# PROVIDER REIMBURSEMENT REVIEW BOARD
# DECISION

ON THE RECORD
2015-D13

**PROVIDER –**
Lutheran Hospital of Indiana
Fort Wayne, Indiana

Provider No.: 15-0017

**vs.**

**INTERMEDIARY –**
Wisconsin Physicians Service/
Blue Cross and Blue Shield Association

**DATE OF HEARING -**
August 28, 2014

Cost Reporting Period Ended -
June 30, 2007

**CASE NO.:** 09-1754

**INDEX**

## ISSUE:

Whether the Medicare Contractor's adjustment to remove time for off-site rotations was proper?[1]

## DECISION:

After considering the Medicare law and program instructions, the evidence presented and the parties' contentions, the Board finds that the Medicare Contractor properly adjusted the Provider's FY 2007 IME and GME payments for interns and residents rotating to nonhospital clinics.

## INTRODUCTION:

Lutheran Hospital of Indiana ("Lutheran Hospital" or "Provider") is an acute care hospital located in Fort Wayne, Indiana. Lutheran Hospital's assigned Medicare contractor during the time at issue was National Government Services ("NGS") and NGS was succeeded by Wisconsin Physicians Service Insurance Corporation (collectively referred to as the "Medicare Contractor").[2]

In 2003, Lutheran Hospital and several other Fort Wayne area hospitals cooperatively established the Fort Wayne Medical Education Program ("FWMEP") to offer medical education in various specialty areas to interns and residents of the hospitals.[3] During fiscal year ending June 30, 2007 ("FY 2007"), Lutheran Hospital as well as the other FWMEP participating hospitals rotated residents to certain nonhospital family practice and orthopedic clinics settings for medical education through the FWMEP (the "FWMEP Clinics"). Consistent with the agreement establishing FWMEP, each hospital pays to FWMEP a share of the cost of the training programs in the FWMEP Clinics for FY 2007 based on a proportionate share of the annual FWMEP budget and the number of resident hours allocable to the hospital for FY 2007.[4] As part of its reimbursement for graduate medical education ("GME") and indirect medical education ("IME"), Lutheran Hospital claimed on its Medicare cost report for FY 2007 the residents associated with the FWMEP in proportion with its financial contribution to FWMEP for FY 2007.[5]

The Medicare Contractor reduced Lutheran Hospital's reimbursement for GME and IME for FY 2007 because Lutheran Hospital neither paid "all or substantially all" of the costs of the FWMEP nonhospital training program nor had a written agreement with the nonhospital setting as required by federal statute and regulations. Specifically, the Medicare Contractor adjusted the full-time equivalent hours ("FTEs") used to calculate Medicare's reimbursement for IME and

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[1] *See* Provider Exhibit P- 2 at 6. *See also* Parties' Stipulations of Undisputed Facts at ¶1.6.
[2] CMS' payment and audit functions under the Medicare program were historically contracted to organizations known as fiscal intermediaries ("FIs") and these functions are now contracted with organizations known as Medicare Administrative Contractors ("MACs"). The term "Medicare contractor" refers to both FIs and MACs as relevant.
[3] *See* Provider Exhibits P-15, P-7.
[4] *See* Provider Exhibit P- 7 at ¶ 5.04.
[5] *See* Provider's Supplemental Final Position Paper at 15-17; Provider Exhibit P-7.

GME, removing all of the interns' and residents' rotations into FWMEP Clinics. This adjustment reduced the GME/IME payment to Lutheran Hospital by $468,312.[6]

Lutheran Hospital timely appealed the Medicare Contractor's final determination to the Provider Reimbursement Review Board ("Board"). Lutheran Hospital was represented by Daniel J. Hettich, Esq. of King & Spalding, L.L.P. The Medicare Contractor was represented by Robin Sanders, Esq. of the Blue Cross and Blue Shield Association.

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:**

Lutheran Hospital asserts that it complied with the legal requirements to be reimbursed for GME/IME costs and the Medicare Contractor improperly reduced this reimbursement.[7] Lutheran Hospital argues that the applicable statutory and regulatory provision located at 42 U.S.C. §§ 1395ww(h)(4)(E) and 1395ww(d)(5)(B)(iv) and 42 C.F.R. § 413.78(e)(1)-(4) (2006) allow reimbursement for resident and intern time spent in an approved nonhospital medical residency training program if:

1) The resident/intern spends his or her time in patient care activities;
2) The hospital incurs all or substantially all of the costs for the training program in that setting; and
3) *Either* the hospital pays all or substantially all of the costs of the training program in a nonhospital setting within three months of the period during which the training occurred, *or* there is a written agreement between the hospital and nonhospital setting that states that the hospital will incur the costs of the resident's salary and fringe benefits while the resident is in training at the nonhospital site and the hospital is providing reasonable compensation to the nonhospital site for supervisory teaching activities. The agreement must indicate the compensation the hospital is providing to the nonhospital site for supervisory teaching activities.

