

CENTERS FOR MEDICARE AND MEDICAID SERVICES

Decision of the Administrator

In the case of:

**Chestnut Hill Benevolent Association
The Leaves, Inc.
Arden Wood, Inc.
Broadview, Inc.**

Provider s

vs.

**Cahaba Government Benefits
Administration/Blue Cross Blue Shield
Association**

Intermediary

Claim for:

**Provider Cost Reimbursement
Determination for Cost Reporting
Period Ending: Various**

Review of:

PRRB Dec. No. 2014-D20

Dated: August 28, 2014

This case is before the Administrator, Centers for Medicare & Medicaid Services (CMS), for review of the decision of the Provider Reimbursement Review Board (Board). The review is during the 60-day period in §1878(f)(1) of the Social Security Act (Act), as amended (42 USC 1395oo(f)). Accordingly, the parties were notified of the Administrator's intention to review the Board's decision. Comments were received from the Providers and CMS' Center for Medicare (CM). All comments were timely received. Accordingly, this case is now before the Administrator for final agency review.

BACKGROUND AND PROCEDURAL HISTORY

These consolidated cases concern the Providers' appeals of nine cost reporting years covering cost reporting periods ending December 31, 2002 through June 30, 2006. The Providers are all Medicare-certified Religious Non-Medical Health Care Institutions (RNHCI) located in Massachusetts, Texas and California.¹ The Providers operate Christian Science Nursing Arts Training Programs (nurse training programs).

¹ This consolidated case involves four Providers with the same issue. These cases were originally PRRB Decisions Nos. 2010-D16, 2010-D17, 2010-D18 and 2010-D19. The Parties agreed that Case No. 07-2549 fiscal year ending (FYE) 12/31/05 which was originally part of the PRRB Dec No. 2010-D16, would serve as the lead

The Board heard oral arguments on the issue of accreditation of the governing commission, for the subject cases, on October 28, 2008 and issued decisions in favor of the Providers on March 17, 2010. On May 17, 2010, the CMS Administrator reversed the Board on the issue of accreditation. The Administrator also determined that the Providers' nursing school costs were not eligible for pass-through reimbursement because the costs at issue were properly classified as continuing education costs, which are payable as operating costs.²

The Providers filed an appeal of the Administrator's decision with the U.S. District Court for the District of Columbia challenging both bases in *Chestnut Hill Association v. Sebelius*, Civ. Action No. 10-1206. On October 12, 2011, the District Court remanded the case to the Secretary with specific instructions to determine "whether the training offered by [the Providers] is necessary to enter the specialty and therefore eligible for pass-through reimbursement or whether it is continuing education that should be 'treated as normal operating cost' under 42 C.F.R. §413.85(h)(3).³ On December 2, 2011, the Administrator remanded the case to the Board, consistent with the court's order to determine the issue stated in the Court's directive. Pursuant to this remand, the Board reopened these cases by letter dated March 26, 2012.

ISSUE AND BOARD'S DECISION

The issue is whether the training offered by the Providers is necessary to enter the specialty of Christian Science nursing in a RNHCI and, therefore, eligible for pass-through reimbursement, or whether the Providers' nurse training program is continuing education that should be treated as normal operating cost under 42 C.F.R. §413.85(h)(3).

The Board held that the nurse training programs operated by the Providers qualified for pass-through reimbursement under 42 C.F.R. §413.85(e). The Board concluded

case for purposes of citing to the record. See Transcript of Oral Hearing (dated Jan. 24, 2013) (Tr. II) at 10. The Transcript for the Oral Hearing (dated October 28 2008) will be referred to as "Tr. I."

² The Administrator held that, since the Providers' nurse education training was not required in order to practice as a Christian Science nurse, the Providers' Christian Science nurse training programs costs were to be treated as normal operating costs subject to the TEFRA limits.

³ Memorandum Opinion and Order, *Chestnut Hill Association v. Sebelius*, Civ. Action No. 10-1206 (D.D.C. Oct. 12, 2011). The Court's decision specified that the Board should not reopen the issue of accreditation.

that completion of the foundational Christian Science nurse-training program (Levels I to IV) was a specialty analogous to a registered nurse and that, in order to be hired as a Christian Science staff nurse in the Medicare-certified unit of a RNHCI, it was necessary for an individual to have successfully completed this foundational Christian Science nurse training program. In reaching this determination, the Board found that the typical individual entering the nurse training programs at Level I had no background in Christian Science nursing. The Board further found that the Providers' nurse training programs were of long duration (specifically, up to three and a half years) for a student nurse to complete the four level training program to begin employment at an RNHCI as a Christian Science staff nurse. In addition, the Providers' nurse-training programs (Levels I to IV) were not "continuing education" because the Providers' programs were designed to teach foundational non-medical nursing skills to not previously trained individuals. This foundational teaching was conducted both in the classroom and through mentorship and was not offered in a non-Christian Science environment. The Board gave great weight to the Providers' witnesses. Based on that evidence, the Board concluded that, because ten of the 17 RNHCI facilities required completion of a structured nurse training program before an individual could be employed as a nurse in a Medicare-certified RNHCI, the Providers had established industry norms. The Board held that the Providers' nurse training programs lead to the ability to both practice and begin employment as a Christian Science staff nurse in a Medicare-certified RNHCI. Therefore, based on a preponderance of the evidence, the Board concluded that the Providers' nurse training programs did not meet the requirements of normal operating cost under 42 C.F.R. §413.85(h)(3) and that the Providers qualify for pass-through reimbursement under 42 C.F.R. §413.85(e).

SUMMARY OF COMMENTS

The Providers submitted comments requesting that the Administrator affirm the Board's determination. The Providers argued that it is an industry norm to require completion of a formal nurse training to begin employment as a Christian Science staff nurse in the Medicare-certified wing of an RNHCI.⁴ The Providers contended that completion of a structured training program such as the programs operated by the Providers are the only way a Christian Science nurse can satisfy the Medicare conditions of participation related to nonmedical nurse staffing in an RNHCI. Specifically, the Medicare conditions of participation for RNHCI's at 42 C.F.R. §403.702 expressly conditions Medicare payment on an RNHCI's demonstration that

⁴ See Providers' Post-Hearing Brief at 3. Of the 17 Medicare-certified RNHCI's operating nationally during the relevant time period, at least 10 required an individual to have graduated from a structured Christian Science nurse training program as condition of employment as a staff nurse in a Medicare-certified RHNCI.

its nonmedical nursing personnel are “trained and experienced in the principles of nonmedical care, and formally recognized as competent in the administration of care.” The Providers asserted that they operated a four level (Levels I through IV) core nursing training program. The Providers stated that these programs are not continuing education because they are of long duration (generally three to three and a half years to complete) and the trainees generally have no nurse training prior to enrolling in the Providers' formal training programs. Trainees are neither qualified, nor permitted, to serve as staff nurses in a Medicare-certified RNHCI until the formal training program is complete. The Providers do offer continuing education courses (Levels V through X) but these continuing education courses are only for short duration. Therefore, the Providers argued that they are entitled to pass-through reimbursement because the nurse training programs furnished meet the criteria for pass-through under the Medicare program as set forth in 42 C.F.R. §413.85.

