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13 March 2024

FILE REF: **SHA/26127**

DECISION MAKING BODY: **NHS ENGLAND & SOUTH YORKSHIRE INTEGRATED CARE BOARD ("THE COMMISSIONER")**

GDS CONTRACTOR: **DR R JOSEPH**

BROOM ROAD DENTAL CARE
41 BROOM ROAD
ROTHERHAM
S60 2SW

and

COLLEGE ROAD DENTAL CARE
126 COLLEGE ROAD
ROTHERHAM
S60 1JA

DISPUTE RESOLUTION: **NATIONAL HEALTH SERVICE (GENERAL DENTAL SERVICES CONTRACTS) REGULATIONS 2005**

RE: **TRANSFER OF UDAS BETWEEN PRACTICES**

1 Outcome

1.1 I determine that it is open to the Commissioner to consider the Contractor's individual circumstances and use its discretion to allow the Contractor to transfer 560 UDAs from the Broom Road Contract to the College Road Contract.

1.2 I note that neither party has submitted a claim for interest with regard to this dispute, so I make no determination in this regard.

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DISPUTE RESOLUTION: **NATIONAL HEALTH SERVICE (GENERAL DENTAL SERVICES CONTRACTS) REGULATIONS 2005**

RE: **TRANSFER OF UDAS BETWEEN PRACTICES**

1 INTRODUCTION

1.1 The Contractor has referred the dispute in relation to its General Dental Services ("GDS") Contracts for dispute resolution under the provisions of Paragraph 55 of Schedule 3 of the National Health Service (General Dental Services Contracts) Regulations 2005 (the "Regulations").

1.2 The Secretary of State for Health and Social Care has directed that NHS Resolution exercise the functions of dispute resolution on their behalf. I, as an authorised officer of NHS Resolution, have made this determination.

2 APPLICATION FOR DISPUTE RESOLUTION

2.1 By email dated 20 December 2023 the Contractor applied to NHS Resolution for dispute resolution.

2.2 I have had regard to the following documents made available to me in consideration of this matter to ensure the just, expeditious, economical and final determination of this dispute: -

2.2.1 Email dated 20 December 2023 from the Contractor;

2.2.2 Email dated 2 January 2024 from the Contractor, with attachments;

2.2.3 Email dated 2 February 2024 from the Contractor, with copy of GDS contract and contract variation for Broom Road Dental Care; and

2.2.4 Email dated 5 February 2024 from the Commissioner, with attachments.

3 PARTIES SUBMISSIONS

The Contractor's application

3.1 "I am writing to appeal a decision made on our exceptional circumstances application, as part of our End of Year Reconciliation for 21/22. The NHS contract number is 5729500005 (Broom Road Dental Care) and 1537880001 (College Road Dental Care).

To summarise the issue, during the COVID-19 pandemic, we buddied our two practices together as per the NHS guidance. This helped to ensure we could continue to provide care when hit with staff and clinician absences, for patients at both practices, which were located less than 1 mile apart. I have attached the NHS guidance titled 'COVID-19: Support for Dental Practices in Yorkshire & Humber region Frequently asked questions related to contact tracing and COVID-19 case management V2 December 2020' which was in place at the time and states "You should make arrangements with a buddy practice to see patients for urgent dental care" if impacted by staff absences. We informed our contract manager that we had buddied the two practices in June 2020 over the telephone, which was followed up by emails. The guidance made sense to us at the time, and still does, and it now seems we have been penalised for following it.

As the practices are less than 1 mile apart, there were instances in H1 of 21/22 when patients from College Road were temporarily seen for treatment at Broom Road if we had staff or clinician absences. On these occasions we pooled the staff between the practices and saw more patients at Broom Road to reduce the burden on College Road. We did this as Broom Road is a larger practice which could offer greater adherence to the NHS COVID guidance at the time e.g. following a one-way system through the practice, maintaining social distancing, and allowing fallow time for AGPs. The UDAs for these patients were therefore added to the Broom contract but need to be credited to College Road.

I can provide examples of these cases using Compass records (with redacted patient information) to illustrate patients who were regularly seen at College Road, seen for a single emergency appointment at Broom Road, and then going back to College Road at a later date.

