

# PROVIDER REIMBURSEMENT REVIEW BOARD HEARING DECISION

2000-D34

**PROVIDER -**  
Rapid City Regional Hospital

Provider No. 43-0077

**vs.**

**INTERMEDIARY -**  
Blue Cross and Blue Shield of Iowa  
Blue Cross and Blue Shield Association

**DATE OF HEARING-**  
October 12, 1999

Cost Reporting Period Ended -  
June 30, 1993

**CASE NO.** 97-2064

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ISSUE:

Was the Intermediary's classification of School of Nursing Joint Education Program cost proper?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

Rapid City Regional Hospital ("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.<sup>1</sup> . Beginning in 1972, the Provider and its predecessors operated a hospital-based nursing education program.<sup>2</sup> After graduation, the students were eligible to take the examination for a registered nursing license. The Provider's program was approved by the State Board of Nursing and accredited by the National League for Nursing.<sup>3</sup> The program was located on the Provider's campus. The program offered classroom education in the School of Nursing, a Provider owned building, and clinical training at the Provider's facility and other area hospitals and clinics.<sup>4</sup>

In 1989, the Provider entered into an agreement with the State Board of Regents ("Agreement") to establish a 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"), and 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.<sup>5</sup>

In its cost report for FYE June 30, 1993, the Provider reported only the costs associated with building and maintenance of the building that the Provider provides for the Joint Education Program in a pass-through cost center. Wellmark/Blue Cross and Blue Shield of Iowa ("Intermediary") reclassified the costs and statistics for the Nursing School from a pass-through cost center to a non-pass-through cost center because it concluded that the Provider was not the legal operator of the Joint Education Program.<sup>6</sup> The Provider appealed the Intermediary's adjustment to the Provider Reimbursement Review Board ("Board") and has met the jurisdictional requirements of 42 C.F.R. §§ 405.1835-.1841.

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<sup>1</sup> Transcript ("Tr.") at 35.

<sup>2</sup> Tr. at 34, 88.

<sup>3</sup> Tr. at 34, 55.

<sup>4</sup> Id. at 33.

<sup>5</sup> See Tr. at 44-47.

<sup>6</sup> See Tr. at 90-98, Intermediary Position Paper at 8.

The amount of Medicare reimbursement in controversy is approximately \$61,000.<sup>7</sup> The Provider is represented by Daniel F. Miller, Esquire, of von Briesen, Purtell & Roper, S.C. The Intermediary is represented by Bernard M. Talbert, Esquire, of the Blue Cross and Blue Shield Association.

STATEMENT OF FACTS AND BACKGROUND:

The Agreement to establish the Joint Education Program required that the Provider:

- A. Accept no new enrollees in its three year program at the School of Nursing after September 1988 and close this program upon graduation of the class of May, 1991.<sup>8</sup>
- B. Provide ongoing clinical experience for the nursing students.<sup>9</sup>
- C. Pay an initial fee of \$250,000 to start up the programs.<sup>10</sup>
- D. Contribute ongoing use of office, classroom and conference room space in the School of Nursing - a building that is owned by the Provider and located approximately three miles from the Provider's campus.<sup>11</sup>
- E. Provide office and classroom equipment and furniture that was utilized by the Provider's School of Nursing in its three year program.<sup>12</sup>
- F. Annually provide in-kind services including audiovisual and print libraries, education equipment and models, a learning resource laboratory and computers.<sup>13</sup>

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<sup>7</sup> Intermediary Position Paper at 5.

<sup>8</sup> Tr. at 47.

<sup>9</sup> Tr. at 48-50.

<sup>10</sup> Tr. at 99-100.

<sup>11</sup> Tr. at 47-48.

<sup>12</sup> Id.

<sup>13</sup> Id.

The Provider, pursuant to the Agreement, also participates in the Management Advisory Committee ("MAC") and the Nursing Education Advisory Committee ("NEAC").<sup>14</sup> The MAC addresses the Board of Regents on matters including:

- A. Resolution of issues uniquely related to the Joint Education Program;
- B. Recommendations to the participating institutions and the Provider when problems occur;
- C. Review of the Joint Education Program's budget as it relates to the Program's needs and goals, and make recommendations;
- D. Review of enrollment plans for consistency with market need for nursing graduates in Western South Dakota and the broader service area and review the availability of direct and in kind resources;
- E. Receipt and review of the reports of the NEAC and oversight of any other ad hoc committees as may be necessary to support or assist in the Joint Education Program;
- F. Appropriate arrangements for the receipt and administration of any funds donated to support students or otherwise in support of the Joint Education Program.
- G. Reports to the Regents by way of written reports through appropriate Presidential reporting requirements or as may be otherwise requested by the Regents.