The CM submitted comments requesting that the Administrator reverse the Board's decision. CM disagreed with the Board's determination that completion of nurse training programs provided by the Providers (Levels I through IV) are necessary in order to practice and begin employment as a Christian Science staff nurse in the Medicare-certified wings of RNHCI. CMS contended that RNHCI nursing education programs do not qualify for pass-through payments under 42 C.F.R. §413.85(h)(3), since Christian Science nurses are not required to participate in nurse training programs before they practice Christian Science nursing in an RNHCI. To support this position, CM referenced the website of The Church of Christ, Scientist, which states that a Christian Science nurse can develop his or her nursing skills in many different ways....⁵ In addition, The Christian Science website listed the requirements for advertising as a Christian Science nurse in The Christian Science Journal, and nursing education was not included on that list.⁶ Accordingly, CM determined that the Intermediary correctly reclassified the nurse training programs in question to a non-reimbursable cost centers and correctly adjusted payments to the respective Providers.

⁵ See Intermediary's Exhibit I-7. See also Intermediary's Exhibit I-16 (application form from the Mother Church for "listing" or advertising as a Christian Science Nurse in the Christian Science Journal). See Tr. II at 146-155; See also [http://christianscience.com/member-resources/for-individuals/christian-science-nursing/how-to-become-a-christian-science-nurse/\(language\)/eng-US](http://christianscience.com/member-resources/for-individuals/christian-science-nursing/how-to-become-a-christian-science-nurse/(language)/eng-US)

⁶ <http://christianscience.com/member-resources/for-individuals/christian-science-nursing/advertise-as-a-christian-science-nurse>

DISCUSSION

The entire record, which was furnished by the Board, has been examined, including all correspondence, position papers, and exhibits. The Administrator has reviewed the Board's decision. All comments received timely are included in the record and have been considered.

From its inception in 1966 until 1983, Medicare paid for covered hospital inpatient services on the basis of "reasonable cost." Section 1861(v)(1)(A) of the Act defines "reasonable cost" as the cost actually incurred," less any costs "unnecessary in the efficient delivery of needed health services." While §1861(v)(1)(A) does not prescribe specific procedures for calculating reasonable cost, it authorizes the Secretary to promulgate regulations setting forth the methods to determine reasonable cost and the items to be included in reimbursable services. In 1982, Congress determined that the Medicare Program should be modified to provide providers with better incentives to render services more economically. Pursuant to the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) Congress amended the law by imposing a ceiling on the rate of increase of inpatient operating costs reimbursable by a provider. The TEFRA rate-of-increase limit is computed according to a provider's "target amount" which, in turn, is calculated according to a provider's cost reporting or "base" period. Under this system, providers are not reimbursed operating costs in excess of their target amounts, but received bonuses if the operating costs are less than the targeted amounts. The statute also sets forth exceptions and adjustments applicable to the rate-of-increase limits.

The Medicare program originally contained provisions authorizing payment for certain services furnished in Christian Science sanatoria. Section 4454 of Budget Balanced Act of 1997 (BBA 1997) repealed the existing Medicare provision authorizing payment for services furnished in Christian Science sanatoria in light of adverse case law. Instead, §4454 authorized Medicare payments for certain services provided in religious nonmedical health care institutions or RNHCI, as defined in the statute.

Services furnished in any facility that meets the definition of an RNHCI may qualify for payment. Section 4454 provides for coverage of inpatient hospital services and post-hospital extended care services furnished in qualified RNHCI's under Medicare. The BBA 1997 amendments make it possible for institutions other than Christian Science facilities to qualify as RNHCI's and to participate in Medicare.

Section 4454 of the BBA 1997, added section 1861(ss) of the Social Security Act, and provided for the payment of certain qualified services provided by a “Religious Nonmedical Health Care Institution” or “RNMCI.” Section 1861(ss) provides that:

(1) The term “religious nonmedical health care institution” means an institution that—

(A) is described in subsection (c)(3) of section 501 of the Internal Revenue Code of 1986 and is exempt from taxes under subsection (a) of such section;

(B) is lawfully operated under all applicable Federal, State, and local laws and regulations;

(C) provides only nonmedical nursing items and services exclusively to patients who choose to rely solely upon a religious method of healing and for whom the acceptance of medical health services would be inconsistent with their religious beliefs;

(D) *provides such nonmedical items and services exclusively through nonmedical nursing personnel who are experienced in caring for the physical needs of such patients;*

(E) provides such nonmedical items and services to inpatients on a 24-hour basis;

(F) on the basis of its religious beliefs, does not provide through its personnel or otherwise medical items and services (including any medical screening; examination, diagnosis, prognosis, treatment, or the administration of drugs) for its patients;

(G)(i) is not owned by, under common ownership with, or has an ownership interest in, a provider of medical treatment or services;

(ii) is not affiliated with—(I) a provider of medical treatment or services, or (II) an individual who has an ownership interest in a provider of medical treatment or services;

(H) has in effect a utilization review plan which—

(i) provides for the review of admissions to the institution, of the duration of stays therein, of cases of continuous extended duration, and of the items and services furnished by the institution, (ii) requires that such reviews be made by an appropriate committee of the institution that includes the individuals responsible for overall administration and for supervision of nursing personnel at the institution, (iii) provides that records be maintained of the meetings, decisions, and actions of such committee, and (iv) meets such other

requirements as the Secretary finds necessary to establish an effective utilization review plan;

(I) provides the Secretary with such information as the Secretary may require to implement section 1821⁷, including information relating to quality of care and coverage determinations; and

(J) *meets such other requirements as the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services in the institution.*

(2) *To the extent that the Secretary finds that the accreditation of an institution by a State, regional, or national agency or association provides reasonable assurances that any or all of the requirements of paragraph (1) are met or exceeded, the Secretary may treat such institution as meeting the condition or conditions with respect to which the Secretary made such finding.*

On November 30, 1999, CMS issued an interim final rule with comment period, effective January 1, 2003, setting forth the requirements that an RNHCI must meet in order to participate in the Medicare or Medicaid program.⁸ The Secretary explained that, under section 1861(ss)(1)(J) of the Act, CMS may accept an entity, as a participating Medicare provider, only if, in addition to meeting the specific statutory requirements, the provider meets other requirements CMS finds necessary in the interest of patient health and safety. With this broad authority given to impose these requirements, CMS set forth conditions of participation it found necessary and appropriate, in the religious nonmedical setting, for an RNHCI to meet in order to participate in Medicare, including at 42 CR 403.740, conditions of participation relating to staffing.

In the interim rule, the Secretary explained, regarding the conditions of participation for Staffing, at §403.740(f), that:

Under the condition for staffing we are requiring the RNHCI to have qualified experienced personnel present in sufficient numbers to meet the specific needs of the patients. The overall goal of this condition is to ensure that all the RNHCI's areas, not just those directly involved

⁷ Section 1821 of the Social Security Act establishes conditions of coverage for RNMHCI. Specifically, section 1821(a) of the Act requires that as a condition for Part A Medicare coverage, the beneficiary must have a condition that would qualify under Medicare Part A for inpatient hospital services or extended care services furnished in a hospital or skilled nursing facility.

