

# PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2010-D50

**PROVIDER -**  
Walter O. Boswell Memorial Hospital  
Sun City, Arizona

Provider No.: 03-0061

**vs.**

**INTERMEDIARY -**  
BlueCross BlueShield Association/  
Noridian Administrative Services

**DATES OF HEARING -**  
March 13, 2009

Cost Reporting Periods Ended -  
December 31, 1995 through  
December 31, 2003

**CASE NOS.:** 06-1889; 06-1886; 06-1890;  
02-1517; 06-1888; 06-1887; 06-0755;  
06-0524 and 06-1142

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## ISSUES:

1. Whether the Provider's nursing education program qualified as provider-operated.
2. Whether, assuming the Provider's nursing education program did not qualify as provider-operated, the Provider is entitled to receive an additional payment to account for services provided to Medicare managed care patients (fiscal years 2000-2003 only).

## MEDICARE STATUTORY AND REGULATORY BACKGROUND

This is a dispute over the amount of Medicare reimbursement due a provider of medical services.

The Medicare program was established to provide health insurance to the aged and disabled. 42 U.S.C. §§1395-1395cc (2009). The Centers for Medicare and Medicaid Services (CMS), formerly the Health Care Financing Administration (HCFA), is the operating component of the Department of Health and Human Services (DHHS) charged with administering the Medicare program. CMS' payment and audit functions under the Medicare program are contracted to organizations known as fiscal intermediaries. Fiscal intermediaries determine payment amounts due providers under Medicare law and under interpretive guidelines published by CMS. 42 U.S.C. §1395h, 42 C.F.R. §§413.20 and 413.24 (2009).

At the close of its fiscal year, a provider must submit a cost report to the fiscal intermediary showing the costs it incurred during the fiscal year and the portion of those costs to be allocated to Medicare. 42 C.F.R. §413.20. The fiscal intermediary reviews the cost report, determines the total amount of Medicare reimbursement due the provider and issues the provider a Notice of Program Reimbursement (NPR). 42 C.F.R. §405.1803 (2009). A provider dissatisfied with the intermediary's final determination of total reimbursement may file an appeal with the Provider Reimbursement Review Board (Board) within 180 days of the receipt of the NPR. 42 U.S.C. §1395oo(a); 42 C.F.R. §405.1835 (2009).

From the inception of the Medicare program, nursing education cost have been reimbursed on a reasonable cost basis if the program was provider-operated. 42 U.S.C. §1395x9v)(1)(A). See 42C.F.R. §405.421 (1970); 57 Fed. Reg. 43,659, 43,661 (Sept. 22, 1992), Exhibit P-19. In 1975, CMS clarified that "[e]xpenditures incurred by a provider in support of approved nursing . . . education programs which the provider does not itself operate are not recognized as allowable costs of the provider for Medicare reimbursement purposes." HCFA Pub. 15-1, Transmittal No. 137 (Nov. 1975), Exhibit P-20.

In 1983, Congress enacted the Medicare inpatient prospective payment system (PPS) under which the Medicare program reimburses inpatient hospital services at a fixed, predetermine rate. See Social Security Amendments of 1983, Pub. L. No. 98-21, §601(e); 42 U.S.C. §1395ww(d). The September 1983 Interim Final Rule implemented the hospital inpatient prospective payment system (PPS).<sup>1</sup> Certain approved nursing education activities were excluded from hospital

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<sup>1</sup> On October 1, 1983, Congress amended the Social Security Act and adopted a new payment system known as the Prospective Payment System (PPS) for the operating costs of inpatient hospital services. 42 U.S.C. §1395ww(d) (2009).

operating costs under PPS, and these costs continued to be paid on a reasonable cost or “pass-through” basis. 42 U.S.C. §1395ww(a)(4).

Regulations implementing the inpatient PPS provided that “approved education activities” of nurses would be paid on a reasonable cost basis. 42 C.F.R. §412.113(b) and, CMS clarified that it would continue to require that nursing education programs be provider-operated to receive reasonable cost reimbursement. 48 Fed. Reg. 39,797, 39,811 (Sept. 1, 1983). CMS added subsection(d)(6) to the regulation governing approved educational activities at 42 C.F.R. §405.21 to clarify that nursing education programs must be provider-operated:

The costs of the following activities are not within the scope of this principle [permitting reasonable cost reimbursement] but are recognized as normal operating costs and are reimbursed in accordance with applicable principles –

\* \* \* \* \*

(6) Other activities which do not involve the actual operation or support (except through tuition or similar payments) of an approved education program.

The preamble to the final rule stated:

We believe that only the costs of those approved medical education programs operated directly by a hospital [should] be excluded from the prospective payment system. If a program is operated by another institution, such as a nearby college or university, [it] must be noted that by far the majority of the costs of that program are borne by that other institution, and not by the hospital. While it is true that the hospital may incur some of the costs associated with its provision of clinical training to students enrolled in a nearby institution, the hospital also gains in return. For example, it obtains the services of the trainee (often at no direct cost to itself). We do not believe that this type of relationship was what Congress intended when it provided for a pass-through of the costs of approved medical education programs. Rather, we believe that Congress was concerned with those programs that a hospital operates itself, and for which it incurs substantial direct costs.

49 Fed. Reg. 267 (Jan. 3, 1984).

The Omnibus Budget Reconciliation Act of 1989<sup>2</sup> (OBRA-89) and the Omnibus Budget Reconciliation Act of 1990<sup>3</sup> (OBRA-90) revised the nursing and allied health education cost rules. Section 6205(a) of OBRA-89 created a temporary category of “hospital-based nursing schools” and allowed a hospital to claim the costs incurred in training students in a hospital-based nursing school as pass-through costs (reimbursed as reasonable costs under Title XVIII of the Social Security Act). This category was effective for cost reporting periods beginning on or after December 19, 1989 and on or before the date the Secretary issued a final rule for the payment of costs of approved nursing and allied health education programs. CMS was directed

<sup>2</sup> Public Law 101-239.