Provider Post Hearing brief at 7, Provider Exhibit P-6

The NEAC advises the administrators of the Board of Regents on matters including:

- A. Healthcare delivery trends relevant to curriculum design and content;
- B. Definition of roles and utilization of the baccalaureate and associate nurse;
- C. Recruitment of students;
- D. Representation of the Joint Education Program to the public;

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<sup>14</sup> Id. at 51-52.

- E. Enhancement of the image of the Joint Education Program through public relations efforts; and
- F. Securing resources for the Joint Education Program (i.e., fund raising for scholarships).

Provider Post Hearing Brief at 7, Provider Exhibit P-6.

The Provider, as required by the Agreement, has had consistent representation on these committees since the inception of the Joint Education Program.<sup>15</sup>

In addition to its representation on these committees, the Provider, through its department managers, meets with the School of Nursing instructors approximately every six weeks to discuss issues regarding the clinical rotations. Further, the Provider and USD/SDSU meet on an annual basis to discuss various policies and procedures including any necessary curriculum changes.<sup>16</sup>

The Provider asserts that its role in the operations of the Joint Education Program is evidenced by the following:

- A. The Provider provides 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.<sup>17</sup>
- B. The Provider assists in the coordination of the scheduling and assignment of clinical experiences.<sup>18</sup>
- C. The Provider provides approximately 25,000 square feet of classroom and office space and equipment for instruction and clinical experiences.<sup>19</sup>

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<sup>15</sup> Tr. at 54.

<sup>16</sup> Tr. at 52, 54-55.

<sup>17</sup> Tr. at. 48-50,53, 56-58.

<sup>18</sup> Tr. at 53, 56-58.

<sup>19</sup> Tr. at 59-61.

- D. The Provider provides parking spaces to the Joint Education Program's instructors and the students.<sup>20</sup>
- E. The Provider allows students and instructors the same access to its cafeteria as provided to its employees.<sup>21</sup>
- F. The Provider 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.<sup>22</sup>
- G. The Provider is entitled to request the withdrawal of any student or instructor whose performance or conduct is detrimental to the Provider's patients or personnel.<sup>23</sup>
- H. The Provider allows students access to its medical library and education departments.<sup>24</sup>
- I. The Provider's employees actively engage in working with students to coordinate the clinical experiences offered as part of the Joint Education Program.<sup>25</sup>
- J. All clinical instructors and students of the Joint Education Program are governed by the Provider's employee policies and procedures while at the Provider's facilities, and the Provider is legally responsible for the students' actions.<sup>26</sup>

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<sup>20</sup> Tr. at 61-62.

<sup>21</sup> Tr. at 62

<sup>22</sup> Tr. at 54-55, 72.

<sup>23</sup> Tr. at 58.

<sup>24</sup> Tr. at 62-63.

<sup>25</sup> Tr. at 75-76.

<sup>26</sup> Tr. at 57-58.

- K. The Provider recruits a substantial number of its nurses from the Joint Education Program.<sup>27</sup>
- L. The Provider has the ability to opt out of the operation of the Joint Education Program pursuant to the Joint Education Program Agreement.<sup>28</sup>

PROVIDER'S CONTENTIONS:

The Provider contends that based upon the evidence included in the record, it is clear that the it operates the Joint Education Program as defined in the Medicare regulations, Federal court cases and previous Administrative decisions. The Provider asserts that it has ongoing responsibilities not only for providing the building in which the Joint Education Program is housed on a rent-free basis, but also for maintaining that building. It is the Provider's position that it exercises the requisite amount of direction and control, as required by Federal case law and previous Administrative decisions, over the Joint Education Program. Thus, the Provider believes that it is a joint operator of the Joint Education Program and should receive pass-through treatment on its costs associated with the Joint Education Program.

The Provider rejects the Intermediary's position that it does not operate the Program. It is the Provider's primary position that it operates the program as defined in the regulations, Federal court cases and Administrative decisions. The Provider refers to the regulations at 42 C.F.R. §412.113(b) which require Medicare payment for approved medical education costs as described in 42 C.F.R. §413.85. The Provider points out that under 42 C.F.R. §413.85(a), payment for approved educational activities is an allowable pass-through cost 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.

Pursuant to 42 C.F.R. §413.85(c),

many communities have not assumed responsibility for financing these programs and it is necessary that support be provided by those purchasing health care. Until communities undertake to bear these

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<sup>27</sup> Tr. at 63-66.

<sup>28</sup> Tr. at 117-119.

costs, the [Medicare] program will participate appropriately in the support of these activities. 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 [the Medicare] program should participate in increased costs resulting from redistribution of costs from educational institutions or units to patient care institutions or units.

Id. (Emphasis added)

The Provider Reimbursement Manual, Part 1 ("HCFA Pub. 15-1") §404.2 states in relevant part:

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.