⁸ 64 Fed. Reg. 67,028 (Nov. 30, 1999).

with patient care, are staffed with sufficient, qualified personnel. We believe an efficient and well-run institution is the product of all staffing areas working to improve the overall quality of the facility.

This condition is composed of three standards which support the objective that the RNHCI be staffed with qualified personnel. The first of these standards, Personnel qualifications, concerns qualifications of those individuals who furnish care to patients. We want to emphasize that the standard applies to all such individuals, whether or not they are employed or compensated by the RNHCI or, if they are compensated, whether salaried or contractors. This standard reflects our view that the conditions of participation for RNHCIs should not prescribe specific Federal personnel requirements for nonmedical personnel or attempt to limit or specify the functions they may perform.

The next standard, Education, training, and performance evaluation, is intended to ensure that the RNHCI staff are aware of their job responsibilities and are capable of meeting them. We are requiring that personnel receive education or training needed to help them achieve this goal. This education may include training that is related to the individual job description, performance expectations, applicable organizational policies and procedures, and safety responsibilities. We are emphasizing that under this standard, the RNHCI is responsible only for ensuring that the individual adequately knows the nature of his or her specific job duties. The individual is responsible for his or her own basic education, and for any continuing education needed to retain specific certification(s), unless the RNHCI chooses to assume this responsibility as part of the staff development process.

The second part of this standard requires all personnel in the RNHCI, as well as contractors and individuals working under arrangement, to demonstrate in practice the skills and techniques necessary to perform their assigned duties and responsibilities. It is not enough that the RNHCI demonstrates that staff has received training, or indicate how much training has been offered or provided. For effective health and safety of the patients, it is critical that all staff use the skills and techniques necessary to do their jobs correctly.

Lastly, this standard requires the RNHCI to evaluate the performance of the staff and implement measures for improvement as needed. We assume that all staff, whether directly or indirectly involved in patient care, will perform their duties competently and efficiently and it is the

RNHCI's responsibility to ensure that the staff meet these expectations on an ongoing basis.⁹

CMS emphasized that the staffing standard reflects the view that the conditions of participation for RNHCI's should not prescribe specific Federal personnel requirements for nonmedical personnel or attempt to limit or specify the functions they may perform. In addition, section 1861(ss)(2) of the Act also provides that CMS may accept the accreditation of an approved group that RNHCI's meet or exceed some or all of the applicable Medicare requirements. Therefore, in the interim final rule, CMS amended the regulations at §488.2 to add section 1861(ss)(2) of the Act as the statutory basis for accreditation of RNHCI's and §488.6 to add the RNHCI's to the list of providers in this section. Finally in 2003, the final rule was issued that addressed a commenter's request for clarification concerning nurse trainees:

[A] commenter would appreciate it if the regulations could clearly state that nursing personnel who are less experienced, such as trainees, may provide service to patients under the supervision of those who are "formally recognized as competent in the administration of care within their religious nonmedical health care group." The commenter assumed that the regulations did not prohibit RNHCI's from allowing trainees to provide service to patients when supervised by experienced personnel but requested that we provide clarification in the regulation.

Response: Medical model health care settings use registered nurses or licensed practical nurses that have participated in educational programs and following graduation take standardized tests for licensure. The statute requires that for payment purposes a beneficiary would require hospital or skilled nursing facility care in order to qualify for admission to an RNHCI. In turn, by statute the RNHCI may provide only nonmedical nursing items and services to patients, which is contrary to conventional nursing practice. Currently the only standardization for RNHCI nurse credentials exists for those individuals prepared in religious group nurse training programs and involved in the practice of that religion.¹⁰

To qualify as an RNHCI provider the implementing regulation at 42 C.F.R. §403.720 lists ten qualifying provisions that a provider must satisfy in order to be

⁹ 67 Fed. Reg. 67028, 67034-67035 (November 30, 1999)(Interim final rule with comment period)(effective January 31, 2000).

¹⁰ 68 Fed. Reg. 66710, 66713-66714 (November 28, 2003)(Final Rule).

reimbursement as an RNHCI for Medicare or Medicaid purposes. In addition, an RNHCI must meet the Conditions of Participation cited in 42 C.F.R. §403.730 through 403.746. Of particular relevance in this case is the Medicare Condition of Participation outlined at 42 C.F.R. §§403.732 and 403.740. The regulation at 42 C.F.R. §403.732 states that:

The RNHCI must develop, implement, and maintain a qualify assessment and performance improvement program.

(a) *Standard: Program scope.* (1) The qualify assessment and performance improvement program must include, but is not limited to, measures to evaluate:

- (i) Access to care.
- (ii) Patient satisfaction.
- (iii) *Staff performance.*
- (iv) Complaints and grievances.
- (v) Discharge planning activities.
- (vi) Safety issues, including physical environment.

With respect to the Conditions of Participation regarding staffing, 42 C.F.R. §403.740 states that:

(a) *Standard: Personnel qualifications.* The RNHCI must ensure that staff who supervise or furnish services to patients are qualified to do so and that staff allowed to practice without direct supervision have specific training to furnish these services.

(b) *Standard: Education, training and performance evaluation.* (1) The RNHCI must ensure that staffs... have the necessary education and training concerning their duties so that they can furnish services competently. This education includes, but is not limited to, training related to the individual job description, performance expectations, applicable organizations policies and procedures, and safety responsibilities. (2) Staff must demonstrate, in practice, the skills and techniques necessary to perform their duties and responsibilities. (3) The RNHCI must evaluate the performance of staff and implement measures for improvement.

If the RNHCI does not meet the Conditions of Participation regarding staffing of a nursing facility, Medicare will not pay for nursing care in that facility. Relevant to this case, an RNHCI is paid under the reasonable cost methodology subject to the

TEFRA target ceiling.¹¹ Under this payment system, certain nursing education programs are paid on a cost basis without being subjected to the target limit, that is, are paid on a “pass-through” basis if they meet the standards set forth in 42 C.F.R. §413.85. Historically, Medicare has paid a share of the net costs of “approved nursing and allied health education activities” under the reasonable cost provisions. The regulations at 42 C.F.R. §413.85(c) which implements §1861(v)((1)(A) of the Act and §4004(b) of the Omnibus Budget Reconciliation Act of 1990, defines “approved education activities” as formally organized or planned programs of study of the type that:

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

In 2001, the Secretary issued a final rule clarifying the policies for the payment of costs associated with nursing and allied health education activities.¹² In the final rule, the Secretary clarified Medicare's policy on the types of training programs that would be paid on a reasonable costs basis and those costs which would be classified as normal operating cost. The Secretary explained:

As we have previously discussed, the final hospital inpatient prospective payment system rule published January 3, 1984, attempted to clarify the Medicare policy on the classification of training costs incurred by providers as costs of approved educational activities paid on a reasonable costs basis. Since that time, questions have arisen about some types of training programs that are neither listed as approved programs under existing §413.85(e) nor readily identifiable under existing §413.85(d) as activities not within the scope of approved educational activities.