<sup>3</sup> Public Law 101-508

to issue regulations by July 1, 1990 clarifying the criteria for reasonable cost reimbursement of nursing education costs:

Such regulations shall specify:

- (i) the relationship required between an approved nursing . . . education program and a hospital for the program's costs to be attributed to the hospital;
- (ii) the types of costs related to nursing . . . education programs that are allowable by Medicare;
- (iii) the distinction between costs of approved educational activities [eligible for pass-through reimbursement] and educational costs treated as operating costs of inpatient hospital services; and
- (iv) the treatment of other funding sources for the program.

Congress mandated that these regulations "shall not be effective prior to October 1, 1990, or 30 days after publication of the final rule in the Federal register, whichever is later." OBRA 1989 §6205(b)(2)(B)(iii). Section 4004(b) of OBRA-90 established the methodology for payment of the costs of approved nursing and allied health education activities.

CMS responded to the 1989 and 1990 OBRA changes with the publication of a proposed rule in 1992. 57 Fed. Reg. 43,659 (Sept. 22, 1992).<sup>4</sup> In it, CMS proposed five criteria that a nursing education program would have to meet to be considered provider-operated.

CMS issued the Final Rule January 12, 2001. 66 Fed. Reg. 3,358.<sup>5</sup> The Final Rule was substantially the same as the proposed rule.

The new 42 C.F.R. §413.85(c) defined "approved educational activities" as formally organized or planned programs of study of the type that:

- (1) Are operated by providers as specified in paragraph (f) of this section;
- (2) Enhanced the quality of inpatient care at the provider; and
- (3) Meet the requirements of paragraph (e) of this section for State licensure or accreditation.

66 Fed. Reg. 3374 (January 12, 2001). 42 C.F.R. §413.85(f)(2001) stated the criteria for identifying programs operated by a provider as follows:

- (1) Except as provided in paragraph (f)(2) of this section, for cost reporting periods beginning on or after October 1, 1983, in order to be considered the operator of an approved nursing or allied health education program, a provider must meet *all* the following requirements:
  - (i) Directly incur the training costs

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<sup>4</sup> Exhibit P-19.

<sup>5</sup> Exhibit P-22.

- (ii) Have direct control of the program curriculum.

(A provider may enter into an agreement with an educational institution to furnish basic academic courses required for completion of the program, but the provider must provide all of the courses relating to the theory and practice of the nursing or allied health profession involved that are required for the degree, diploma, or certificate awarded at the completion of the program.)

- (iii) Control the administration of the program, including collection of tuition (where applicable), control the maintenance of payroll records of teaching staff or students, or both (where applicable), and be responsible for day-to-day program operation.

(A provider may contract with another entity to perform some administrative functions, but the provider must maintain control over all aspects of the contracted functions.)

- (iv) Employ the teaching staff.
- (v) Provide and control classroom instruction and clinical training (where classroom instruction is a requirement for program completion), subject to the parenthetical sentence in paragraph (f)(1)(ii) of this section.

- (2) Absent evidence to the contrary, the provider that issues the degree, diploma or other certificate upon successful completion of an approved education program is assumed to meet all of the criteria set forth in paragraph (f)(1) of this section and to be the operator of the program.

42 C.F.R. §413.85(f)(2001). (Emphasis added)

Section 541(a) of the Medicare, Medicaid, and SCHIP Balanced Budget Refinement Act (BBRA) of 1999 provides for additional payments to hospitals for costs of nursing and allied health education programs associated with Medicare managed care or Medicare + Choice enrollees. The applicable regulation, 42 C.F.R. §413.87 (2001), states in part:

- (a) *Statutory basis* – This section implements section 1886(l) of the Act, which provides for additional payments to hospitals that operate and receive Medicare reasonable cost reimbursement for approved nursing and allied health education programs and the methodology for determining the additional payments.
- (b) *Scope* – This section sets forth the rules for determining an additional payment amount to hospitals that receive payments for the costs of operating approved nursing or allied health education programs under §413.85.

CMS issued a Program Memorandum on November 22, 2000 addressing this issue. Transmittal No. A-00-86<sup>6</sup> states:

Hospitals that operate approved nursing or allied health education programs and receive Medicare reasonable cost reimbursement for these program[s] are entitled to receive additional payments for Medicare + Choice enrollees.

#### STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

Walter O. Boswell Memorial Hospital (Provider) is not-for-profit acute care hospital located in Sun City, Arizona. The following facts relevant to the above issues were stipulated:

#### Issue No. 1 - - Provider - Operated Nursing Education Program

- The facts relevant to a decision on the remaining issues are not in dispute.
- The facts relevant to a decision on the remaining issues were the same throughout the cost reporting periods covered by these appeals.
- Nearly 30 years ago, Boswell's community Board of Directors authorized the establishment of a nursing education program in partnership with a local community college. Boswell approached Mesa Community College ("MCC" or "Mesa"), which is part of the Maricopa County Community College District ("MCCCD"), and the two institutions began a partnership for a nursing school to be located on the Boswell campus. The Boswell/Mesa nursing education program began operating in January 1982, and the first class graduated in December 1982.
- When the nursing education program was established at Boswell, neither MCC nor any other educational institution operated a nursing school in Sun City, Arizona.
- The initial contract between Boswell and MCC regarding the Boswell nursing education program was executed in November 1981. The contract stated that Boswell and MCC were creating "a new educational program in nursing to serve the community area." Boswell was responsible for the full cost of the program's faculty and agreed to "pay (MCCCD) the salary (to include fringe benefits and other related costs appropriately agreed to by both parties) of the Nursing faculty members needed to implement the program at the Boswell Education Center. Said salaries are subject to the salary schedules of the MCCCD."
- Under the terms of the 1981 contract, faculty were to be selected jointly by Boswell and MCC, and faculty members were to be subject to Boswell's rules and regulations. Boswell was required to supply secretarial support and to provide all instructional supplies for the program. The contract specified that, after consulting with Boswell, MCC would provide the outlines and content of the nursing education program's curriculum.

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<sup>6</sup> See Intermediary's Revised Final Position Paper at Exhibit I-30.