In addition, HCFA Pub. 15-2, §2807 states that for cost reporting periods beginning on or after October 1, 1990, both classroom and clinical costs are allowable as pass-through costs, as defined in 42 C.F.R. §413.85, if the Provider operates an approved nursing or allied health education program that meets the criteria of 42 C.F.R. §§412.113(b) and 413.85.

In this case, the Provider believes that the Intermediary reclassified the nursing education program costs solely because it concluded that the Provider was not the legal operator of the program.<sup>29</sup> However, the Provider contends that the Intermediary's interpretation of the regulations is inconsistent with Federal case law and previous administrative decisions addressing the issue.

The Provider references several court decisions and Board decisions that address joint education costs when the issue relates to whether the Provider operated the program. The Provider asserts that these decisions have allowed pass-through cost reimbursement in circumstances similar to this case, even when the provider was not the "legal operator" of the program.

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See Tr. at 94.

The Provider contends that the leading court decision addressing this issue is St. John's Hickey Memorial Hospital, Inc. v. Califano, 599 F.2d 803 (7th Cir. 1979) (“St. John's Hickey”). The Provider points out that in this case, the court rejected the argument that the hospital must be the "legal operator" of the nursing school program to satisfy the "engaged in" requirement of 42 C.F.R. §413.85 (then 41 C.F.R. §405.421). Further, the court found that the "engaged in" requirement may be satisfied and pass-through costs paid as a result of the following: (1) the hospital's contract to participate in the program clinically and financially; (2) the use of the hospital's premises for clinical classroom instruction and training; (3) participation of the hospital's staff in the clinical portion of the program; (4) compliance by the instructors with the hospital's rules and practices; and (5) resolution of any differences with respect to conduct by the administrators of both institutions. St. John's Hickey at 809. In St. John's Hickey, the court set forth the criteria, as required by the regulations, for allowing the educational costs to be reimbursable:

- A. the provider is engaged in (operated) the approved educational activity;
- B. the education program is approved;
- C. the program contributes to the quality of patient care within an institution;
- D. the community has not undertaken to finance the program;
- E. the program does not result in the redistribution of costs from the educational institution to the provider.

St. John's Hickey, 599 F.2d at 808-810.

The Provider notes that the Seventh Circuit's reasoning in St. John's Hickey was also adopted by the district court for the District of Columbia in Los Alamitos General Hospital, Inc. v. Donnelly, 558 F.Supp. 1141 (D.D.C. 1983) (“Los Alamitos”).

The Provider further notes that in a number of other Administrative decisions, the Board found that the Provider operated the Joint Education Program under similar facts. See Barberton Citizens Hospital v. Blue Cross and Blue Shield Association /Community Mutual Insurance Company, PRRB Dec. No.94-D6, July 28, 1994, Medicare & Medicaid Guide (CCH) ¶ 42,587, (1994); St. Ann's Hospital v. Blue Cross and Blue Shield Association/Community Mutual Insurance Company, PRRB Dec. No. 93-D61, July 21, 1993, Medicare & Medicaid Guide (CCH) ¶41,616, (1993) and St. Mary's Medical Center Duluth, Minnesota v. Blue Cross and Blue Shield Association/Blue Cross and Blue Shield of Minnesota, PRRB Dec. No. 97-D82, July 15, 1997, Medicare & Medicaid Guide (CCH) ¶ 45,503, (1997). In these decisions, the Provider asserts that the Board has consistently rejected the Intermediary's position that the Provider did not operate a joint education program. The Provider contends that in each of the above decisions, the Board found that its opinion was consistent with the

logic presented in the 7th Circuit's decision in the St. John's Hickey case, wherein the court found that the joint operation of a nursing program by a provider satisfied the regulatory requirement.<sup>30</sup>

The Provider refers to the Intermediary's Position Paper which references a HCFA Administrator decision dated April 7, 1978, which reversed PRRB Case No. 78-D7, Butler Memorial Hospital v. Blue Cross Association, et al ("Butler Memorial").<sup>31</sup> The Provider notes that in this decision, the HCFA Administrator held that the Intermediary's disallowances were proper and the provider was not entitled to reimbursement for any payments it made to Butler County Community College in support of the nursing education program. The Intermediary contended when comparing Butler Memorial and the case at hand, 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."<sup>32</sup> However, the Provider points out that the HCFA Administrator's decision was reversed by the United States District Court for the Western District of Pennsylvania. Butler County Memorial Hospital v. Califano, U.S. District Court, Western District of Pennsylvania, No. 78-652-C, October 17, 1979, Medicare & Medicaid Guide (CCH) ¶ 30,048, (1979). The district court based its decision on the fact that the Provider's nursing program met the requirements of the regulation and that the Administrator's interpretation of "engage in" to require that the hospital be the legal operator of the program was overly restrictive and not in accordance with the legislative history of the Social Security Act. Id. This decision was based, in part, on the 7th Circuit's decision in St. John's Hickey. The Provider contends that the 7th Circuit's decision in St. John's Hickey also formed the basis for several other district court decisions that reversed HCFA Administrator decisions similar to Butler Memorial. See Community Hospital of Indianapolis Inc. v. Califano (1979-2 Transfer Binder ¶ 29,999), Cleveland Memorial Hospital, Inc. v. Califano (1980 Transfer Binder ¶30,487), The Archbishop Bergan Mercy Hospital v. Califano (1980 Transfer Binder ¶30,512), Washington Adventist Hospital, Inc. v. Califano (1981-2 Transfer Binder ¶31,470), and Los Alamitos.