The programs that had been included in our list of approved programs were generally programs of long duration designed to develop trained practitioners in a nursing or allied health discipline, such as professional nursing or occupational therapy. This is contrasted with a continuing education program of a month to a year in duration in which a practitioner, such as a registered nurse, receives training in a specialized skill, such as enterostomal therapy. *While such training is*

¹¹ See 42 C.F.R. §413.40.

¹² See 66 Fed. Reg. 3358 (Jan. 23, 2001).

undoubtedly valuable in enabling the nurse to treat patients with special needs and in improving the level of patient care in a provider, the nurse, upon completion of the program, continues to function as a registered nurse, albeit one with special skills. Further distinction can be drawn between this situation and one in which a registered nurse undergoes years of training to become a CRNA. The costs of continuing education training programs are not classified as costs of approved educational activities that are passed through and paid on a reasonable cost basis. Rather, they are classified as normal operating cost covered by the prospective payment rate or, for providers excluded from the prospective payment system, as costs subject to the target rate-of-increase limits. In proposed 413.85(g)(3) (§413.85(h)(3) of this final rule), we proposed to revise the regulations to include continuing educational programs in the same category as “educational seminars and workshops that increase the quality of medical care or operating efficiency of the provider.”¹³ (Emphasis added.)

In addition, in the May 19, 2003 proposed rule, the Secretary proceeded to explain what constituted “continuing education” for purposes of determining whether a nursing or allied health education activity would or would not qualify for Medicare reasonable cost-pass-through payments.¹⁴ The Secretary explained that, “provider-operated programs that do not lead to any specific certification in a specialty would be classified as continuing education.”¹⁵ The Secretary further explained that:

By certification, we do not mean certification in a specific skill, such as when an individual is certified to use a specific piece of machinery or perform a specific procedure. Rather, we believe certification would mean the ability to perform in the specialty as a whole.

Although, in the past, we believe we have allowed hospitals to be paid for operating a pharmacy “residency” program, it has come to our attention that those programs do not meet the criteria for approval as a certified program. Once individuals have finished their undergraduate degree in pharmacy, there are some individuals who go on to participate in 1-year hospital-operated postundergraduate programs. It is our understanding that many individuals complete the postundergraduate program practice pharmacy inside the hospital setting. However, we also understand that there are pharmacists who

¹³ *Id.* at 3370 (Jan. 23, 2001).

¹⁴ *See* 68 Fed. Reg. 27209, 27210 (May 19, 2003).

¹⁵ *Id.*

do not complete the 1-year postundergraduate program, but have received the undergraduate degree in pharmacy, who also practice pharmacy inside the hospital setting. Because pharmacy students need not complete the 1-year residency program to be eligible to practice pharmacy in the hospital setting, the 1-year programs that presently are operated by hospitals would be considered continuing education, and therefore, would be ineligible for pass-through reasonable cost payment.¹⁶

Finally, in the final rule the Secretary explained that costs associated with optional residency programs, which are not required for a nursing or allied health professional to practice in a provider setting, have always been considered “continuing education.” The Secretary explained:

Our intent is to ensure that Medicare-pass-through payments are only provided for programs that enable an individual to be employed in a capacity that he or she could not have been employed without having first completed a particular education program. We believe, that, for Medicare purposes, training that enhances an individual's competencies, but does not permit that individual to be employed in a new capacity in which he or she could not have been employed without completing the additional training, would not qualify for Medicare reasonable cost pass-through payments. Medicare provides payments for such educational activities, but only under the methodology applicable to payment of normal operating costs....¹⁷

The Secretary further stated in the final rule, that:

Our view of a “specialty” in the nursing and allied health education context is based on what the industry views as the standard of practice in a specific area within a profession. The training required to allow a person to serve in the “specialty” is tailored to the skill level and context that an individual is expected to use in that “specialty.”

Consistent with what we stated in the proposed rule, Medicare reasonable cost pass-through payments are only provided for programs, that according to industry norms qualify an individual to be employed in a specialty in which the individual could not have been employed before completing a particular education program. Given the confusion

¹⁶ *Id.*

¹⁷ 68 Fed. Reg. 45425 (Aug. 1, 2003).

expressed by commenters, we recognize the need to specify how we will determine whether completion of a particular education program enables an individual to be employed in a specialty. We will use “industry norms” as the standard to determine whether participation in a specialty enables an individual to be employed in a capacity that he or she could not have been employed without having first completed a particular education program. We are defining “industry norm” to mean that more than 50 percent of hospitals in a random, statistically valid sample require the completion of a particular training program before an individual may be employed in a specialty. (We understand that, in some instances, due to the unique staffing circumstances faced by many smaller hospitals, inclusion of small hospitals in the sample would introduce factors that are not typically representative of the industry as a whole and would skew the results inappropriately....

However, we note that we do not completely defer to the information provided by industry representative in order to determine the “industry norm.” Rather, if at any time we obtain information that calls our view of industry norms into question, we may make our own determination based on a random sample of hospitals....

We also recognize that industry norms are susceptible to change over time. Therefore, although it may not currently be the “industry norm” to require completion of a particular nursing or allied health education program in order to practice and being employment in a particular specialty, it may become the “industry norm” in the future. If we find that it has become the “industry norm,” we may allow the hospitals operating those programs (and meeting the requirements at §413.85) to be paid for the costs of those programs on a reasonable cost basis.¹⁸ (Emphasis added.)

The issue on remand is whether an individual's completion of a Christian Science Nursing Arts Training Programs is a requirement for individuals to enter the specialty field of Christian Science nursing. The Board concluded that the Providers' nurse training programs are not continuing education, but rather, they are necessary to enter the specialty of Christian Science nursing in a Medicare-certified RNHCI and, therefore, eligible for pass-through reimbursement under 42 C.F.R. §413.85.

Applying the relevant law and program policy to the foregoing facts, the Administrator does not agree with the Board's determination. The Administrator

¹⁸ 68 Fed. Reg. 45425, 45426-45427 (Aug. 1, 2003).

finds that the Christian Science Nursing Arts Training Programs do not qualify for Medicare pass-through payments, as Christian Science nurses do not need to participate in a Christian Science nurse education program before they begin practicing as nurses in an RNHCI.

A review of the record shows that a Christian Science nurse can develop his or her nursing skills in many different ways. Testimony from Ms. Carol Worley, Director of Christian Science Nurse's Training at Chestnut Hill shows that completion of the nurse training program is not necessary to enter the field of Christian Science nursing. Ms. Worley testified that the ability of an individual to identify him or herself as a Christian Science nurse is within the purview of the Church of Christ, Scientist.¹⁹ In addition, Ms. Worley testified that, in the world of Christian Science nursing, there could be Christian Science nurses that didn't go through a structured training program.²⁰

The Church of Christ, Scientist identifies the following examples of career development paths for how an individual may develop "Christian Science nursing skills:"

- Experience in nursing family members;
- One-to-one training from an experienced Christian Science nurse;
- Courses provided by Christian Science nursing organization.²¹

In addition, the website of The Church of Christ, Scientist, explains that:

Becoming a Christian Science Nurse Requires a strong, deep, spiritual commitment. Membership in The Mother Church is a primary requirement. Christian Science Primary class instruction is required to advertise in the *The Christian Science Journal*.