- The contract between Boswell and MCC that was in effect during the Provider's fiscal year 1995 through 2003 Medicare cost reporting periods was essentially the same as the 1981 contract.
- With respect to the relationship between Boswell and MCC, the Boswell nursing education program has operated in basically the same manner since its inception through the periods covered by these appeals.
- From the inception of the Boswell/Mesa nursing education program in 1982, and until the adjustments that are the subject of these appeals, Boswell's costs relating to the operation of the nursing school were reimbursed on a reasonable cost basis in the Provider's Medicare cost report.
- In 1990, the Provider and the Intermediary entered into a settlement of a Provider Reimbursement Review Board appeal involving the Provider's fiscal years 1984-1988. The appeal involved the application of the "consistency rule" during the hospital inpatient prospective payment system (PPS) transition period. As part of that settlement, the Intermediary "agree[d] to allow cost reimbursement for the nursing education costs incurred by the provider for the years under appeal. . . ." A signed stipulation in that appeal stated that "Blue Cross and Blue Shield of Arizona acknowledges that after the completion of the PPS transition period, Boswell once again qualified for Medicare reimbursement of its nursing education as a pass-through cost." The settlement agreement and stipulation reflect the Intermediary's acknowledgment, at that time, that the Boswell nursing education program qualified as provider-operated under the Medicare rules in effect at that time.
- In 1992, the Health Care Financing Administration, now the Centers for Medicare and Medicaid Services (hereafter, "CMS"), issued proposed Medicare regulations that identified five criteria that a nursing or other allied health education program would have to meet to be considered provider-operated:
  - The provider must incur the costs associated with the training.
  - The provider must directly control the curriculum, that is, the provider must determine the requirements to be met for graduation.
  - The provider must control the administrative duties relating to the program.
  - The provider must employ the faculty.
  - The provider must provide and control both classroom and clinical instruction.

57 Fed. Reg. 43,659, 43,672 (1992). At 66 Fed Reg. 3361 (2001), the Secretary stated that the revision to 42 C.F.R. §413.85(f), which added the five criteria, was intended to clarify its policy on paying providers for nursing and allied health programs. These five proposed criteria had not previously appeared in any Medicare regulation, manual provision, transmittal, or program instruction regarding the requirements for qualifying as "provider-operated."

- Following the issuance of the proposed criteria in 1992, the Intermediary continued to treat the Boswell nursing education program as a provider-operated program.
- On January 12, 2001, CMS issued a final rule for reimbursement of nursing and other allied health education programs. 66 Fed. Reg. 3,358 (2001). The final rule largely mirrored the language in the 1992 proposed rule and included the five criteria for qualifying as “provider-operated.”
- Prior to the issuance of final Medicare regulations on January 12, 2001, the Intermediary had consistently treated the Boswell/Mesa nursing education program as a provider-operated nursing education program.
- Boswell employs the director of the Boswell nursing education program (hereafter “Director”). The Director reports directly to the Provider’s Vice President of Nursing and serves as the nursing education program’s liaison to the Provider’s community Board of Directors. The Provider is responsible for the costs of the Director’s salary and fringe benefits.
- The Director is responsible for overseeing all clinical and administrative aspects of the Boswell nursing education program and controls the program’s day-to-day operations. Among other duties, the Director determines and manages the program’s annual budget in conjunction with the Provider’s fiscal staff and administration; mentors and evaluates faculty; determines the number of students to admit to the program; determines and distributes scholarship funds; implements the curriculum; oversees the distribution of faculty loads; determines the types and locations of clinical experiences; distributes funds for faculty continuing education; oversees the purchasing of educational and technological resources for faculty and students; and otherwise handles the day-to-day issues that arise in operating the nursing school. The Director also represents the nursing school on the MCCC Nursing Instructional Council and communicates with MCC administration regarding issues relating to the program.
- In addition to the Boswell/Mesa nursing education program’s Director, the Provider also employs an administrative assistant whose sole responsibility is aiding in the administration of the Boswell nursing education program. The Provider also employs a Faculty Lab Coordinator, who helps guide students through the clinical curriculum. The Provider is responsible for the salary and fringe benefits of the administrative assistant and Faculty Lab Coordinator.
- Boswell pays for the costs of educational seminars for faculty and for computer, laboratory, and other equipment necessary for instruction. Boswell is also responsible for the costs of the building in which instruction takes place on the Boswell campus. These costs are included in the Provider’s Medicare cost report by virtue of an allocation of building costs from Sun Health Corporation’s Home Office Statement.
- During the cost reporting periods at issue, except for some part-time faculty that were paid directly by Boswell, the nursing school faculty salaries were paid from a restricted fund that was maintained by MCC, but was funded by Boswell, consistent with its contractual obligation. Boswell was financially responsible for the cost of the faculty’s salary and fringe benefits, including payroll taxes. All salary increases for the nursing school faculty were subject to Boswell approval. During the cost reporting periods at issue, most, but not all, of the nursing school faculty were on the MCC payroll. MCC issued W-2s for these faculty members. The Provider issued W-2s for the part-time faculty members that were paid directly by the Provider.

- The Provider is responsible for the environment in which the faculty members conduct their work, and the faculty members perform their work on the Boswell campus. The Director prepares evaluations of the faculty members. The faculty members are subject to Boswell's personnel and other policies. Boswell supervises and controls faculty work schedules. Boswell creates the teaching schedule for instruction and determines the distribution of faculty hours.
- The nursing school faculty members are selected jointly by Boswell and MCC. Boswell has the authority to terminate nursing school faculty, and they must satisfy Boswell's standards in order to be hired and retained. Boswell has exercised its authority to terminate nursing school faculty.
- The nursing school faculty members are treated as employees of the Provider while in the Provider's facilities and are governed by the Provider's employee policies and procedures.
- The nursing school students take all required classes in nursing theory and laboratory practice in facilities on the Provider's campus. This instruction takes place in a Boswell building dedicated to the nursing program.
- The only classes that the Provider's nursing students do not take at Boswell are some required classes not specifically related to nursing. Only three of the 21 required courses for the Registered Nurse program are not available at Boswell (Principles of Human Nutrition, English 102, Humanities). Of the 12 classes required for the Licensed Practical Nurse program, only one (Principles of Human Nutrition) is not furnished at Boswell.
- The State of Arizona allocates state funds to community college districts based on full-time equivalent student enrollment, commonly known as the "FTSE." A FTSE is defined as fifteen semester credits. The FTSE is a proxy used by the state to allocate state funding. The FTSE payment is not tied to the actual cost of a full-time student. An increase in FTSE does not necessarily mean that a community college receives additional funding from the State. The State funding can fall as the number of FTSE rises, due to budget cuts or other factors.
- MCC includes students enrolled at the Boswell campus when reporting the number of MCC full-time equivalent students for purposes of the FTSE calculation. MCC provides certain administrative support services for the Boswell nursing education program, including collection of tuition, student enrollment, issuance of reports cards and diplomas, furnishing student email accounts and maintaining accreditation. None of the costs incurred by MCC in providing these administrative services is claimed by Boswell in its Medicare cost report.
- Since the beginning of its nursing education program, and through the cost reporting periods at issue, the Provider has been obligated to pay the faculty salary costs for the Boswell/Mesa nursing education program. MCC maintained restricted accounts for the Boswell nursing education program. These accounts were self-balancing, and funds paid by the Provider to MCC directly offset the faculty salaries. The restricted accounts for the Boswell program, which balance to zero, were not recorded in MCC's operational fund.
- Boswell received no FTSE funds or any other State or local government funds for the costs it incurred in operating its nursing education program.