Lutheran Hospital contends that the Medicare Contractor had consistently accepted its written agreement with FWMEP and accepted the fact that Lutheran Hospital paid a proportional share of nonhospital training costs under this agreement in prior cost reporting periods. Lutheran Hospital maintains that changing the application of this policy, as the Medicare Contractor is now trying to do, violates the notice and comment rulemaking requirements contained in the Administrative Procedure Act ("APA").[8]

Lutheran Hospital points out that Congress amended the GME/IME statutory provisions several times in recent years, most recently in § 5504 of Patient Protection and Affordable Care Act of 2010 ("ACA").[9] This amendment allowed a hospital to count a proportional share of the costs of

[6] *See* Provider's Supplemental Position Paper at 3-4.
[7] *See id.* at 4.
[8] Codified at 5 U.S.C. Ch. 5, Subch II.
[9] Pub. L. 111-148, 124 Stat. 119, 559-660 (Mar. 23, 2010). The Health Care and Education Reconciliation Act of 2010 ("HCERA"), Pub L. 111-152, 124 Stat. 1029 (Mar. 30, 2010) amended certain ACA provisions; however, HCERA is not relevant to this case as it did not amend ACA §5504.

training in a nonhospital setting as determined by a written agreement between the hospitals.[10] Based on the precise language in the statute, Lutheran Hospital argues that the Medicare Contractor should reopen its FY 2007 cost report and reverse the GME/IME adjustment because Lutheran Hospital had a "jurisdictionally proper appeal pending as of the date of the enactment of this Act" as specified in ACA § 5504(c) [11] Lutheran Hospital argues that CMS understood that pending appeals on the GME/IME issue had to be reopened and adjusted because, in the preamble to its proposed rule to implement ACA § 5504, CMS stated that § 5504(c):

> specifies that the amendments made by the provisions of section 5504(a) and (b) shall not be applied in a manner that would require the reopening of settled cost reports *except where the provider has a jurisdictionally proper appeal pending on the issue of direct GME or IME payments as of March 23, 2010*.[12]

Lutheran Hospital argues that, since its appeal has been pending before the Board as of March 23, 2010, the Board must order that the GME/IME adjustments be reversed. Lutheran Hospital finds support for this position in the Board's decision in *Eastern Maine Med. Ctr. v. Blue Cross Blue Shield Ass'n* ("*Eastern Maine*"),[13] in which the Board held:

> The Provider has satisfied the requirement in ACA § 5504(c) because, as of March 23, 2010, both of the subject appeals were pending before the Board and GME and IME payments were specific issues on appeal as required by the regulation. Indeed, the GME and IME payment issue before the Board is the very one addressed by the statutory changes to [sic] made by ACA §§ 5504(a) and (b) must be applied to this case.[14]

Lutheran Hospital asserts that CMS' interpretation that ACA § 5504 has a stated effective date of July 1, 2010 and, therefore, cannot apply to any prior periods[15] is contrary to the plain reading of ACA § 5504(c) and 42 C.F.R. 413.78(g)(2) (2010).[16]

Finally, Lutheran Hospital argues in the alternative that it has satisfied the Medicare Contractor's purported requirement that one entity incur all of the costs of the residency programs in nonhospital settings because it participates in FWMEP and one entity, FWMEP, pays all of the costs of the residency programs in the nonhospital settings using funds contributed by the FWMEP participating hospitals.[17]

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[10] *See* ACA § 5504 (amending 42 U.S.C. § 1395ww(h)(4)(E)(ii) for GME and 42 U.S.C. § 1395ww(d)(5)(B)(iv)(II) for IME).
[11] *See* Provider's Supplemental Position Paper at 11-12 (discussing and quoting ACA § 5504(c)).
[12] *Id*. at 12 (quoting 75 Fed. Reg. 46169,46385 (Aug. 3, 2010) (emphasis added)).
[13] PRRB Dec. 2014-D10 (June 2, 2014), *rev'd* CMS Adm'r Dec. (July 23, 2014).
[14] *Id.* at 12.
[15] 75 Fed. Reg. 71800, 72136 (Nov. 24, 2010). CMS further explained its interpretation in a clarification in 79 Fed. Reg. 49854, 50118 (Aug. 22, 2014).
[16] Provider's Supplemental Position Paper at 23.
[17] *Id*. at 25.