Therefore, it is the Provider's position in the instant case that its Joint Education Program clearly meets the conditions set forth in 42 C.F.R. §413.85, St. John's Hickey and previous board decisions.

The Provider contends that it operates the Joint Education Program consistent with 42 C.F.R. §§412.113(b) and 413.85 and previous Federal court and Administrative decisions that have addressed this issue. More, specifically, the Provider supports this contention with the following:

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<sup>30</sup> In the Provider's Post Hearing Brief at 15-24, the Provider provides an in depth analysis of each of the above three cases and how they relate and support the current case.

<sup>31</sup> Intermediary Position Paper at 9.

<sup>32</sup> Id.

- A. The Provider has been engaged in a nursing education program on a continuing basis since 1972, the costs of which the Intermediary has allowed as pass-through. See Tr. at 34, 88.
- B. During the cost reporting period in contention, the Provider was engaged in a Joint Education Program involving nursing education activities in conjunction with the USD and SDSU. See Tr. at 44-47.
- C. The Joint Education Program is certified by the State Board of Nursing and accredited by the National League for Nursing. See Tr. at 34,55.
- D. The terms and conditions that the Provider was subject to in its Agreement, include:
  - 1. Providing ongoing clinical experience for the students enrolled in the Joint Education Program.
  - 2. Paying an initial fee of \$250,000 to start up the Joint Education Program.
  - 3. Contributing ongoing use of office, classroom and conference room space in the School of Nursing, a building that is owned by the Provider and located on the Provider's campus.
  - 4. Providing office and classroom equipment and furniture.
  - 5. Annually providing in-kind services including audiovisual and print libraries, educational equipment and models, a learning resource laboratory and computers.

See Tr. at. 47-50, 99-100.

- E. The Provider provides clinical experiences for the students of the Joint Education Program and participates in the development of the clinical aspects of the Program. See Tr. at 48-50, 53, 56-58.
- F. The Provider assists in the coordination of the scheduling and assignment of the clinical experiences. See Tr. at 53, 56-58.
- G. The Provider provides approximately 25,000 square feet of classroom and office space and equipment for instruction and clinical experiences. See Tr. at 59-61.
- H. The Provider provides parking spaces to the Joint Education Program's instructors and students. See Tr. at 61-62.

- I. The Provider allows students and instructors the same access to its cafeteria as provided to its employees. See Tr. at 62.
- J. The Provider allows students access to its medical library and educational departments. See Tr. at 62-63.
- K. The Provider's employees actively engage in working with students to coordinate the clinical experiences offered as part of the Joint Education Program. See Tr. at 75-76.
- L. All clinical instructors and students of the Joint Education Program are governed by the Provider's employee policies and procedures while at the Provider's facilities, and the Provider is legally responsible for the students' actions. See Tr. at 57-58.
- M. The Provider is entitled to request the withdrawal of any student or instructor whose performance or conduct is detrimental to the Provider's patients or personnel. See Tr. at 58.
- N. The Joint 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. See Tr. at 66.
- O. The Joint Education Program is necessary to meet the community's and the Provider's need for nursing personnel. See Tr. at 66-67.
- P. The Joint Education Program gives the Provider access to a pool of qualified nursing personnel. See Tr. at 63-66.
- Q. The Provider recruits a substantial number of its nurses from the Joint Education Program. See Tr. at 63-66.
- R. The Provider maintains consistent representation on the MAC and the NEAC, which oversee the Joint Education Program. See Tr. at 54.
- S. The Provider maintains routine and consistent communication with the School of Nursing instructors regarding various issues related to clinical rotations. See Tr. at 52, 54-55.
- T. The Provider meets annually with USD and SDSU to discuss policies and procedures. See Tr. at 52, 54-55.