- The students in the Boswell nursing education program provide a benefit to the Provider through the provision of clinical services to patients in the Provider.
- The costs incurred by the Provider do not exceed the costs the Provider would have incurred if it operated the nursing school without the involvement of MCC.
- The curriculum utilized at Boswell is developed in conjunction with the Maricopa Community Colleges Nursing Program (“MCCNP”). The nursing school Director at Boswell is a member of the MCCNP Nursing Instructional Council. Members of the Boswell faculty serve on the MCCNP’s Community & Curriculum Integration Team (“CCIT”), which helps to develop and implement nursing school curriculum.
- The Mesa Community College nursing school, including the Boswell/Mesa nursing education program, is accredited by the National League for Nursing Accreditation Commission (“NLNAC”). The NLNAC determines the requirements to be met for each nursing program (e.g., Registered Nurse, Licensed Practical Nurse) and requires that nursing school faculty develop the curriculum for meeting these requirements. Each nursing school faculty member develops the syllabus for his or her course and determines the learning activities to ensure the objectives of the course are achieved.
- The Boswell/Mesa nursing education program is the type of formally organized and planned program of study usually engaged in by a provider to enhance the quality of patient care.
- Because of the critical nursing shortage in Arizona, the Boswell/Mesa nursing education program is helpful to meet the Provider’s and the community’s needs for nursing personnel.
- The Boswell/Mesa nursing education program gives the Provider access to a pool of qualified nursing personnel. The Provider recruits a substantial number of its nursing staff from the nursing school.

#### Issue No. 2 - Medicare Managed Care Payment For Provider’s Nursing Education Program

- If the Boswell/Mesa nursing education program is determined to qualify as a provider-operated program, the Provider is entitled to receive an additional payment to account for services provided to Medicare managed care patients, pursuant to 42 C.F.R. §1395ww(1) and 42 C.F.R. §413.87, for cost reporting periods beginning on or after January 1, 2000.
- For the cost reporting periods at issue in these appeals, the Provider is entitled to and received Medicare payments for the costs of clinical training under the Boswell/Mesa nursing education program.
- For the cost reporting periods at issue in these appeals, the Provider had a Medicare managed care utilization rate greater than zero.

The Provider timely appealed the Intermediary’s adjustments to the Board. The Provider was represented by Mary Susan Philp, Esquire, of Powers, Pyles, Sutter & Verville, P.C. The Intermediary was represented by James R. Grimes, Esquire, of Blue Cross Blue Shield Association.

Issue No. 1 - - Provider-Operated Nursing Education ProgramPROVIDER'S CONTENTIONS:

The Provider contends that its nursing education program qualifies as provider-operated for the entire period covered by these appeals, FYs 1995-2003, under the criteria published in 2001 in 42 C.F.R. §413.85(f). The Provider argues these five criteria must be interpreted consistently with previously established standards for provider-operated status and, as so interpreted, the Provider's nursing education program meets the five criteria. Specifically, the Provider contends that the relevant facts, as stipulated by the parties and as testified to at the hearing, support the Provider's position that it: (1) incurs the training costs; (2) controls the curriculum; and (3) controls the administration of its nursing education program; (4) employs the teaching staff; and (5) controls the classroom instruction and the clinical training.

First, the Provider contends it controls the day-to-day administration of the program both through hands-on control and through its funding of the program. The Provider employs the Director of the Boswell nursing education program who is responsible for overseeing all clinical and administrative aspects of the program and controls the program's day-to-day operations. In addition, the Provider employs an administrative assistant, whose sole responsibility is aiding in the administration of the Boswell nursing education program, and a Faculty Lab Coordinator, who helps guide students through the clinical curriculum. The Provider is responsible for the salary and fringe benefits of the administrative assistant and Faculty Lab Coordinator. The Provider pays the costs of educational seminars for faculty and for computer, laboratory, and other equipment necessary for instruction, and is also responsible for the costs of the building in which instruction takes place on the Boswell campus. While some administrative responsibilities, such as payroll for selected faculty and issuance of reports cards, are delegated to MCC, the Provider maintains overall administrative control of the nursing education program thereby satisfying this criterion for provider-operated status. Furthermore, this cost-effective arrangement is consistent with the 2001 provider-operated regulations which permit a provider to "contract with another entity to perform some administrative functions." 42 C.F.R. §413.85(f)(1)(iii).

Second, the Provider contends it employs the teaching staff. The regulation at 42 C.F.R. §413.85(f)(iv) does not define the word "employ." Accordingly, in interpreting its meaning, the Provider directs the Board to the common law definition of "employ" and traditional principles of agency law. *See New York Life Ins. Co. vs. United States*, 190 F.3d 1372, 1382 (D.C. Cir. 1999) (applying common law definitions of employee in the Medicare context). The Provider asserts it employs the faculty to a greater degree than did hospitals involved in other nursing education programs found by the Board to be provider-operated. *See, e.g., Barberton Citizens Hospital v. Blue Cross and Blue Shield Association/ Community Mutual Insurance Company*, [1994-2 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶42,587 (PRRB 1994) (program may be provider-operated if the hospital has the authority to remove faculty members, and they are "treated as employees of the Provider while in the Provider's facilities, are governed by the Provider's employees policies and procedures, and are covered under the Provider's liability

insurance policy”).<sup>7</sup> Therefore the Provider “employs” the faculty for purposes of section 413.85(f)(1)(iv). The Provider also contends that the fact that MCC may also employ the faculty does not undercut this conclusion, as the regulation does not require that a provider be the sole employer of the teaching staff and does not preclude a joint employment relationship. See, Growers Co. vs. Industrial Comm’n of Arizona, (Ariz. Ct. App. 1993). Here, Boswell and MCC both retain some degree of control over the faculty and the services rendered by the faculty benefit both institutions. Accordingly, both Boswell and MCC may be viewed as employing the faculty, and Boswell satisfies the employment criterion of 42 C.F.R. §413.85(f)(1)(iv).