¹⁹ See Tr. II 147 (Ms. Worley explained that "[y]ou know, questions that are being asked me in regard to the authority to call oneself a Christian Science nurse is not in my criteria or [Chestnut Hill's] criteria or Medicare's criteria. It would belong to our church ..."). See also Tr. II 176-177 (testimony from Ms. Worley noting that the Church of Christ, Scientist bylaws include a provision setting forth the "rules" for how those representing themselves as Christian Science nurses may be included in *The Christian Science Journal*).

²⁰ See Tr. II 155 ("Q. But in the world of Christian Science there could be a Christian Science nurse that didn't go through the program. A. Yes.").

²¹ See Intermediary's Exhibit 1-7 titled "Christian Science Nurses: Becoming a Christian Science Nurse."

Involves developing Christian Science nursing skills which maybe accomplished in many different ways, including: Experience in nursing family members;

One-to-one training from an experienced Christian Science nurse;

Course provided by Christian Science nursing organizations.

May include a combination of some courses and some experience with facility or private duty Christian Science nursing, How one proceeds is very individual.

Involves, above all, turning to God in prayer for guidance each step.²²

The “Application for Advertising as a Christian Science nurse in The Christian Science Journal” requires that the applicant set forth his or her “practice” and names of three Journal-listed Christian Science nurses (or other alternative persons that can speak to the applicant's qualifications), who have observed the applicant's care of patients first hand and are ready to verify that the applicant is fully prepared to represent themselves as a Christian Science nurse.²³

The Providers argued that the Providers' nurse training programs do lead to the ability to practice and begin employment as a staff nurse in a Medicare certified RNHCI and “provides the only recognized standardization for nurse credentials available to individuals seeking to the ability to practice nursing in a RNHCI.”²⁴ The testimony was that the hiring standards for staff nurses in the Medicare certified RNHCI were set by looking at the requirements by the Commission as well as the Medicare regulation “which stipulates we have trained and experienced Christian Science non-medical personnel that can render care and that they are recognized formally recognized as competent.”²⁵

The Providers also contend that it is an “industry norm” to require completion of a formal nurse-training program to begin employment as a Christian Science staff

²² See, Intermediary Exhibit 1-7.

²³ See Intermediary Exhibit 1-16. See also <http://christianscience.com/member-resources/for-individuals/christian-science-nursing/advertise-as-a-christian-science-nurse>

²⁴ Providers' Post-Hearing Brief at 20.

²⁵ Providers' Post-Hearing Brief at 21.

nurse in a Medicare-certified RNHCI.²⁶ To support that proposition, the Providers' witness stated that she was aware of ten (from a total universe of 17 RNHCIs) requiring completion of a structured Nurse Training Program before an individual can begin employment as a nurse in a Medicare-certified RNHCI.

The Administrator finds that specific education and or experience standards or requirements for Christian Science nurses employed at Medicare participating RNHCIs are not set out in the Medicare conditions of participation. The controlling RNHCI condition of participation regulation sets forth the criteria that must be met but does not prescribe the particular means of meeting these requirements. The regulation instead provides, *inter alia*, that: "The RNHCI must ensure that staffs... have the necessary education and training concerning their duties so that they can furnish services competently."

A review of the record and evidence presented in the case²⁷ shows that the "industry norm" and standard for credentialing nursing staff to meet the conditions of participation are met by an RNHCI's use of Journal-listed nurses. For support, the Providers alleged that the Accreditation Commission for Christian Science Nursing facilities would not accredit a Medicare-certified Christian Science facility that used "non-accredited" trained Christian Science nurses on the floor. That is, the Providers stated that only nurses that had completed the full formal nursing program training at issue in this case could be used in the Medicare certified RNHCIs in order for the service to qualify for Medicare payment.²⁸

²⁶ Another related issue of such an "industry norm" alleged by the Provider is the lack of an accrediting body that standardizes the training incorporated into such programs as addressed in the earlier Administrator decision. Consequently, it is an "industry norm" without any industry standardization.

²⁷ Certain internet pages have been introduced into the record by both of the parties. In this case, while not necessary to support the Administrator findings in light of the record, the Administrator takes notice of certain other related websites and webpages. Certain of the webpages are related to websites already presented by the Providers in the record, or related to testimony presented by the Providers. For a general discussion on the related subject see "Judicial Notice of Internet Evidence" *The United States Law Week, Case Alert & Legal News, Bloomberg BNA, Vol. 82, No. 34 (March 11, 2014).*

www.jha.com/us/filemanager/judicialnotice_of_intemet_evidence.pdf

²⁸ *See* Providers' Supplemental Position Paper at 22 ("The only means by which RNHCIs can demonstrate compliance with the core conditions of Medicare participation is through the operation of Christian Science nursing training programs like the ones whose costs are at issue in this appeal.")

A function of “The Commission for Accreditation of Christian Science Nursing Organizations/Facilities, Inc.” is to, inter alia, establish, improve, promote and maintain standards for the operation of Christian Science Organizations/Facilities providing Christian Science nursing services.²⁹ An official function is to “list and certify Christian Science Nursing organizations/facilities which are accredited by the corporation for purposes of Federal and State reimbursement programs and laws including those established under the Federal Medicaid or Medicare programs.”³⁰ However, the documentation of the Accreditation requirements for recognition by The Mother Church as a Christian Science Nursing facility does not specify the completion of a formal training program for nursing staff of an accredited Christian Science nursing facility, nor does it accredit nursing programs.³¹ Instead, the type of organizations eligible for Accreditation as a Christian Science nursing facility must meet these criteria:

The primary services is rendered by Christian Science nurses representing themselves in accord with the standard for the “Christian Science nurse: Article VIII, Section 31 of the *Manual of The Mother Church* by Mary Baker Eddy.

The organization's facilities must be sufficiently staffed and equipped to provide 24-hour Christian Science nursing services under the supervision of Christian Science nurses whose cards appear in *The Christian Science Journal*.³²

The “Accreditation Standards for Nursing Organizations/Facilities for Christian Scientists” further discusses in detail the “Responsibilities of Christian Science

²⁹ See, e.g., Provider Exhibit P-38 (A.R. 159).

³⁰ See, e.g., Provider Exhibit P-38 (A.R. 160).