- U. The Joint Education Program has not resulted in any redistribution of costs from the educational institution to the Provider. See Tr. at 101.
- V. The Provider has the ability to opt out of the operation of the Joint Education Program pursuant to the Joint Education Program Agreement. See Tr. at 117-119.

Additionally, the Provider asserts that it incurs substantially less costs by operating the Joint Education Program in conjunction with USD and SDSU than it would if it was forced to operate a freestanding nursing education program. Thus, the Provider contends that it follows that as in the above referenced Federal court cases and Administrative decisions, its costs associated with its Joint Education Program should methodically flow through the Medicare program's reimbursement process as allowable pass-through costs.

The Provider argues further that by disallowing pass through treatment of its joint education costs, it would overturn 20 years of Medicare reimbursement history and constitute an arbitrary and capricious action, an abuse of discretion, and a violation of law. The Provider refers to the Intermediary's argument<sup>33</sup> that a recent HCFA Administrator decision, reversing the Board, Northwest Medical Center v. Blue Cross and Blue Shield Association of Arkansas, PRRB Dec. No. 99-D55, June 30, 1999, Medicare & Medicaid Guide (CCH) ¶80,326, rev'd HCFA Administrator, August 31, 1999, Medicare & Medicaid Guide (CCH) ¶80,336, ("Northwest") supports the Intermediary's position on the joint education issue. The Provider points out that in Northwest, the provider claimed the costs associated with the nursing school expenses, reimbursed to a party in its joint education agreement, as nursing education activity pass-through costs in its filed cost report. The intermediary reclassified the costs to a non pass-through cost center, allowing the claimed amount as operating cost for the provider. This Provider claims that the reclassification was based on the intermediary's belief that the provider did not operate the nursing school and, therefore, the costs claimed on its cost report were not reimbursable as passthrough education expenses pursuant to 42 C.F.R. § 412.113 and § 413.85.

The provider appealed the intermediary's reclassification based on its belief that the reclassification was inconsistent with the Medicare regulations governing reimbursement of costs of nursing educational activities. The provider in Northwest specifically referenced 42 C.F.R. § 412.113(b) and 42 C.F.R. § 413.85.

The Board found that the provider appropriately included the net direct costs associated with the nursing education program as pass-through medical education cost under PPS consistent with existing Medicare regulations. Northwest at 201,035. The Provider asserts that the Board interpreted the prerequisite established under 42 C.F.R. § 412.113(b) to mean that, if a provider can substantiate that its medical education activities meet the conditions set forth in 42 C.F.R. § 413.85, then costs

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<sup>33</sup>

Tr. at 21-22.

associated with such activities will systematically flow through to the Medicare program's reimbursement process as an allowed PPS pass-through cost. Id.

The Board further found that the provider was significantly engaged in the joint operation of the nursing education program in accordance with the governing regulations. Id. Among the numerous factors which demonstrate the provider's participation in the nursing program, the Board found the provider's involvement in the following elements to be significantly noteworthy:

- A. The provider's nursing staff provided extensive training and supervision to the students, including acting as preceptors, instructing in patient care functions and charting, lab interpretation and equipment use;
- B. The teaching function was enhanced by allowing the students to interact with the provider's medical staff,
- C. The provider's Director of Education also acted as a liaison between the provider and another party to the joint agreement; and
- D. All instructors and students at BMSSN-Northwest were subject to the provider's policies and procedures while on campus, which specifically included those related to clinical practices, patient care and safety.

Id. at 201,035-201,036.

The Board again reasoned that its decision was consistent with the logic presented in the 7th Circuit's decision in the St. John's Hickey case.

The Provider points out that the Board's decision in Northwest was subsequently reversed by the HCFA Administrator (see HCFA Administrator's review of PRRB Decision No. 99-D55, dated August 31, 1999).<sup>34</sup> The Administrator found that in applying the provisions of 42 C.F.R. § 413.85(d)(6) to the facts of this case, the provider was not entitled to be reimbursed on a reasonable cost basis for the costs of the nursing education because the provider was not the operator of the program, nor the joint operator of the nursing program as required by the PPS revised 42 C.F.R. § 413.85. HCFA Administrator's Review Northwest at 10. According to the Administrator, the provider incurred no direct costs of operating the program. It was the Administrator's opinion that the four factors that the Board lists as representative of the provider's engagement in the program, do not constitute "operation" of the nursing program.

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<sup>34</sup> The provider appealed the HCFA Administrator's decision on November 5, 1999 and the case is currently pending in the United States District Court for the District of Columbia.