FINDINGS RELATING TO THE REQUIREMENT FOR PAYMENT OF ALL OR SUBSTANTIALLY ALL OF THE PROGRAM COSTS

The Board disagrees with Lutheran Hospital's position that it met all of the Medicare statutory and regulatory requirements for Medicare coverage of its GME/IME costs for interns and residents rotating to nonhospital clinics. For GME/IME reimbursement purposes, 42 U.S.C. §§ 1395ww(h)(4)(E) and 1395ww(d)(5)(B)(iv) entitle a hospital to count the time its residents spend in patient care activities in non-hospital settings, if "the hospital incurs all, or substantially all, of the costs *for the training program* in that [nonhospital] setting."[18] During FY 2007, federal regulations located at located at 42 C.F.R. § 413.75(b) (2006) defined the term "all or substantially all of the costs for the training program in the nonhospital setting" to mean "the residents' salaries and fringe benefits (including travel and lodging where applicable) and the portion of the cost of teaching physicians' salaries and fringe benefits attributable to direct graduate medical education (GME)."

In this case, there is insufficient evidence to demonstrate that Lutheran Hospital paid <u>all</u> or substantially all of "the costs for the training program" in the FWMEP Clinics (*i.e*., the nonhospital settings). In fact, the evidence is to the contrary because Lutheran Hospital itself has admitted that its "financial contribution [to FWMEP] was based on a proportionate share of the annual FWMEP budget and the number of resident hours allocable to the hospital."[19] Accordingly, the Board finds that this financial arrangement did not sufficiently comply with longstanding federal statute and regulation and that the Medicare Contractor's GME/IME adjustments for interns and residents rotating to nonhospital clinics was proper.

In support of its finding, the Board references CMS' principle of GME/IME reimbursement that the impact of Medicare payment of these costs "does not redistribute costs and community support" for these programs. More specifically, CMS maintains that, by funding GME and IME costs, "Congress intended hospitals to facilitate training in nonhospital sites that would not have occurred *without the hospital's sponsorship*"[20] and that, unless the hospital incurs all or substantially all of the costs for the training program, it is possible that the nonhospital could simply be shifting costs of training residents in nonhospital sites that were previously funded from other community sources.[21] To that end, 42 C.F.R. § 413.78(e)(2) (2006)[22] specifies that a hospital cannot count the time residents spend in nonhospital settings, such as clinics, in its GME/IME FTE count, unless "*the hospital* . . . incur[s] all or substantially all of the costs *for the training program* in the nonhospital setting."[23] In this case, Lutheran Hospital admits that FWMEP incurs the full costs of the medical education program at the FWMEP Clinics and that Lutheran Hospital pays to FWMEP only a share of the overall nonhospital residency training

[18] (Emphasis added.)
[19] Provider's Supplemental Position Paper at 17.
[20] *See* 68 Fed. Reg. 45346, 45444 (Aug. 1, 2003) (emphasis added).
[21] *See id.*
[22] This regulation was originally codified at 42 C.F.R. § 413.78(f) and was redesignated as § 413.78(f) without substantive changes for cost reporting periods on or after October 1, 2004. *See* 69 Fed. Reg. 48916, 49111-49112, 49235-49236, 49254, 49258 (2004). 42 C.F.R. § 412.105(f)(1)(ii)(C) incorporates these GME requirements (as originally codified and later redesignated) into the IME requirements. <u>*See id.* at 49244-49245.</u>
[23] The Board further notes that 42 U.S.C. § 1395ww(d)(5)(B)(iv) similarly includes that condition that "*the hospital* incurs all, or substantially all, of the costs *for the training program* in that [nonhospital] setting." (Emphasis added.)

costs which is based on a proportion of the overall FWMEP annual budget and the number of resident hours allocable to Lutheran Hospital. This proportional share does not meet the requirements of 42 U.S.C. §§ 1395ww(h)(4)(E) and 1395ww(d)(5)(B)(iv) or 42 C.F.R. § 413.78(e)(2).