Third, the Provider contends it incurs the training costs of the nursing education program. Provider points out Board precedent establishing that a nursing program is provider-operated if the hospital incurs costs such as salary and benefits of personnel who are involved in the training, capital costs related to classrooms, offices, and equipment used for the training, and overhead costs in support of the training.<sup>8</sup> The Provider claims it meets these standards by having incurred substantially all the costs relating to the program including salaries of the program’s faculty, Director, Administrative Assistant, and the Faculty Lab Coordinator. The Provider also incurs the non-salary costs of faculty continuing education, educational and technological resources for faculty and students, classroom instruction, and scholarship funds. The Provider supplies the building in which the non-clinical instruction takes place, and all of the computer, laboratory, and other equipment used for the instruction.

Fourth, the Provider contends it controls the curriculum through its development by the Provider’s faculty and other employees, as well as through classroom and clinical instruction on the Provider’s campus. Specifically, the curriculum utilized at Boswell is developed in conjunction with the Maricopa Community Colleges Nursing Program (MCCNP). The Provider’s nursing program Director is a member of the MCCNP Nursing Instructional Council, and members of the Provider’s faculty serve on the MCCNP’s Community & Curriculum Integration Team, which helps develop and implement the nursing school curriculum. The course objectives and outlines developed through this process are implemented by the Provider’s faculty into the nursing school curriculum.

Finally, the Provider asserts it controls the classroom instruction. The nursing students enrolled in the Boswell nursing education program take all required classes in nursing theory and practice on the Provider’s campus. The classroom instruction takes place in a Boswell building dedicated to the nursing program. The only classes that the Provider’s nursing students do not take at Boswell are a few required classes not specifically related to nursing, which is permitted by the regulations. The Provider contends it controls the clinical training through the Program’s Director, who is a Provider employee. The director determines the types and locations of clinical experiences, and another Provider employee, the Faculty Lab Coordinator, helps guide students through the clinical curriculum.

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<sup>7</sup> See also, St. Ann’s Hospital v. Blue Cross and Blue Shield Association/Community Mutual Ins. Co., [1993-2 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶41,626; See also Provider’s Position Paper at Exhibit P-26; St. Mary’s Medical Center v. Blue Cross and Blue Shield Association/ Blue cross and Blue Shield of Minnesota, [1997- 2 Transfer Binder] Medicare and Medicaid Guide (CCH) ¶45,503.

<sup>8</sup> See, Barberton Citizen’s Hospital; St. Mary’s Medical Center; St. Ann’s Hospital.

Alternatively, the Provider contends that if it is not found to meet the five criteria in 42 C.F.R. §413.85(f), then it should be found to meet the standards for provider-operated status that existed prior to the issuance of that regulation in 2001. The 2001 regulation regarding provider-operated status was issued pursuant to a Congressional directive in the Omnibus Budget Reconciliation Act (OBRA) of 1989 which expressly stated that the regulation establishing provider-operated criteria “shall not be effective prior to October 1, 1990, or 30 days after publication of the final rule in the federal register, whichever is later.” OBRA 1989 §6205(b)(2)(B)(iii). Because the 2001 final rule was published on January 12, 2001, Congress explicitly required that it not take effect until 30 days later, i.e., on February 11, 2001. The provider contends applying the 2001 regulation to the Provider’s FYs 1995 through 2001 (i.e., cost reporting periods that began prior to February 11, 2001) would violate the explicit mandate of OBRA 1989.

The Provider argues that, prior to the 2001 regulation, standards for provider-operated status were well-developed through PRRB and judicial decisions. As established in the seminal court decision in St. John’s Hickey Memorial Hospital, Inc. vs. Califano, 599 F.2d 803 (7<sup>th</sup> Cir. 1979) and as applied by the Board in numerous decisions, nursing education programs were considered provider-operated if the following factors were present:

1. The clinical portion of the program involves classroom and on-the-job training on the provider’s premises;
2. The provider initiates the program and plays a major role in developing the curriculum, and its staff actively participates in the day-to-day operations of the program;
3. The provider pays for the salaries of the clinical instructors through cash payments to the school;
4. The faculty and students are subject to the provider’s rules and practices;
5. The provider has a strong voice in the selection of the faculty and can remove an instructor or student for failure to comply with provider policies;
6. Administrators of both institutions periodically discuss the operation of the program and resolve any differences with respect to its conduct; and
7. The provider controls the scheduling of clinical assignments.

The Provider contends its nursing education program clearly meets the above standards to qualify as provider-operated.

The Provider asserts that CMS adopted these standards when CMS applied the standards articulated in St. John’s Hickey to Community Hosp. of Indianapolis, Inc. v. Blue Cross Ass’n/Mutual Hosp. Ins. Co., [1979-2 Transfer Binder] Medicare & Medicaid Guide (CCH) ¶30,089 (HCFA Admin 1979)<sup>9</sup> and then commented in the Final Rule:

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<sup>9</sup> Exhibit P-23

On October 1, 1979, Medicare policy was amended to correspond with the ruling of the court in HCFA administrator's decision on Provider Reimbursement Review Board Decision No. 79-D50.<sup>10</sup>

#### INTERMEDIARY'S CONTENTIONS:

The Intermediary contends that nursing education program costs were disallowed because the provider did not meet the criteria in 42 C.F.R. §413.85(f)(2001). It was not deemed to be the operator of the program as defined subsection (f)(2) because the nursing education program accreditation certificate was issued to Mesa Community College, not the Provider, and Mesa issues the degrees or certificate.<sup>11</sup> Because the Provider does not meet the claimed status, it must therefore meet all five of the regulation criteria at 42 C.F.R. §413.85(f)(1) to be considered provider-operated. The Intermediary contends those requirements were not met by the Provider. First, the Intermediary's contends the Provider does not control the administration of the program because it does not collect tuition or maintain payroll records. Second, the Provider does not employ the teaching staff. Rather, the faculty is subject to the salary guidelines and schedules of the college and they are on MCC's payroll. Finally, the Provider does not directly control the program curriculum. The curriculum is controlled by and determined by the Maricopa County Community College District (MCCCD) of which Mesa Community College is a part. Under the terms of the 1981 contract between Boswell and MCC, the college is responsible for the outlines and content of the nursing program courses at the Boswell Education Center.