As noted above in Northwest, the Administrator found that the four factors that the Board listed as representative of the provider's engagement in the program do not constitute "operation" of the nursing program. However, the Provider in the current case argues that those four factors are virtually indistinguishable as to the type of factors that the Board listed as representative of the Northwest providers' engagement in the nursing education programs in cases such as St. John's Hickey, Barberton, St. Mary's Medical Center, and St. Ann's Hospital. In all of these cases, the Board found that the providers' engagement in the nursing education programs was sufficient to constitute a "joint operation" of the nursing education programs. The Provider points out that in St. Mary's Medical Center, among others, the Administrator declined to review the Board's decision. Thus, the Provider asserts that the Administrator has accepted the Board's reasoning in these earlier cases.

The Provider argues that the only reasons for reversing 20 years of Medicare reimbursement history that the Administrator provided in Northwest are contained in footnote 21. According to the Administrator, the final decisions of the Secretary in such PPS cases as St. Mary's Medical Center, and St. Ann's Hospital, fail to recognize that there is a distinction in the use of the term "provider operated" in determining when costs are allowable operating costs or allowable passthrough costs, under PPS. Additionally, the Administrator opined that those cases failed to recognize that the criteria for treating nursing education costs as pass-through costs was not at issue in the pre-PPS St. John's Hickey case.

The Provider believes that the Administrator's rationale for reversing the Board's decision in Northwest as well as 20 years of Medicare reimbursement history cannot withstand analysis. The Provider contends that the Administrator acted arbitrarily and capriciously in reversing 20 years of Medicare history which many providers, including the Provider in this case, have reasonably relied upon for guidance related to Medicare reimbursement for nursing education costs.

In addition, the Administrator's action in reversing the Board's decision in Northwest ignores HCFA's historical treatment of nursing education costs since the inception of PPS. In determining the initial PPS reimbursement rates, HCFA excluded nursing education costs from base year costs used to calculate PPS rates, ostensibly because these expenses would continue to be treated as pass-through costs. The Provider believes that the Administrator is now clearly attempting to include providers' costs associated with joint education programs as part of the providers' operating costs, which is not how HCFA has historically treated nursing education costs since the inception of PPS. Thus, the Administrator's reversal of the Board's decision in Northwest is arbitrary, capricious, not in accordance with law, unsupported by substantial evidence and clearly an abuse of the Administrator's discretion. Therefore, the Board should reject the Intermediary's suggestion that Northwest supports the Intermediary's adjustment in this case.

Finally, the Provider points out that the Social Security Act ("the Act") at 42 U.S.C. §1395(x)(v)(1)(A) prohibits shifting to non Medicare patients the necessary direct or indirect costs of efficiently providing services to Medicare beneficiaries. In this case, both Medicare and non-Medicare patients are served

by the Joint Education Program.<sup>35</sup> Thus, the Provider contends that the disallowance of its claim for pass-through treatment of the costs associated with the Joint Education Program would violate the Act by imposing the full cost of the Joint Education Program on individuals who are not Medicare patients.

INTERMEDIARY'S CONTENTIONS:

In its as-filed cost report, the Provider classified the Nursing School program costs in a pass-through cost center. It is the Intermediary's position that the Provider is not the legal operator of the program; therefore, the costs cannot be considered as pass-through.<sup>36</sup> Accordingly, the Intermediary made an adjustment to reclassify the cost and statistics for the Nursing School cost center from a pass-through line to a non-pass-through line.<sup>37</sup>

The Intermediary contends that the adjustment to reclassify the School of Nursing costs and statistics was made in accordance with Medicare regulation 42 C.F.R. § 413.85 - Cost of Educational Activities, HCFA Pub. 15-1 § 404.2- Approved Programs, Provider Reimbursement Manual (HCFA Pub. 15-2) § 2807 - Worksheet A - Reclassification and Adjustment of Trial Balance of Expenses, and Blue Cross Association (BCA) Administrative bulletin No. 834.

The Intermediary refers to 42 C.F.R. § 413.85(b) which states (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.

In addition, 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. 15-2 § 404.2 states (Exhibit I-8):

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<sup>35</sup> See Tr. at 53.

<sup>36</sup> Intermediary Position Paper at 7.

<sup>37</sup> See Intermediary Exhibit I-2 for details of the adjustment.

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.

Also the Intermediary refers to HCFA Pub. 15-2 § 2807 (Exhibit 1-9) which 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 further contends that BCA Administrative bulletin No. 834 (Exhibit 1-10) 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.

The Intermediary references two HCFA Administrator decisions reversing the Board in support of its case. Intermediary Exhibit I-11 contains the HCFA Administrator's Decision for Butler County Memorial Hospital v. Blue Cross Association, et al, PRRB Case Number 78-D7, April 7, 1978, which reversed the Board's 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 PRRB should follow the HCFA Administrator's ruling in the current appeal.