**FINDINGS RELATING TO THE REQUIREMENT FOR A WRITTEN AGREEMENT**

The Board disagrees with the Provider's assertion that it had a written agreement which satisfied the regulatory requirements of 42 C.F.R. § 413.78(e)(3)(ii) (2006) which required the following:

> There is a written agreement *between the hospital and the nonhospital site* that states that the hospital will incur the cost of the resident's salary and fringe benefits while the resident is training in the nonhospital site and the hospital is providing reasonable compensation to the nonhospital site for supervisory teaching activities. The agreement must indicate the compensation the hospital is providing to the nonhospital site for supervisory teaching activities.[24]

Lutheran Hospital proffers the "Amended and Restated Operating Agreement of The Fort Wayne Medical Education Program" and a sample "Residency Agreement" between FWMEP and a resident[25] to demonstrate that it had written agreements in place during FY 2007 which complied with the applicable statute and regulations. The Medicare Contractor disagreed and maintains that these FWMEP agreements do not comply with the regulatory requirements in 42 C.F.R. § 413.78(e)(3)(ii) because the FWMEP agreements do not specify the following: (1) Lutheran Hospital will incur the cost of the resident's salary and fringe benefits while the resident is training in the nonhospital site; (2) Lutheran Hospital is providing reasonable compensation to the nonhospital site for supervisory teaching activities; and (3) the amount of compensation that Lutheran Hospital is providing to the nonhospital site for supervisory teaching activities.[26]

The Board finds that the Medicare Contractor was correct in its determination regarding the FWMEP written agreements do not satisfy the regulatory requirements in 42 C.F.R. § 413.78(e)(3)(ii). First, Lutheran Hospital cannot point to a written agreement between it and the FWMEP Clinics (*i.e.*, the nonhospital sites) rather it points to an agreement with FWMEP.[27] Second, while the sample resident agreement specifies the amount of the residents' stipend and

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[24] (Emphasis added.)
[25] Provider Exhibits P-7, P-22.
[26] *See* Medicare Contractor's Supplemental Position Paper at 8-9.
[27] The Board's conclusion that 42 C.F.R. § 413.78(e)(3)(ii) requires a written agreement between the hospital and the nonhospital site is supported by the following cases which involve similar cost sharing arrangements: *Borgess Med. Ctr. v. Sebelius*, 966 F. Supp. 2d 1, 7 (D.D.C. 2013) (stating that [t]he 1973 Agreement does not satisfy the Written Agreement Requirement because it was not executed as required between a hospital and nonhospital); *Kingston Hosp. v. Sebelius*, 828 F. Supp. 2d 473, 478 (N.D. N.Y. 2011) (stating that "this undertaking failed to satisfy the written agreement requirement because it . . . was between hospitals, not the hospitals and the non-hospital sites"); *Covenant Med. Ctr. Inc. v. Sebelius*, 424 Fed. Appx. 434,436 (6th Cir. 2011) (applying written agreement requirement to related parties); *Chesnut Hill Hosp. v. Thompson*, No. 04-1128, 2006 WL 2380660 at *5 (D. D.C. Aug. 15, 2006) (stating [t]hese, however, are not agreements with the non-hospital settings").

fringe benefits, this agreement does not specifically apply to training at the FWMEP Clinics themselves as the Board believes is required by § 413.78(e)(3)(ii). Third, Lutheran Hospital has failed to provide a written agreement that specifies the amount of compensation of the supervising personnel as required by the regulations as neither of the FWMEP agreements furnished by Lutheran Hospital addresses this. Finally, the Board finds that there is no APA violation related to the Medicare Contractor's rejection of the FWMEP agreements for FY 2007 despite having allegedly accepted them for prior fiscal years because Medicare contractors do not generally make CMS policy and the FWMEP agreements do not comply with CMS' published regulatory policy in effect during FY 2007.

**FINDINGS RELATING TO THE APPLICATION OF ACA** § 5504

ACA § 5504(a) amended 42 U.S.C. § 1395ww(h)(4)(E) to allow a hospital to count all the time that a resident trains in a nonhospital site so long as the hospital incurs the costs of the residents' salaries and fringe benefits for the time that the resident spends training in the nonhospital site. As part of this amendment, it removed the language requiring hospitals to have a written agreement with the non-hospital setting and the reference to compensation for supervisory teaching activities. ACA § 5504(b) made similar changes to 42 U.S.C. § 1395ww(d)(5)(iv) to apply these changes to IME reimbursement as well. Both §§ 5504(a) and (b) specify that they are effective prospectively for cost reporting periods or discharges on or after July 1, 2010.[28]

ACA § 5504(c) addressed certain additional permissible and nonpermissable applications of ACA §§ 5504(a) and (b) by stating the following:

> (c) The amendments made by this section shall not be applied in a manner that requires reopening of any settled hospital cost reports as to which there is not a jurisdictionally proper appeal pending as of the date of the enactment of this Act on the issue of payment for indirect costs of medical education under section 1886(d)(5)(B) of the Social Security Act (42 U.S.C. 1395ww(d)(B)) or for direct graduate medical education costs under section 1886(h) of such Act (42 U.S.C. 1395ww(h)).[29]

As part of the final rule published on November 24, 2010 (the "November 2010 Final Rule") CMS promulgated regulations at 42 C.F.R. §§ 413.78(g) and 412.105(f)(1)(ii)(E) to implement ACA § 5504.[30] In particular, 42 C.F.R. § 413.78(g)(6) echoes ACA § 5504(c) because it reads:

> The provisions of paragraph (g)(1)(ii), (g)(2), (g)(3), and (g)(5) of this section cannot be applied in a manner that would require the reopening of settled cost reports, *except* those cost reports on

[28] By its terms, ACA § 5504(a) was effective for cost reporting periods on or after July 1, 2010 and ACA § 5504(b) was effective for discharges occurring on or after July 1, 2010.
[29] ACA § 5504(c).
[30] 75 Fed. Reg. 71800, 72134 (Nov. 24, 2010).

> which there is a jurisdictionally proper appeal pending on direct GME or IME payments as of March 23, 2010.[31]

As part of the preamble to the final rule published on August 22, 2014 (the August 2014 Final Rule"), CMS included a section entitled "Clarification of Policies on Counting Resident Time in Nonprovider Settings Under Section 5504 of the Affordable Care Act."[32] In this section, CMS discussed at length the "longstanding substantive standard" which allowed hospitals to count residents training if that one single hospital incurs all or substantially all of the costs for the training referring readers to final rules from 1998, 2003 and 2007.[33] Regarding the retroactivity of ACA §§ 5504(a) and (b), CMS stated: "The introductory regulatory language of 413.78(g) explicitly states that paragraph (g) governs only 'cost reporting periods beginning on or after July 1, 2010.' . . . [W]hereas earlier cost reporting periods are governed by other preceding paragraphs of 413.78."[34] Further, CMS states:

> Accordingly, we believe that it is apparent that the provisions of sections 5504(a)(3) and (b)(2) of the Affordable Care Act are not to be applied prior to July 1, 2010, irrespectively of whether a hospital may have had a jurisdictionally proper appeal pending as of March 23, 2010 on an IME or direct GME issue from a cost reporting period occurring prior to July 1, 2010.[35]

In summary, CMS maintains through its regulation at 42 C.F.R. § 413.78(g) that the changes made in ACA §§ 5504(a) and (b) only apply prospectively beginning July 1, 2010 and do not apply to any appeals that were pending as of March 23, 2010 and had a GME or IME issue from a cost reporting period beginning prior to July 1, 2010.

The Board recognizes that its decision in *Eastern Maine* conflicts with CMS' regulatory clarification of 42 C.F.R. § 413.78(g). However, the Board notes that CMS made the above regulatory clarification subsequent to the Board's decision in *Eastern Maine* and that, pursuant to 42 C.F.R. § 405.1867, the Board is bound by this regulatory clarification of 42 C.F.R. § 413.78(g)(6). Accordingly, consistent with this regulatory clarification, the Board concludes that that ACA § 5504 is not applicable to the subject appeal because fiscal year at issue in this case began before July 1, 2010. In support of its conclusion, the Board notes that, in its 2015 decision in *Covenant Med. Ctr., Inc. v. Burwell*, the Sixth Circuit upheld CMS' regulatory clarification and applied that clarification to fiscal years occurring prior to its issuance.[36]

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[31] (Emphasis added).
[32] 79 Fed. Reg. 49854, 50117 (Aug. 22, 2014).
[33] *See id.* at 50117-50122.
[34] *Id.* at 50118.
[35] *Id*. at 50119.
[36] 603 Fed. Appx. 360 (6th Cir. 2015) (involving FYs 1999 to 2006).

DECISION AND ORDER:

After considering the Medicare law and program instructions, the evidence presented and the parties' contentions, the Board finds that the Medicare Contractor properly adjusted Lutheran Hospital's FY 2007 IME and GME payments for interns and residents rotating to nonhospital clinics.

BOARD MEMBERS PARTICIPATING:

Michael W. Harty
Charlotte F. Benson, C.P.A.
Clayton J. Nix, Esq.
L. Sue Andersen, Esq.

FOR THE BOARD:

/s/
Michael W. Harty
Chairman

DATE: August 4, 2015