The Intermediary further notes that the MCCCD includes nursing school students in its FTSE<sup>12</sup> report used to allocate state funds and that CMS agrees that the Boswell nursing program is not provider-operated.<sup>13</sup> The Intermediary asserts its position is consistent with various U.S. Court of Appeal decisions and states that the decision in St. John's Hickey is not controlling in this case.

#### Issue No. 2 – Medicare Managed Care Payment for Provider's Nursing education Program

#### PROVIDER'S CONTENTIONS:

The Provider contends the plain language of 42 U.S.C. §1395ww(1) entitles it to Medicare managed care payment regardless of whether or not the Provider's nursing program is deemed to be provider-operated for FYs 2000 through 2003. The criteria for payment in 2000 is that a hospital: (1) must have received reasonable cost reimbursement two years previously for an approved nursing or allied health training program and (2) must receive reasonable cost reimbursement in the current year for the approved nursing or allied health training program. For 2001 and thereafter, the statute also requires that the hospital must have some Medicare managed care utilization. The Provider contends that it meets these statutory requirements.

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<sup>10</sup> 66 Fed. Reg. 3359 (Jan. 12, 2001) Exhibit P-22. Decision No. 79-D50 is the Board's decision on Community Hosp.

<sup>11</sup> See Intermediary's Revised Final Position Paper at Exhibit I-9. See also, Transcript at 19-20.

<sup>12</sup> Full-time equivalent student.

<sup>13</sup> See Intermediary's Revised Final Position Paper at Exhibits I-10 through I-12.

The Provider also cites the Medicare regulation at 42 C.F.R. §413.87 as support for an additional payment for Medicare managed care patients to a hospital that operates and/or receives payment for approved nursing and allied health programs. Finally, Provider argues that from January 1, 2001 onwards, the regulation does not require a provider to operate the nursing education program. The structure of the regulation for years after 2000, therefore, conforms to the statute which, by its own terms, applies to all hospitals that receive reasonable cost reimbursement for nursing education costs. Thus, if the regulation is interpreted to limit payment to provider-operated programs, it would be in conflict with the statute.

#### INTERMEDIARY'S CONTENTIONS:

The Intermediary contends that 42 C.F.R. §413.87 is applicable only to providers which operate a nursing or allied health program. There is no exception for providers who were paid only for clinical costs associated with non provider-operated programs.

#### FINDINGS OF FACT, CONCLUSION OF LAW AND DECISION:

After considering the Medicare law and guidelines, the parties' contentions and the evidence presented, including stipulations which the Board finds to be supported by the record, the Board finds and concludes as follows:

##### Issue No. 1 - - Provider-Operated Nursing Education Program

The Board finds that the Provider's nursing education program does not comply with the regulatory requirements of 42 C.F.R. §413.85(f). This regulation, amended in 2001, has five requirements that must all be met in order for a Provider's nursing education program to be considered provider-operated. In summary, a provider must:

- (i) Directly incur the training costs.
- (ii) Have direct control of the program curriculum.
- (iii) Control the administration of the program, including collection of tuition (where applicable), control the maintenance of payroll records of teaching staff or students, or both (where applicable), and be responsible for day-to-day program operation.
- (iv) Employ the teaching staff; and
- (v) Provide and control both classroom instruction and clinical training.

After reviewing the entire record, the Board concludes that the Provider did not meet all the criteria. In a letter dated March 29, 2005, CMS stated the Provider did not satisfy the following requirements: (1) control the administration of the program (2) employ the teaching staff and (3) have direct control of the program curriculum.<sup>14</sup> The Board concurs with CMS' analysis of the Provider's program.

Regarding control of the program's administration, the regulation at 42 C.F.R. §413.85(f)(1)(iii) requires the collection of tuition. Provider witness, Paulette Compton, Program Director, testified that the tuition is set by the MCC board; the Provider has no control over the amount of

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<sup>14</sup> Provider Position Paper Exhibit P-39.

tuition charged.<sup>15</sup> The Intermediary's witness, James Ward, Appeals Coordinator, stated that setting the tuition is a part of program administration; in this case, Mesa or MCC is the party collecting the tuition, even though the Provider incurs all or most of the cost of the program (salaries of all faculty-directly or indirectly, benefits, space, supplies and equipment, CPE, etc.<sup>16</sup> The Board finds that because the tuition was not collected by the Provider nor used for the Provider's benefit, i.e., it was not netted against expenses incurred by the Provider, the Provider does not meet the regulation's explicit requirement for control of the program's administration.

Regarding the regulatory requirement for employing the teaching staff, it is undisputed that the Provider does not employ the teaching staff or maintain payroll records.

Finally, the parties acknowledged that the provider did not have control over the program's curriculum.<sup>17</sup> The National League for Nursing Accreditation Commission (NLNAC) determines the requirements to be met for each nursing Program and requires the nursing school faculty to develop the curriculum that meet those requirements. Although the curriculum used at Boswell was developed in conjunction with the Maricopa Community Colleges Nursing Program Community and Curriculum Integration Team (MCCNP), the Board finds that the provider did not have direct control of the program's curriculum.

Based on the above analysis, the Board concludes that the Provider did not meet all of the 2001 requirements of 42 C.F.R. §413.85(f)(1).

This does not end our analysis, however. The Provider argued that the 2001 revision to 42 C.F.R. §413.85(f) cannot be applied to fiscal years ended 1995 through 2000 because the regulation change was not finalized and available for application until 2001. The regulation plainly states that the 2001 regulation change applies to cost reporting periods beginning on or after October 1, 1983<sup>18</sup> and the Board has no authority to invalidate the expressed effective date of the 2001 change. However, for judicial economy, the Board will address fact issues relating to whether the criteria in the 2001 regulatory rule represented policy prior to the publication of the rule.