³¹ See Administrative Record in Chestnut Hill Benevolent Association, PRRB Dec No 2010-D16, Provider Exhibit 18 ("Accreditation Standards for Nursing Organizations/Facilities for Christian Scientists" Revised June 2002, April 2005)(A.R. 707, 710, 716-717) . See Administrator Decision in PRRB Dec No 2010-16, D17, D18, D19, discussing the accreditation of Christian Science Nursing facilities and the requirement for the use of "Journal-listed" nurses at pp 13-15., Provider Exhibit P-40 at ii (A.R. 170)("Accreditation Standards for Nursing Organizations/Facilities for Christian Scientists 1990")(published prior to issuance of 1999 Condition of Participations).

³² Provider Exhibit P-40 at ii (A.R. 170)("Accreditation Standards for Nursing Organizations/ Facilities for Christian Scientists").

Nurses in the facility.”³³ The Standards listed under “Section C. Responsibilities of Christian Science Nurses In the Facility” reads as follows:

1. There is a two-tiered structure to this accreditation standard.

Model A – organizations have a sufficient number of Christian Science nurses whose cards appear in the Christian Science Journal to provide direct supervision of the nursing areas continuously for 24 hours a day, 7 days a week. In instances where a second nurse is not required on the third (overnight) shift, Model A organizations will have a second qualified nurse to be available on the nursing floor ready to work within 15 minutes (including travel time.)

Model B – facilities will be required to have Christian Science nurses whose cards appear in the Christian Science Journal on duty 16 hours per day 7 days a week, that is, the first and second shifts. However, a designated JLN must be on the floor within 15 minutes if needed during the third shift. Experience nurses who do not have cards in The Christian Science Journal and who are scheduled as supervisors must have demonstrated ability in supervision and oversight and be capable of providing proper care in all nursing situations.

2. Facilities will demonstrate they have staffing and procedures in effect to meet any and all sudden and unexpected needs on all shifts.
3. The setting of standards for nursing practice within a facility shall be the responsibility of the nursing staff who have their cards listed in The Christian Science Journal. Standards shall be in agreement with Article VIII Section 31 in the Church Manual in this document. They shall have the support of the administrator and the governing board. The Accreditation team will satisfy itself that these standards fulfill the requirement of providing proper care and are being adhered to through the facility.
4. The organization provides for supervision of all patients and the nursing staff by an experience nurse (such as superintendent, nurse-manager, etc.) whose card appears in the Christian Science Journal.
5. The organization provides a thorough orientation of new nursing staff members to the facility's policies, procedures, and any considerations in meeting the needs of individual patients with whom the staff members will be working.

³³ Provider Exhibit 18.

6. The organization maintains patient and nursing records and other documentation that are legible, easily understood, which documents clearly that proper care has been provided, and is sufficient for legal requirements, for third party review, or for other purposes. All patient care plans/information sheets, and daily nursing records are non-condition oriented and are reviewed and updated daily by nurses whose cards appear in the Christian Science Journal. These records are stored and maintained as required by local laws.

7. The organization has and follows a process to encourage the nursing staff and those receiving nursing service to identify ways and means to continually refine and improve the quality of service to patients....³⁴

Notably, under the Accreditation standards, the following rules for the residential programs, as opposed to the nursing services program, must be followed: Christian Science Nursing must be the organization's primary mission and the residential rooms and residents must be physically separate from nursing patients' rooms and patients. The standards do not otherwise recognize separate standards of nursing care (that is, Medicare-certified nursing care vs non-Medicare certified nursing care), but only recognizes Christian nursing services program vs the residential program.³⁵

Further, at the 2008 Oral Hearing the following exchange occurred between the witness from the Accreditation Commission and the Providers' representative now erroneously used to support their allegations:

Q: Would the Commission accredit a Medicare certified Christian Science facility that used non-accredited (³⁶) trained Christian Science nurse on the floor?

A. We would see that they—looked to see that they had proper education as far as nurse—CS nurses training. So I would say the answer is no, but it wasn't a specific requirement, but you could hardly have proper oversight of a floor with Medicare patients without that kind of— *without their own listed nurse on the floor and every shift.*³⁷

³⁴ Provider's Exhibit P-19 at 8-9.

³⁵ Provider Exhibit 18 at 12 (A.R. 720).

³⁶ As noted, the record also does not demonstrate that there is in fact an "accredited" nurse training program, but rather the Commission "accredits" facilities that have nurses sufficient trained and approved to be included on the Journal-listing. Hence an "accredited" trained nurse could be seen as a nurse that meets the standards to be listed in the Journal.

³⁷ Tr. I 157-158.

Consistent with the Accreditation Commission standard, the witness was not confirming that only staff that had completed the nursing program could be employed in the Medicare certified facility but rather that the method of showing compliance to the Medicare Conditions of Participation was through the use of Journal-listed nurses.³⁸ Similarly, the Commission Inspection Report awarding Chestnut Hill the three years Accreditation Certificate, dated May 9, 2006 stated that:

Section C Responsibilities of Christian Science Nurses in the facility.

1. Chestnut Hill meets the requirements of a Model A facility—with a sufficient number of *Journal*-listed Christian Science nurses (JLN's) to provide direct supervision 24 hours a day, 7 days a week . Staffing needs are being met with the assistance of temporary nurses and the organization is actively working to increase its staff.³⁹

This testimony is also consistent with the “Checklist for Inspecting Nursing Organizations/Facilities for Christian Scientists.” For example, for the “Overlook” Inspection, dated July 14 & 15, 2002”⁴⁰ reflects these same standards:

C. Responsibilities of Christian Science Nurses in the facility. C-1 The organization has a sufficient number of Christian Science nurses whose cards appear in *The Christian Science Journal* providing direct supervision of the nursing areas continuously for 24 hours a day, 7 days a week (Noncompliance, automatic 6-month probation.)”

In addition to erroneously contending that the completion of the Christian Science training program was required to meet the conditions of participation, the Providers contended, through testimony, that a large number of RNHCIs require their nurses to complete the Training Programs involved in this cases to serve in the Medicare

³⁸ See also "National Christian Science Care Data Base" <http://www.ncscd.com/medicare.htm>; ("Eligibility for Medicare Reimbursement for Christian Science Nursing Care-Christian Science nursing care must meet very specific criteria to qualify for Medicare reimbursement. For Medicare purposes, the nursing care must require the judgment, skill, oversight, observation, or direct care of a Journal-listed Christian Science nurse. Generally, the nursing need must include at least one of the following:- full care in bed, the full assistance of one or more nurses to walk, the dressing and bandaging of a wound - assistance to ensure proper and adequate nourishment.")

³⁹ Provider Exhibit P-18 (A.R. 686, 688) See also A.R. 693.