We kept a record of the UDAs affected at the time and this came to 560 UDAs. I am unsure how else we could have corrected these cases other than request the transfer from yourself."

Representations

The Commissioner's representations

3.2 "Thank you for your letter dated 8 January 2024 in which you request an up-to-date version of the contracts, containing all variations agreed since the contract was signed, we have included the following documents in the evidence bundle:

Contract Number 1537880001 - We hold a GDS Contract (evidence bundle document 1) with the provider Mr R Joseph and Mr G Jones (evidence bundle document 1, page 135) for the provision of 15,000 UDAs each year (evidence bundle document 1 page 45) The contract commenced on 1 January 2016 (evidence bundle document 1 page 24) The address of the premises to be used by the provider is 126 College Road, Rotherham S60 1JA (evidence bundle document 1, page 41).

Unfortunately, we have been unable to locate the subsequent contract variation changing the Mr R Joseph and Mr G Jones partnership to the individual Mr R Joseph.

The College Road contract was varied in March 2022 reflecting Mr R Joseph entering into partnership with Abrahem Malik (evidence bundle document 2 page 2).

Contract Number 5729500005 - We hold a GDS Contract (evidence bundle document 3) with the provider Mr R Joseph Mr G Jones and Mr AB Jones (evidence bundle document 3 Page 146) For the provision of 11,867 UDAs per year (evidence bundle document 3 page 44). The contract commenced on 1 April 2007 (evidence bundle document 3 page 4) The address of the premises to be used by the provider is 41 Broom Road, Rotherham S62 2SW (evidence bundle document 3 Page 38).

Unfortunately, we have been unable to locate the subsequent contract variation changing the Mr R Joseph Mr G Jones and Mr AB Jones partnership to the individual Mr R Joseph.

This contract was varied in April 2012 to change the number of UDAs commissioned to 17,802 UDAs each year (evidence bundle document 4 page 1).

Our representations are as follows:

In 2021/22 the contracted number of UDAs at College Road was 15,000 UDAs and at Broom Road was 17,802 UDAs.

The contract documentation for these two GDS contracts are separate for the delivery of NHS dental services at two separate addresses.

<u>Policy for Year End Reconciliation 2021/22</u>

The commissioner aims to reconcile all contracts in a consistent manner and in line with the national guidance. Contracts at 2021/22 Year End were reconciled in accordance with the document 'Managing the 2021/22 year-end reconciliation' published 5 April 2022 (evidence bundle document 5) This document was published on 5 April 2022 so neither the commissioner nor the provider would have read this document whilst in the contract year 2021/22. However national guidance issued in-year was published through a series of letters

- 29 March 2021 NHS dental contract reform and arrangements letter (evidence bundle document 6)

- 30 September 2021 Next Steps to support the recovery of NHS dentistry (evidence bundle document 7)

- 22 December 2021 Key steps in 2022 to deliver for patients in NHS dentistry (evidence bundle document 8)

It should be noted that none of documents 6, 7 and 8 provide specific reference to delivering activity from different treatment locations or allowing activity accrued on one contract number to be counted at year end against another. Therefore, any such arrangement would have needed to be agreed locally.

The document 'Managing the 2021/22 year-end reconciliation' states 'Should any practice negotiate a permanent or temporary in year rebasing of their contract value and associated activity on 2021/2022 income protection arrangements will not apply' This document was published on 5 April 2022 so it is acknowledged that the commissioner and the provider would only have had reference to this document after the contract year 2021/22.

<u>Financial Recovery for Year End Reconciliation 2021/22</u>

The Year end letter for College Road was published on 28 July 2022 showing a total financial recovery of £103,879.31 (evidence bundle document 9 page 3) showing performance in each time period to be above the % minimum threshold but below the % performance threshold.

The Year End letter for Broom Road was published on 28 July 2022 showing a total financial recovery of £23,029.11 (evidence bundle document 10 page 3) which is a recovery of undelivered activity only, no adjustment recovery because the performance was above the % performance threshold in all three time periods.

The provider raised three queries regarding the 2021/22 Year end letters

- The shift of 560 UDAs from the Broom Road to the College Road contract number which is the subject of this dispute resolution.