The Board observes that the regulatory rule for nursing education programs involving outside educational institutions prior to 2001 was very general. In November 1975, CMS issued Program Instruction Revision No. 137 which required approved nursing education programs to be provider-operated. The Board finds no evidence, however, that the criteria in the 2001 rule reflected long standing program policy.

First, the OBRA 89 directive for CMS to issue regulations addressing how relationships and specific costs would be handled for pass-through reimbursement suggests Congress was not satisfied CMS had already established these criteria.

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<sup>15</sup> Transcript (Tr.) at 55-56.

<sup>16</sup> Tr. at 83-84.

<sup>17</sup> See Stipulations ¶¶ 34 and 35.

<sup>18</sup> See, 42 C.F.R. §413.85(f)(1).

Second, the proposed rule describes criteria that it stated is reflected in the Provider Reimbursement Manual (PRM) but does not identify which section or the language on which it relies to have previously established that particular criteria. Although several provisions are discussed and quoted in detail, none contain the specific criteria adopted in the 2001 regulation.<sup>19</sup>

Third, the regulation in effect prior to the 2001 publication of the Final Rule spawned litigation, including the St. John's Hickey decision in the Seventh Circuit.<sup>20</sup> While prior court cases are not dispositive of the Agency's position, they certainly shed light on how the Agency interpreted the regulation prior to issuing the proposed rule in 1992. Although CMS challenged a jointly operated program as qualifying as "provider operated" there is no reference to indicate CMS was relying on specific, detailed criteria that was later published in the proposed rule and represented to reflect prior policy. The Seventh Circuit found no obstacle in the old regulation or any agency interpretations offered in that case to prohibit a jointly operated program from being considered provider-operated. The facts in this case are remarkably similar and there is no evidence in the record of any other criteria being published or applied that is any different than that found applicable in St. John's Hickey until the 1992 proposed rule. The Intermediary has not furnished any authority that a proposed rule, in itself, establishes policy. Moreover, in Community Hospital of Indianapolis, Inc v. Blue Cross Blue Shield Association/Mutual Hosp. Ins. Co.,<sup>21</sup> the Administrator affirmed the Board's conclusion that costs incurred for a joint nursing education program were reimbursable, citing facts similar to those in St. John's Hickey. The Provider characterizes this statement as an adoption of the St. John's Hickey criteria. That characterization appears to have support in commentary to the Final Rule in which CMS states "on October 1, 1979, Medicare policy was amended to correspond with the ruling of the court in the HCFA Administrator's decision on Provider Reimbursement Review Board Decision No. 79-D50 [the Community Hospital decision]."<sup>22</sup> (emphasis added).

Fourth, it is also significant that the Intermediary was apparently unaware of what CMS claims was its prior policy, for the Intermediary found the Provider's program appropriate for cost reimbursement until 2002. At that time, CMS instructed the Intermediary to reopen cost reports to disallow the reasonable cost reimbursement.<sup>23</sup> A Blue Cross Blue Shield Association (BCBSA) comment on the proposed rule indicates other intermediaries were also unaware the proposed rule reflected "policy interpretations . . . previously set forth in the Provider Reimbursement Manual and other documents."<sup>24</sup> BCBSA, the prime contractor for numerous other Medicare fiscal intermediaries, commented that CMS's proposed criteria for determining provider-operated status were "more stringent" than the regulatory criteria previously applied and requested guidance on how to handle education programs that might no longer qualify under the proposed rule.<sup>25</sup>

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<sup>19</sup> See e.g. discussion of Section 404.2 of the PRM 57 at Fed. Reg. 43,659, 43661-43663 (Sept. 22, 1992), Exhibit P-19.

<sup>20</sup> See also cases cited at page 7 of the Provider's Position Paper.

<sup>21</sup> Medicare & Medicaid Guide (CCH) HCFA Administrator Dec. Oct. 4, 1979 (CCH ¶30,089)(1979), Exhibit P-23.

<sup>22</sup> 66 Fed. Reg. 3359, (Jan. 12, 2001), Exhibit P-22 and 57 Fed. Reg. 43,659, 43,662-43,663.

<sup>23</sup> Exhibits P-35, 37 and 39.

<sup>24</sup> 57 Fed. Reg. 43,659, 43,669-70, 43,672 (Sep. 22, 1992); Exhibit P-19.

<sup>25</sup> Id.

Fifth, CMS' commentary appears to acknowledge that the provider-operated criteria were OBRA-driven, and that other payment policy was what was being clarified. The Proposed Rule at page 43,660 states the purpose as twofold: to implement the provisions of OBRA 1989 and 1990 and restate and clarify current policies governing these costs which were previously set forth in the Provider Reimbursement Manual and other documents. The Final Rule explains:

We proposed to retain the general rule specified under existing §413.85 that payment for a provider's net cost of approved educational activities is made on a reasonable cost basis.

We also proposed to set forth §413.85(e) [§413.85(f) in the final rule] criteria we would use to identify programs operated by a provider.

66 Fed. Reg. 3361. Therefore, both the proposed and Final Rule commentary appear to indicate that the criteria are added to carry out the OBRA 89 and 90 directives and that it is only the prior payment policy that is clarified. It is unmistakable, though, that the regulation itself makes the five criteria applicable to periods prior to the Final Rule.

The Provider further argued that if the 2001 Rule were considered new rule making, and is therefore not applicable, its nursing education program arrangement would clearly be considered allowable under the regulations and Medicare instructions that existed prior to the 2001 regulatory change. The regulation at 42 C.F.R. §413.85 in effect during the fiscal periods in dispute, stated as follows:

#### **413.85 Cost of educational activities.**

- (a) *Payment* – (1) *General rule*. Except as provided in paragraph (a)(2) of this section, a provider's allowable cost may include its net cost of approved educational activities . . .
- (b) *Definition* – *Approved educational activities*. 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 . . .
- (c) *Educational activities*. Many providers engage in educational activities including training programs for nurses, medical students, interns and residents, and various paramedical specialties. These programs contribute to the quality of patient care within an institution and are necessary to meet the community's needs for medical and paramedical personnel . . . .
- (d) *Activities not within the scope of this principle*. The costs of the following activities are not within the scope of this principle but are recognized as normal operating costs and are reimbursed in accordance with applicable principles –
  - \* \* \* \*
  - (6) Clinical training of students not enrolled in an approved education program operated by the provider; and

(7) Other activities that do not involve the actual operation of an approved education program . . .