At the hearing, the Intermediary referred to HCFA Administrator's decision in Northwest Medical Center v. Blue Cross and Blue Shield Association of Arkansas, PRRB Dec. No. 99-D55, June 30, 1999, Medicare & Medicaid Guide (CCH) ¶80,326, Rev'd HCFA Administrator, August 31, 1999,

Medicare & Medicaid Guide (CCH) ¶80,336 (“Northwest”).<sup>38</sup> It is the Intermediary’s position that the Administrator’s decision in Northwest presents “a good history of the evolution on the issue [in this case] and the proper interpretation of what is now the controlling regulation, 413.85 (d) (6), that to be eligible for pass-through costs, the program must be the Provider’s program.”<sup>39</sup> The Intermediary contends that the Provider cannot stretch its relationship with the nursing school to make itself the operator of the program. The Intermediary also points out that in Northwest, one of the arguments was that the school itself was a provider. In the instant case however, the Intermediary asserts that the sponsor of the program is two universities. Id. The Intermediary believes that there is an insufficient nexus between the Provider’s participation in the program to make it the operator of the program. Consequently, it is the Intermediary’s position that including the Provider’s costs identified as nursing education in normal operating costs (instead of pass-through costs) was the correct decision. Id. Therefore, the Intermediary requests that the Board affirm its adjustment.

CITATION OF LAW, REGULATIONS, AND PROGRAM INSTRUCTIONS:

1. Law- 42 U.S.C.:
  - § 1395(x)(v)(1)(A) - Reasonable Cost
2. Regulations- 42 C.F.R.:
  - § 405.1835.1841 - Board Jurisdiction
  - § 412.113 et seq. - Other Payments
  - § 413.85 et seq - Cost Of Educational Activities
3. Provider Reimbursement Manual, Part 1, (HCFA Pub. 15-1):
  - § 404.2 - Costs of Approved Nursing and Paramedical Education Programs
  - § 2807 - PPS for Inpatient Hospital Capital Related Costs

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<sup>38</sup> Tr. at 11, 21-22.

<sup>39</sup> Tr. at 21-22.

4. Cases:

Barberton Citizens Hospital v. Blue Cross and Blue Shield Association /Community Mutual Insurance Company, PRRB Dec. No.94-D61, July 28, 1994, HCFA Admin. Decl. Rev., Medicare & Medicaid Guide (CCH) ¶ 42,587, (1994).

Butler Memorial Hospital v. Blue Cross Association, et al , PRRB Case No. 78-D7, rev'd HCFA Admin., April 7, 1978.

Butler County Memorial Hospital v. Califano, U.S. District Court, Western District of Pennsylvania, No. 78-652-C, October 17,1979, Medicare & Medicaid Guide (CCH) ¶ 30,048, (1979).

Cleveland Memorial Hospital, Inc. v. Califano (1980 Transfer Binder ¶ 30,487).  
Community Hospital of Indianapolis Inc. v. Califano (1979-2 Transfer Binder ¶ 29,999).

Los Alamitos General Hospital, Inc. v. Donnelly, 558 F.Supp. 1141 (1983).

Northwest Medical Center v. Blue Cross and Blue Shield Association of Arkansas, PRRB Dec. No. 99-D55, June 30, 1999, Medicare & Medicaid Guide (CCH) ¶80,326, Rev'd HCFA Administrator, August 31, 1999, Medicare & Medicaid Guide (CCH) ¶ 80,336.

St. Ann's Hospital v. Blue Cross and Blue Shield Association/Community Mutual Insurance Company, PRRB Dec. No. 93-D61, July 21, 1993, Medicare & Medicaid Guide (CCH) ¶ 41,616, (1993).

St. John's Hickey Memorial Hospital, Inc. v. Califano, 599 F.2d 803 (7th Cir. 1979).

St. Mary's Medical Center Duluth, Minnesota v. Blue Cross and Blue Shield Association/Blue Cross and Blue Shield of Minnesota, PRRB Dec. No. 97-D82, July 15, 1997, HCFA Admin. Decl. Rev., Medicare & Medicaid Guide (CCH) ¶ 45,503, (1997).

The Archbishop Bergan Mercy Hospital v. Califano (1980 Transfer Binder ¶ 30,512).

Washington Adventist Hospital, Inc. v. Califano (1981-2 Transfer Binder ¶ 31,470).

5. Other:

BCA Administrative Bulletin No. 834, Reimbursement of Nursing Education Costs in the Medicare Program, December 30, 1974.