- The accuracy of the figures using the BDA calculator - an issue which was resolved locally and therefore not needed to be considered in this dispute resolution.

- Need to credit for the additional UDAs for the incentivised support for urgent care, this was agreed and 54 UDAs for Q3 and 91.8 for Q4 were credited- an issue which was resolved locally and therefore not needed to be considered in this dispute resolution.

Our colleagues at NHSBSA have run the year end calculations to include a shift of 560 UDAs of activity from Broom Road to College Road which would result in a total financial recovery of £72,815.79 for College Road (evidence bundle document 11) and £25,950.34 at Broom Road (evidence bundle document 12). Please note that these calculations also include the 54 + 91.8 UDAs agreed between the commissioner and provider.

A point of dispute between the two parties is regarding whether the commissioner had agreed that the two practices could buddy up meaning that activity delivered at Broom Road could be accrued on the College Road contract number.

The provider did raise the question with the commissioner and the contract manager regrets not formally responding at the time, but the commissioner maintains that an agreement was never reached on this point.

Correspondence has been reviewed to produce a timeline:

06/2020	The provider states that they phoned the contracts manager in June 2020 to inform of the arrangements in place to open College Road and Broom Road. The contract manager does remember this phone call explaining that the practice at Broom Road had larger premises better able to follow SOP (Standard Operating Procedure) guidance regarding flow of patients through the building. The contract manager does not dispute that this phone call took place. The emphasis at the time was to support practices to open following the closedown and following the publication of the SOP enabling practices to reopen.
05/04/2022	Publication of Managing the 2021/22 year-end reconciliation (evidence bundle document 5)
19/04/2022 Email from Richard Joseph (provider) to Sarah Hipkiss (Contracts Manager)	I am writing to request the transfer of 560 UDAs achieved from our contract at Broom Road Dental Care to our contract at College Road Dental Care for the period of H1 21/22. I have spoken to the BSA about this request due to our 'buddying up' of the practices as instructed by the NHS due to COVID-19, who advised that although they are not aware of an existing application we can submit, it may be more straightforward to put this request to you directly. Our reason for this request is that in H1 of last year, when we were hit by COVID-19 staff/ clinician absences, we buddied up the two practices under the instruction of the NHS so that some patients from College Road were temporarily seen at Broom Road to minimise disruption and maintain

	patient care. I believe we informed you of this arrangement in June 2020 when we initially returned to work following the full lockdowns. As the practices are located so close together, patients were happy to be seen at Broom Road when it was required. In addition, Broom Road is a larger practice and allowed us to follow the NHS SOP more closely during particularly busy periods and lockdowns, e.g., maintaining a one-way system throughout and social distancing. This resulted in UDAs being completed across the two practices, so on average we have achieved our minimum targets but some UDAs have been completed at Broom Road for College Road patients, leaving an imbalance of 560 UDAs which we would like to correct. (evidence bundle document 13)
28/07/2022 2021/22 YE reconciliation letters published	2021/22 YE reconciliation letters published (evidence bundle document 9 and 10)
15/08/2022 Exert of Email from Richard Joseph to NHSBSA Dental Cases	**Contract number 1537880001** To whom it may concern, I am writing to raise serious issue with the end of year statement we have been provided with. There are two main issues: 1. Under the advice of the NHSBSA, I wrote to our contract manager in March 2022 to request the transfer of 560 UDAs for H1 from one of our practice contracts to another, due to a misrepresentation of UDAs achieved following the 'buddying up' of our two practices last year, as per NHS guidance. I received no response to this request and subsequently this has been reflected in our year end position. ....

The provider has referenced the COVID19 Support for Dental Practices in Yorkshire & Humber Region and the 'Frequently Asked Questions' (evidence bundle document 14 page 2)

What if my practice needs to close due to multiple staff isolating?	You should make arrangements with a buddy practice to see patients for urgent dental care. If you have an NHS contract you will need to inform the NHS commissioning team england.yhdentalreturns@nhs.net

We should explain that this FAQ was regarding a buddy practice seeing urgent patients in the event of multiple staff isolation however in this scenario of a buddy practice delivering urgent activity the activity would have accrued on the buddy practice contract number, this was not describing that practices could transfer activity delivered at one practice to another practices contract number.