\* \* \* \*

As noted earlier, the above regulatory rule for nursing education programs involving outside educational institutions before 2001 was very general and provided minimal guidance on the criteria to be used to determine whether or not a program qualified as provider-operated. The standards for determining provider-operated status developed through litigation before the Provider Reimbursement Review Board and federal courts. The leading case is the Seventh Circuit St. John's Hickey decision.

In analyzing the Provider's factual situation using the St. John's Hickey criteria, the Board finds that the nursing program was provider-operated. In St. John's Hickey, the court rejected the Secretary's argument that the hospital must be the "legal operator" of the nursing education program to satisfy the operational requirement of 42 C.F.R. §405.421.<sup>26</sup> The court found that joint operation of a nursing education program satisfied the operational requirement as a result of the following: (1) the hospital's contract was agreement to participate in the joint nursing program; (2) the hospital's origination of the joint program; (3) the use of the hospital's premises for clinical classroom instruction and training; (4) participation of the hospital's staff in the clinical portion of the program; (5) compliance by the instructors with the hospital's rules and practices; and (6) the joint participation on the curriculum committee. The Board concludes that, if the criteria established in St. John's Hickey is found to be applicable, the contracted operating activities and curriculum development between the Provider and Mesa Community College is a program that satisfied the regulation in existence prior to 2001. However, the Board has no authority to apply these criteria in reaching its decision, therefore, the Intermediary's adjustments are affirmed.

#### Issue No 2 - - Medicare Managed Care Payment for Provider's Nursing Education Program

The Board finds that the Provider is entitled to an additional payment for its Medicare managed care patients for its approved nursing education program. The Social Security Act at 1886(l) states in relevant part:

- (1) PAYMENT FOR NURSING AND ALLIED HEALTH EDUCATION FOR MANAGED CARE ENROLLEES
- (1) *In General.* – For portions of cost reporting periods occurring in a year (beginning with 2000), the Secretary shall provide for an additional payment amount for any hospital that receives payments for the costs of approved education activities for nurse and allied health professional training under section 1861(v)(1).

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<sup>26</sup> Currently 42 C.F.R. §413.85.

The implementing regulation at 42 C.F.R. §413.87 (2001) states in relevant part:

Payments for Medicare + Choice nursing and allied health education programs.

- (a) *Statutory basis.* This section implements section 1886(l) of the Act which provides for additional payments to hospitals that operate and receive Medicare reasonable cost reimbursement for approved nursing and allied health education programs and the methodology for determining the additional payments.
- (b) *Scope.* This section sets forth the rules for determining an additional payment amount to hospitals that receive payments for the costs of operating approved nursing or allied health education programs under §413.85.
- (c) *Qualifying conditions for payment.*
  - (1) For portions of cost reporting periods occurring on or after January 1, 2000 and before January 1, 2001, a hospital that operates and receives payment for a nursing or allied health education program under §413.85 may receive an additional payment amount associated with Medicare +Choice utilization. The hospital may receive the additional payment amount, which is calculated in accordance with the provisions of paragraph (d) of this section, if both of the conditions specified in paragraphs (c)(1)(i) and (c)(1)(ii) of this section are met.
    - (i) The hospital must have received Medicare reasonable cost payment for an approved nursing or allied health education program under §413.85 in its cost reporting period(s) ending in the fiscal year that is 2 years prior to the current calendar year. (For example, if the current year is calendar year 2000, the fiscal year that is 2 years prior to calendar year 2000 is FY 1998.) For a hospital that first establishes a nursing or allied health education program after FY 1998 and receives reasonable cost payment for the program as specified under §413.85 after FY 1998, the hospital is eligible to receive an additional payment amount in a calendar year that is 2 years after the respective fiscal year so long as the hospital also meets the condition under paragraph (c)(1)(ii) of this section.
    - (ii) The hospital must be receiving reasonable cost payment for an approved nursing or allied health education program under §413.85 in the current calendar year.
  - (2) For portions of cost reporting periods occurring on or after January 1, 2001, in addition to meeting the conditions specified in paragraphs (c)(1)(i) and (c)(1)(ii) of this section, the hospital must have had a Medicare + Choice utilization greater than zero in its cost reporting periods (s) ending in the fiscal year that is 2 years prior to the current calendar year.

Both the statute and regulation, read together and taken as a whole, allow for an additional payment if a provider is reimbursed and has received Medicare reasonable cost payment for nursing education programs under 42 C.F.R. §413.85 on its current and prior two fiscal years. The Parties' Stipulation ¶40 states that the Provider was entitled to and received Medicare payment for the costs of clinical training under the Boswell/Mesa nursing education program. The Board finds that if the Provider received cost reimbursement under Medicare, it should also receive an additional payment for its Medicare + Choice patients. The Board concludes that the above statute and regulation allow for such payment.<sup>27</sup>

DECISION AND ORDER:

Issue No. 1 – Provider-Operated Nursing Education Program

The Board is bound by the clear language of the 2001 regulatory change which states that the provider must have a provider-operated nursing program based on meeting all the requirements of 42 C.F.R. §413.85(f). Provider does not meet all those requirements; therefore, the Intermediary's adjustments are affirmed.

Issue No. 2 – Medicare Managed Care Payment for Provider's Nursing Education Program

The Provider is allowed an additional payment under §1886(l) of the Social Security Act and 42 C.F.R. §413.87. The Intermediary's adjustments are reversed.

BOARD MEMBERS PARTICIPATING:

Suzanne Cochran, Esquire  
Yvette C. Hayes  
Keith Braganza, C.P.A.

FOR THE BOARD:

Suzanne Cochran, Esquire  
Chairperson

DATE: September 28, 2010

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<sup>27</sup> Furthermore, the Program Memorandum A-03-043 dated May 23, 2003, supports this result.