

Truth is, in my humble opinion, if we must traverse OBRA 1990 land, the Provider still prevails. OBRA 1990 ' 4004, Payments for Medical Education Costs, (b) UNIVERSITY HOSPITAL

NURSING EDUCATION, contains two (2) subparts.

Subpart (1) OBRA 1990 ' 4004(b)(1) IN GENERAL 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 education programs that are not operated by the hospital shall be allowable as reasonable costs under Part A of title XVIII of the Social Security Act and reimbursed under such part on a pass-through basis. There is no question that the building in controversy, and thus the cost associated, belongs to the Provider (Tr. pp. 47-48, 59-61, 62-63; Provider Exhibit 86, Joint Stipulation, II-B) and thus constitutes Premises of the Provider. Similarly, there is no controversy surrounding the Activities, i.e. accredited, (SEE Provider's Position Paper Following Remand, 29 August 2000, p. 2) clinical sciences education in nursing. (SEE Tr.pp.48-50, 53, 56-58, 54-55, 72; Provider Exhibits P-77, P-78, P-79, P-80, P-87, P-88) (SEE ALSO Provider's Post-Hearing Brief Following Remand and Proposed Findings of Fact, Conclusions of Law and Decision, 15 December 2000, pp. 7-8, for an interesting conundrum created in the Deputy Director's Remand Order whereby, in applying the exception set forth in ' 413.85(d)(6) to this case to deny the Provider pass-through costs, he must, by rule, accept the costs as being for clinical training). In addition, the associated costs of the clinical training that occurred in the building, a significant portion of which ultimately undeniably benefitted Medicare recipients, were most certainly reasonable. (Provider Exhibits P-78, P-80; P-86 Joint Stipulation, II-N, II-O) Thus, if we must go there, the Provider meets all of the OBRA 1990 ' 4004(b)(1) tests: on premises, approved educational program, reasonable costs, clinical training - thus entitling them to Medicare pass-through costs for their cost-efficient, effective and creative nursing education program in collaboration with USD/SDSU.

Subpart two (2), OBRA 90 ' 4004(b)(2) CONDITIONS FOR REIMBURSEMENT, lists four (4) conditions that a Provider must meet to claim reasonable costs under Medicare for nursing education if the program is not operated by the hospital. All of these conditions can also be met by Rapid City Regional Hospital, as noted infra.

OBRA 90 ' 4004(b)(2)(A) - the hospital claimed and was reimbursed for such costs during the most recent cost reporting period that ended on or before October 1, 1989; (SEE Provider Exhibit P-86, Joint Stipulation, II-A, II-C for verification of this Condition for Reimbursement)

OBRA 90 ' 4004(b)(2)(B) - the proportion of the hospital's total allowable costs that is attributable to the clinical training costs of the approved program, and allowable under (b)(1) during the cost reporting period does not exceed the proportion of total allowable costs that were attributable to the clinical training costs during the cost reporting period described in subparagraph (A); (SEE Provider Exhibit 86, Joint Stipulation, II-E, II-F, II-G, II-H, II-N, II-O; Provider Exhibits P-77, P-78, P-80 for verification of this Condition for Reimbursement)

OBRA 90 ' 4004(b)(2)(C) - the hospital receives a benefit for the support it furnishes to such program through the provision of clinical services by nursing or allied health students participating in such program; and (SEE Provider Exhibit P-86, Joint Stipulation, II-I, II-J, II-K, II-M and Provider Exhibit 82 for verification of this Condition for Reimbursement)

OBRA 90 ' 4004(b)(2)(D) - the costs incurred by the hospital for such program do not exceed the costs that would be incurred by the hospital if it operated the program itself. (SEE Provider Exhibit P-86, Joint Stipulation, II-N, II-O for verification of this Condition for Reimbursement)

Finally, I write to express my disturbance with the action of the Deputy Administrator of CMS (formerly HCFA) whereby he not only vacated what were solid PRRB Decisions (2000-D34, 2000-D35) that responded squarely to the Appellant-framed Issue Statement, but then also proceeded to arbitrarily rewrite the Appellant-owned Issue Statement, on remand, in a manner which, had the PRRB bit on the red herring bait, would have had the impact of foreclosing the Provider's due process rights. The real issue here is a question of appropriateness of the reclassification of School of Nursing Joint Education costs, not the narrow question of whether the Provider followed a very circumscribed pathway to be reimbursed for legitimate Medicare costs.

Like a cagey Minnesota walleye, the Board Majority was eventually wise enough to only nibble at the bait, spit, and then to return to, and reaffirm, the solid full-Board Decisions in 2000-D34 and 2000-D35.

Respectfully

Henry C. ABud@Wessman, Esq.
Senior Board Member