In summary our main points are

- The two GDS contracts at College Road and Broom Road are separate for the delivery of NHS dental services at two separate addresses. The two contracts are reconciled separately.

• There was no national guidance allowing activity accrued on one contract number to be counted at year end against another. Therefore, any such agreement would have needed to be agreed locally.

• Phone conversations were held but no local agreement was reached or formalised to agree to move 560 UDAs from Broom Road to College Road."

The Contractor's representations

3.3 "Please find attached a copy of our GDS contract and variations.

Our appeal is as follows.

Throughout the COVID-19 pandemic, we buddied our two practices together as per the NHS guidance. This helped to ensure we could continue to provide care when hit with staff and clinician absences, for patients at both practices, which were located less than 1 mile apart. We informed our contract manager that we had buddied the two practices in June 2020 over the telephone, which was followed up with emails.

I have attached the NHS guidance titled 'COVID-19: Support for Dental Practices in Yorkshire & Humber region Frequently asked questions related to contact tracing and COVID-19 case management V2 **December 2020**' which states "You should make arrangements with a buddy practice to see patients for urgent dental care [if impacted by staff absences]". In H1 of 21/22, we continued to follow the guidance we were given, temporarily seeing patients from College Road for urgent treatment at Broom Road if we had staff or clinician absences across the two sites. On these occasions, we pooled the staff between the practices and saw more patients at Broom Road to reduce the burden on College Road. We did this as Broom Road is a larger practice which could offer greater adherence to the NHS COVID guidance at the time e.g. following a one-way system through the practice, maintaining social distancing, and allowing fallow time for AGPs. Clinicians from College Road worked at Broom Road temporarily on days to ensure their patients could be seen, by them, in the safest way possible. We emailed our contract manager during H1 21/22 to inform her of this, and to confirm that what we were doing was correct, but unfortunately received no response. At the time we assumed that the NHS would include these arrangements in their reconciliation of UDAs at the end of the year, so as not to unfairly penalise practices who had followed the guidance and buddied practices to offer greater patient safety.

In order to ensure both practices are fairly remunerated for their UDAs, we are requesting a transfer of UDAs completed at Broom Road, on behalf of College Road (on College Road patients, by College Road dentists). We kept a record of the UDAs affected at the time and this came to 560 UDAs. I am unsure how else we could have corrected these cases other than request the transfer from our Local Area Team. I strongly feel that discretion should be used in this circumstance. These UDAs should be credited to College Road, or else we have been penalised for following the NHS guidance provided at the time.

I have provided examples of these cases using Compass records (with redacted patient information, sent in our original appeal) to illustrate patients who were regularly seen at College Road, seen for a single emergency appointment at Broom Road, and then going back to College Road at a later date (post COVID restrictions)."

Observations

The Contractor's observations

3.4 "Our only comment is that had we have known we would not be credited for the work done for College Road at Broom Road, we would have kept our staffing and patients as they normally are. We trusted the guidance we received and that we were doing what was best for the safety of the patients and staff, and were not told that we would be unfairly penalised for doing it."

4 CONSIDERATION

4.1 This application for NHS dispute resolution relates to the Contractor's request to transfer 560 UDAs from its Contract at College Road Dental Care to its Contract at nearby Broom Road Dental Care. The Contractor seeks to dispute the Commissioner's decision to not allow the transfer of UDAs between the two Contracts during the 2021/22 financial year.

4.2 I note that the Year-end reconciliation statements for 2021/22 for each practice were sent to the Contractor by letters dated 28 July 2022. I note that the Contractor subsequently raised a concern with the Commissioner by email dated 15 August 2022, that while it had previously requested the transfer of 560 UDAs between its practices, it had not received a response and this had now been reflected in the year end position.

4.3 I have been provided with a copy of the Commissioner's Local Resolution Panel decision dated 26 April 2023 which refused the Contractor's request to transfer UDAs. The Contractor was advised that it may wish to refer the matter to NHS Resolution. On this basis I am satisfied that there has been some attempt at local resolution as set out in the Contracts, however the parties have been unable to resolve the dispute and therefore the Contractor has referred the matter to NHS Resolution. There is no dispute from either party that local dispute resolution has not been entered into, therefore I will proceed to consider the matter before me.