⁴⁰ Provider Exhibit P-39 (A.R. 143)

certified unit of the Christian Science nursing facility thus demonstrating this as the “industry norm.”⁴¹

In discussing this criterion, CMS stated that: “We are defining “industry norm” to mean that more than 50 percent of hospitals in a random, statistically valid sample require the completion of a particular training program before an individual may be employed in a specialty...” CMS also stated that: “We note that we do not completely defer to the information provided by industry representative in order to determine the “industry norm.” Rather, if at any time we obtain information that calls our view of industry norms into question, we may make our own determination based

⁴¹ The Intermediary also presented documentation that one Medicare-participating RNHCI – Sunland Home Foundation – does not require the completion of a training program prior to hiring individuals as Christian Science nurses. The record shows that during the relevant time period of this appeal, Sunland Home Foundation employed four levels of Christian Science nurses. The Sunland Home Foundation job descriptions for these four levels of Christian Science nurse level 4 is indicated as "Journal-Listed" (unlike nurse levels 1-3) and does not show nursing arts classes as a Qualification, although a Qualification is being "listed in the current issue of the Christian Science Journal" and shows that "experience, training and education may include “successful completion of Advanced CS Nursing Arts IV class or equivalent. See Provider's Exhibits P-38 through P-42. P-38 at Id. at ¶5 (Letter from Pamela Ludwig, Executive Director of Sunland Home Foundation stating that during Ms. Ludwig's eight year tenure as executive director she has hired more than 20 Christian Science nurses and “all but one of these nurses has had some level of formal training as a Christian Science nurse. But see <http://www.sunland.org/employment.asp> (CHRISTIAN SCIENCE NURSES. Sunland invites Christian Science nurses to join our team! The provision for the Christian Science Nurse, found in the Manual of the Mother Church, by Mary Baker Eddy, requires the ability to pray. It describes the need for "a demonstrable knowledge of Christian Science practice" in order to be a nurse (Art. VIII, Sect. 31). It means that love for God and man motivates your desire to nurse. Christian Science nurses of all experience levels, Journal-listed Christian Science nurses and those just entering the field, are encouraged to apply.") <http://www.sunland.org/rates.asp> ("Medicare- The patient who has Medicare benefits may choose to use them at Sunland (designated in Medicare law as a Religious Nonmedical Health Care Institution, or RNHCI) if the following conditions have been met: • His/her condition would qualify under Medicare Part A for inpatient services. • His/her care would be coverable on inpatient hospital services and post-hospital extended care services furnished in qualified RNHCIs under Medicare. • The care requires the judgment, skill, and oversight of a fully trained Journal-listed Christian Science nurse.")

on a random sample of hospitals ...” While the Providers are relying upon this criteria they did not present a third party “industry representative” nor a random statistically valid sample demonstrating that the required completion of the subject programs before an individual may be employed in a specialty. Instead, a primary source of the testimony came from the Director of the nurse training program.

The Chestnut Hill Benevolent Association website in describing the Christian Science nursing services acknowledges the criteria of Journal listed nursing staff for an RNHCI in stating that:

Christian Science Nursing Admission Coordinators are available twenty four hours a day to respond to all requests for inpatient, outpatient and visiting Christian Science Nursing care. All Christian Science Nursing care is given under the direct supervision of a Journal-listed Christian Science Nurse.⁴²

The Chestnut Hill witness contends that they may require the completion of a structured Nurse-Training Program before an individual can began employment as a nurse in a Medicare-certified RNHCI. The Chestnut Hill presented testimony as to its individual hiring practice of requiring that “Staff Nurses” complete its training program as a prerequisite for employment, yet never cites a requirement that the nurse be Journal-listed.⁴³ The Providers also pointed to Exhibit P-36(b) which describes the position title of “Staff Nurse (Completed All Courses)”. This job was described as an entry level position at Chestnut Hill for providing non-medical care in the Medicare—certified RNHCI. However, the Job Description does not itself refer to the Medicare-certified level of care or that such a nursing position is exclusive to the Medicare-certified “wing” as suggested by the Board. The job description does not require the applicant to be Journal-listed and thus would not, on its face, meet the Commission Accreditation Standards for the Medicare-certified RNHCI.

Moreover, as shown on the Chestnut Hill Christian Science Nursing program webpage “FAQs”:

Once I complete the CSNA program does that mean I will automatically be listed as a Christian Science nurse in the Christian Science Journal?

Individuals who have completed the CSNA program would need to apply through the First Church of Christ, Scientist (The Mother

⁴² <http://www.chbenevolent.org/christain-science-nuring;>

⁴³ See Tr., II 178-119.

Church), in order to be considered for listing as a Christian Science nurse in *The Christian Science Journal*. Specific requirements to apply for Journal listing can be found here.⁴⁴

Thus, while the training and mentoring might assist a graduate in qualifying for Listing in the *Journal*, a Christian Science nursing graduate is not the same as a *Journal*-listed nurse, nor is the completion of the program a requirement to qualifying for listing as a Christian Science nurse in *The Christian Science Journal*. Regarding Christian Science nurse employment at Chestnut Hill, the website explains that:

We're expanding our staff and welcome inquiries from *Journal*-listed Christian Science Nurses with sound and substantial practices. Be a part of our vibrant, healing ministry of Christian Science nursing in greater Boston and New England. Opportunities include positions on our active Christian Science nursing floor (with needs from Light Assistance to skilled care): As a Christian Science nurse; As a Supervisor. We invite applications from those who: Meet the requirements of the *Church Manual* By-law "Christian Science Nurse" and are listed in *The Christian Science Journal*, Have an experienced practice in the field of Christian Science nursing and exemplify the qualities of a Christian Science nurse, Are flexible and willing to be available to work various shifts. We offer excellent benefits and an opportunity to apply for focus training courses for Christian Science nurses. Position Type-Full or Part-Time.⁴⁵

Finally a Chestnut Hill Association sponsored "Bldg" dated as recent as July 30, 2014 entitled "Christian Science Nursing, Assisted-Living or Light Assistance-What's-the-Difference?", again highlights the criteria for Medicare certified care given by a *Journal*-listed nurse in stating that:

To prepare for this blog I checked out the *Association of Organizations for Christian Science Nursing (AOCSN)* website for member organizations, as well as the *Organization of Residential Homes (ORH)* website. I thought I knew most of the terms for care at our Christian Science facilities, but a few were new even to me! Below is a list of most of the services offered by our organizations along with a definition. It's immediately clear that the term "Assisted Living" is the hardest one to tie down – I actually found eight other names for it!

⁴⁴ Intermediary Exhibit 1-17 at 15.

⁴⁵ <http://www.chbenevolentorg/employment-2/employmentchristian-science-nurses>.

1. Christian Science nursing care – usually refers to care that requires the skills, judgment and/or oversight of a Journal-listed Christian Science nurse. This care usually qualifies for Medicare if other requirements are met. Sometimes referred to as skilled care.
2. Christian Science Care – refers to care that may not require the skills, judgment and/or oversight of a Journal-listed Christian Science nurse....⁴⁶

In addition, a Chestnut Hill supported Blog Post Reply, dated August 6, 2014, concerning the recruitment of Christian Science nurses, stated that:

The requirement for hiring Journal-listed Christian Science nurses is based in our Accreditation Standards and not Medicare/Medicaid. If we were not a Medicare provider, we would still require Journal-listing for certain positions. It is true that when hiring temporary CS nurses we are looking for Journal-listed CS nurses. It is the only standard that we have for recruiting those who are representing themselves as Christian Science nurses.⁴⁷

That is, the Chestnut Hill website acknowledges that the only standard for recruiting those who are representing themselves as Christian Science nurse is the Journal listing.