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, finds and concludes that the Provider appropriately included in a pass-through cost center the costs associated with the building and maintenance of the building that the Provider provides for the Joint Education Program pursuant to its agreement with the South Dakota Board of Regents. The Board finds that the inclusion of these costs as pass-through medical education costs under PPS is consistent with the existing Medicare regulations. The regulation at 42 C.F.R. § 412.113(b) specifically allows for the payment on a pass-through basis of medical education costs for approved educational activities of nurses and paramedical health professionals as described in 42 C.F.R. § 413.85. The regulations at 42 C.F.R. § 413.85 set forth the applicable principles for reimbursing the reasonable costs of educational activities under the Medicare program, and explicitly define the types of approved educational activities that are within the scope of these reimbursement principles. The Board interprets the prerequisite established under 42 C.F.R. § 412.113(b) to mean that, if a provider can substantiate that its medical education activities meet the conditions set forth in 42 C.F.R. § 413.85, then the costs associated with such activities will systematically flow through the Medicare program's reimbursement process as an allowed PPS pass-through cost.

The Board finds that the Provider operated a hospital based nursing education program from 1972 to 1989. The Board also finds that in 1989, the Provider entered into an agreement with the South Dakota Board of Regents to phase out its program during the following 3 years in favor of a more cost effective arrangement with two South Dakota universities. Further, the Board finds that the Provider claimed significantly less Medicare reimbursement for the education program under the new arrangement than under the old arrangement.

The Board also finds that the Provider's program was approved by the State Board of Nursing and accredited by the National League for Nursing. In addition, the Board finds that there were two parties that were engaged in and jointly operating the education program. The two parties being the South Dakota Board of Regents (University of South Dakota and South Dakota State University) and the Provider. The Board notes that the Provider was the progenitor of the nursing education program in question, and the cost-effective consortia of the Provider and the South Dakota Board of Regents enhanced both the quality and availability of personnel for Medicare and non-Medicare patients alike, at the Provider's facility. The Board also notes that the program in question has a direct impact on the quality of care as it supplied a critical nursing staff.

Based on its examination of the facts and evidence presented in this case, the Board concludes that the Provider has an appropriate and approved nursing education program as defined by 42 C.F.R. § 413.85(b). The Board further concludes that the Provider's program is a formally organized or planned program of study that is usually engaged in by providers in order to enhance the quality of patient care in an institution within the meaning of 42 C.F.R. § 413.85(b). The Board notes that there is no prohibition against jointly operating a program in either the regulations or the program instructions.

Addressing the Intermediary's main argument that the costs of the program were unallowable because the Provider was not the legal operator of the education program,<sup>40</sup> the Board finds nothing in the statute, regulations, or program instructions requiring the Provider to be the "legal operator" of the program.

The Board concludes that the Provider has satisfied the regulations that it was engaged in a joint operation of an approved education program. The Board also concludes that the above uncontroverted facts, as well as other facts in the record, clearly demonstrate that the Provider did operate, to a significant extent, the nursing education program. This opinion is consistent with the logic presented in the Circuit court's decision in the St. John's Hickey wherein the court found that the joint operation of a nursing program by a provider and university satisfied the regulatory operational requirement. In addition, the Board's ruling in this case is in accord with prior Board decisions on this issue under facts substantially similar to those found here.<sup>41</sup> With the approved programs recognized as an allowable cost, the mechanical process set forth in 42 C.F.R. §412.113 allows for the reimbursement of approved medical education activities as pass-through costs.

Regarding the Intermediary's reference to 42 C.F.R. § 413.85(c) that costs should not be increased as a result of redistribution of costs from educational institutions, as noted above, the Board found that the costs are significantly lower under the new arrangement with the Board of Regents than they would have been by operating a free standing nursing education program.

#### DECISION AND ORDER:

The Provider has an appropriate approved nursing program as defined by 42 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.

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<sup>40</sup> Intermediary Position Paper at 16.

<sup>41</sup> Northwest Medical Center v. Blue Cross and Blue Shield Association of Arkansas, PRRB Dec. No. 99-D55, June 30, 1999, Medicare & Medicaid Guide (CCH) ¶80,326, rev'd HCFA Administrator, August 31, 1999, Medicare & Medicaid Guide (CCH) ¶80,336, St. Mary's Medical Center Duluth, Minnesota v. Blue Cross and Blue Shield Association/Blue Cross and BlueShield of Minnesota, PRRB Dec.No. 97-D82, July 15, 1997, HCFA Admin. Decl. Rev., Medicare & Medicaid Guide (CCH)¶45,503, (1997), Barberton Citizens Hospital v. Blue Cross and Blue Shield Association /Community Mutual Insurance Company, PRRB Dec.No.94-D61, July 28, 1994, HCFA Admin. Decl. Rev., Medicare & Medicaid Guide (CCH) ¶42,587, (1994).

Board Members Participating:

Irvin W. Kues  
Henry C. Wessman, Esquire  
Martin W. Hoover, Jr. , Esquire  
Charles R. Barker

**Date of Decision:** March 24, 2000

FOR THE BOARD

Irvin W. Kues  
Chairman