4.4 As part of this consideration of the application for NHS dispute resolution, I required up-to-date versions of the Contracts in dispute containing all variations agreed since the Contracts were signed. These were provided by the parties, with the exception of two contract variations amending the names of the partners for each Contract. These variations have not been disputed.

4.5 The Contractor states that during the Covid-19 pandemic it buddied its two practices together "as per the NHS guidance", thereby helping to ensure that it could provide continuity of care. The Contractor refers to guidance titled 'COVID-19: Support for Dental Practices in Yorkshire & Humber region' which was issued to practices at the time and provides guidance regarding some frequently asked questions related to contact tracing and Covid-19 case management. I note that at page 2, in answer to the question 'What if my practice needs to close due to multiple staff isolating?', the guidance states "You should make arrangements with a buddy practice to see patients for urgent dental care. If you have an NHS contract you will need to inform the NHS commissioning team …". The Contractor considers that it has now been penalised for following this guidance.

4.6 The Contractor explains that because the practices are less than a mile apart, patients from College Road were sometimes temporarily seen for treatment at Broom Road if it had staff or clinician absences. I note that staff were pooled between the practices and more patients were seen at Broom Road as a way of reducing the burden on College Road. The Contractor describes Broom Road as a larger practice which was more able to adhere to NHS Covid guidance such as a one-way system through the practice. The Contractor therefore added the UDAs for these patients to the Broom Road Contract, but states that they need to be credited to College Road. I note that the Contractor has provided an example of a patient usually seen at College Road, but seen on one occasion for treatment at Broom Road.

4.7 The Contractor states that in June 2020 it informed the Commissioner by telephone that it had buddied up the two practices, and that this was "followed up by emails". I have not been provided with copies of follow up emails for this time period but believe these were after the Year-end reconciliation letters were issued to the Contractor.

4.8 The Commissioner has reviewed its correspondence and provided a timeline, which has not been disputed by the Contractor. This indicates that the Contractor spoke to the Contracts Manager who remembers a phone call taking place in June 2020 in which the Contractor explained that its Broom Road practice had larger premises which were better able to follow SOP guidance regarding the flow of patients through the building. The Commissioner states that the emphasis was to support practices to opening following closure due to the pandemic and the publication of the SOP which enabled practices to reopen. I note the Commissioner's comment that "*The provider did raise the question with the commissioner and the contract*

manager regrets not formally responding at the time, but the commissioner maintains that an agreement was never reached on this point."

4.9 The Commissioner states that guidance titled 'Managing the 2021/22 year-end reconciliation' ("the Guidance") was published on 5 April 2022 and comments that both the Commissioner and Contractor therefore only had reference to this guidance after the 2021/22 financial year. The Commissioner notes however that national guidance was provided during the year through a series of letters, dated 29 March 2021, 30 September 2021 and 22 December 2021, with copies provided. I note that the letters provided information regarding UDA thresholds for clawback and the exemption process, with links to further guidance online. The Commissioner comments that none of the letters provide specific reference to the delivery of activity from different locations or allowing activity accrued on one contract to be transferred to another at year end and that therefore this would need to be agreed locally.

4.10 The Commissioner has provided a copy of an email dated 19 April 2022 sent by the Contractor to the Contracts Manager to request the transfer of 560 UDAs from Broom Road to College Road for the period H1 (1 April 2021 to 30 September 2021) of 2021/22. The Contractor stated that it had spoken to the NHS BSA about this, who advised that it may be best to submit a request directly to the Commissioner. The Contractor explained again that it had buddied the two practices and referred to the phone call in June 2020 when it had initially informed the Commissioner of the arrangement. The Contractor noted that due to UDAs having been completed across the two practices, it had achieved its minimum targets, but that there was an imbalance of 560 UDAs due to some UDAs having been completed at Broom Road for College Road patients. There is no reference to any response having been sent to the Contractor.

4.11 According to the timeline, the year-end reconciliation letters for each Contract were sent to the Contractor on 28 July 2022 and I have been provided with copies of these. I note that the total financial recovery for the Broom Road contract was £23,029.11 and for College Road the total recovery was £103,879.31.

4.12 On 15 August 2022 the Contractor emailed the NHS BSA to raise an issue with the reconciliation letters. I have been provided with an excerpt from the email which states:

"*Under the advice of the NHSBSA, I wrote to our contract manager in March 2022 to request the transfer of 560 UDAs for H1 from one of our practice contracts to another, due to a misrepresentation of UDAs achieved following the 'buddying up' of our two practices last year, as per NHS guidance. I received no response to this request and subsequently this has been reflected in our year end position.*"

4.13 I have not been provided with a copy of any response to this email, however a final decision ("the decision") was made by the Local Resolution Panel regarding the request and issued to the Contractor by email dated 26 April 2023.

4.14 The decision states that the Commissioner was working in accordance with the Guidance and referred in particular to the following sections:

"***2. Arrangements for reconciling year end activity***

…

General conditions required for income protection

7. In order to receive income protection for any time period, the minimum or performance thresholds and contractual requirements must be met.

…

Conditions required for partial income protection

12. Contracts that have met all the conditions of income protection described in paragraph 8 and who have delivered levels of care between the minimum threshold and the performance threshold in H1 and or Q3 and or Q4 will be eligible for partial income protection in that period on a sliding scale (see worked example 2) between the minimum threshold and performance threshold. The adjustment for variable costs will be applied as above to reflect reduced patient care activity.

…

Rebasing of contracts

20. Should any practice negotiate a permanent or temporary in-year rebasing of their contract value and associated activity in 2021/22 income protection arrangements will not apply."

4.15 The decision explained that if the Commissioner were to temporarily vary the contracted number of UDAs at both practices i.e. adding 560 UDAs to Broom Road and taking 560 UDAs away from College Road, then the income protection arrangements would not apply as indicated in the guidance above.

4.16 The decision also referred to the guidance highlighted by the Contractor titled 'COVID 19 Support for Dental Practices in Yorkshire & Humber Region' and states that "*this FAQ was regarding a buddy practice seeing urgent patients in the event of multiple staff isolation however in this scenario of a buddy practice delivering urgent activity the activity would have accrued on the buddy practice contract number, this was not describing that practices could transfer activity delivered at one practice to another*".

4.17 The Contractor believes that discretion should be used in this circumstance, or it will have been penalised for following the NHS guidance at the time.

4.18 The Commissioner states that the NHS BSA has run the year end calculations to include a shift of 560 UDAs from Broom Road to College Road, and that this would result in a total financial recovery of £72,815.79 for College Road (as opposed to £103,879.31) and £25,950.34 for Broom Road (as opposed to £23,029.11). I note that this would lead to an improved position for the Contractor.

4.19 It is unfortunate that there appears to have been a misunderstanding between the Commissioner and the Contractor when the Contractor first raised the matter of buddying with another practice in June 2020. It is, however, unsatisfactory that the Commissioner did not provide a decision to the Contractor at that time. Contractors were clearly encouraged to make arrangements with a buddy practice in order to see urgent patients and notify the Commissioner of this. The Contractor was making the best use of the premises available to it at a difficult time in order to ensure patient safety and continuity of services. If, as the Commissioner puts it, "*The emphasis at the time was to support practices to open following the closedown and following the publication of the SOP enabling practices to reopen"*, then it follows that buddying enabled the Contractor to achieve this. From the information before me, it is unclear whether the Contractor was aware that agreement was needed but this does not absolve the Contractor from its responsibilities to ensure that its proposal was acceptable to the Commissioner. It is unfortunate that there was no clear guidance at the time to both the Commissioner and contractors regarding UDAs being completed at a buddy practice, which would have helped to inform the decision making in this regard. Nevertheless, it is clear that the decision of the Contractor to buddy with another practice has resulted in unintended consequences for the Contractor. In light of the above, I consider that it is open to the Commissioner to use its discretion in these circumstances.

5 DECISION

5.1 I determine that it is open to the Commissioner to consider the Contractor's individual circumstances and use its discretion to allow the Contractor to transfer 560 UDAs from the Broom Road Contract to the College Road Contract.

5.2 I note that neither party has submitted a claim for interest with regard to this dispute, so I make no determination in this regard.

Head of Appeals
NHS Resolution