In addition, the RNHCIs with which the witness expressed familiarity included the four RNHCIs at issue in this case and Peace Haven, Sunland Home, Lynn House, Glenmont, Wide Horizon and High Ridge House. The witness testified that requiring the completion of a structured nurse training program was a standard practice for these Medicare-certified RNHCIs. (Tr II 1/12/13 at 184:2-13).⁴⁸ The Providers thus argued that at least 10 of the total universe of 17 Medicare certified RNHCIs require the training at issue before an individual is eligible for employment as a nurse at these facilities demonstrating that the training at issue is an industry norm for employment in the Medicare certified unit of the RNHCI.⁴⁹ Further, while the

⁴⁶ <http://www.chbenevolentorg/blog/cs-nursing/assisted-living-or-light-as-is-tance-whats-the-difference>

⁴⁷ <http://www.chbenevolent.org/blog/janivas-blog/18-christian-science-nurses-blessing-ba>

⁴⁸ The Providers submitted certain website pages to show certain of these were in fact Medicare-certified facilities. *See, e.g.*, A.R. at 1125 for Lynn Haven and A.R. at 1127 for Glenmont.

⁴⁹ Ms. Worley further clarified that, with regards to her level of familiarity as to the hiring practices of the identified RNHCIs, she did not know the various levels of their

Providers submitted certain website pages to support their case, other aspects of these same websites would appear to contradict their contentions.

All the Medicare certified facilities acknowledge the standard of credentialing of the nursing staff for Medicare certified care is Journal-listing as a Christian Science nurse. The Glenmont Christian Service Facility explains that: "Only Christian Science nursing care that requires the skills, judgment, observation or direct care of Christian Science Journal-listed nurses is covered by Medicare. Other Christian Science nursing care is not eligible for Medicare coverage."⁵⁰ Lynn House also explains that: "Christian Science Nursing Care: for those needing the nursing skills, judgment, and spiritual readiness of a Journal-listed Christian Science nurse. (Christian Science Nursing Care is covered by Medicare for those eligible; it is also covered by some private insurance companies.)"⁵¹ Broadview Christian Science Nursing in describing the different levels of care explains that: "The most acute level of care we offer. Provided only by a skilled Christian Science nurses who have met the requirements for listing in The Christian Science Journal. Those receiving care at this level may qualify for Medicare benefits."⁵² With respect to other Medicare certified facilities, including High Ridge House,⁵³ similar explanations of the

nursing staff, nor had she reviewed or familiarized herself with the job descriptions for such staff. *See* Tr. II 143-144.

⁵⁰ <http://www.glenmontcsn.com/nursing-care/medicare-and-medicaid/>;

<http://www.glenmontcsn.com/nursing-care> ("FAQ Who shall be admitted to Glenmont? Serious students of Christian Science. Do I have to enlist a Journal listed Christian Science Practitioner? Yes, unless it is Rest and Study or Residential-Care. What should I bring? A week's worth of clothing that can be laundered, no dry-cleaning. Bring your personal items, no drugs, vitamins or food supplements, and no valuables. Social Security Card;Photo ID Medicare Card; Insurance Card, if any Power of Attorney Document")

⁵¹ <http://www.lynnhouse.org/services.html>; <http://www.lynnhouse.org/services.html>; <http://www.lynnhouse.org/employment.html#nurses> ("Christian Science Nurses We have opportunities available for Christian Science Nurses at our beautiful nursing facility in Alexandria Virginia. If you have ever been trained or Journal listed as a Christian Science Nurse, and would like to renew or continue your practice and share your love and special gifts, we would like to hear from you. Skills refreshment and work towards current listing in The Christian Science Journal is available.")

⁵² <http://www.csbread.org/services>

⁵³ <http://www.highridgehouse.org/docs/HRHSummer04.pdf>;
http://www.highridgehouse.org/docs/CS%20Nurse%20III_2013.pdf;
www.highridgehouse.org.../MEDICARE_AND_INSURANCE_-_-FREQUENTLY_UNASKED_QUESTIONS

Medicare-certified level of care indicates that only a Journal-listed nurse is required.⁵⁴

(“What Conditions Are Eligible for Medicare Reimbursement? The nature of the care must require the services of a skilled nurse. For Medicare purposes this means the care requires the judgment, skill, oversight, observation, or direct care of a Journal listed Christian Science nurse.)

(http://www.highridgehouse.org/docs/DCSN_2014.pdf; (Director of Nursing “Must be a member of The Mother Church, an active member of a branch church, and express a deep commitment to the healing ministry of our church through regular study of the Bible and the writings of Mary Baker Eddy. Must be listed in the current Christian Science Journal.)

⁵⁴ Examples of other with Medicare-certified Christian Science Nursing facilities and other Guidance regarding Medicare payments for services in an RHNCI include: Fernlodge ("The Christian Science nursing care we offer is given by Christian Science nurses, whose education, training and experience is wholly within the education system of Christian Science, and includes no medical training. Nursing is practiced under the supervision of qualified Christian Science nurses who are listed in the current edition of the church publication *The Christian Science Journal*.")

<http://fern lodge.org/about-us/>; <http://il.wp.com/fern lodgs.org/wp-content/uploads/DCSN-ad-2014-A.jpg> (Job for Director of Nursing Journal listed) Sunrise Haven Christian Science Nursing Services ("Medicare is available for Christian Scientists who are having a physical challenge of a critical nature. The level of care needed must require the services of a skilled Christian Science nurse listed in *The Christian Science Journal*.")

<http://www.sunrisehaven.org/web/resources/pdf/MedicareEligibility.pdf>;

Beacon Haven ("Full Care in Our Facility. There are three basic levels of care in our facility: Christian Science Nursing Care (CSNC). This is our highest level of care. CSNC requires a Journal-listed Christian Science nurse to provide care. Hours of Christian Science nursing are typically 4-6 per day, although this can extend to more when needed. CSNC may be covered by Medicare, private insurance, or some long-term care policies for those eligible.")

<http://www.beaconhaven.org/ourservices/christiansciencenursing.html>;

Peace Haven Association ("What Is Covered versus Not Covered at Christian Science Nursing Facilities Medicare Part A covers Christian Science nursing services, room charges and meals at facilities, and most nursing supplies. It does NOT cover the following: Christian Science nursing care that does not require a Journal-listed Christian Science nurse;") <http://www.peacehavenassociation.org/wp-content/uploads/2014/04/MedicarePaperFeb2014.pdf>; High Ridge House ("WHAT CONDITIONS ARE ELIGIBLE FOR MEDICARE REIMBURSEMENT? The nature of the care must require the services of a skilled nurse. For Medicare purposes

In support of this nursing training program industry standard the Provider also points to language in the final rule published in 2003 for support of its position where CMS stated: "Currently the only standardization for RNHCI nurse credentials exists for those individuals prepared in religious group nurse training programs and involved in the practice of that religion."⁵⁵ However, in response to the Medicare conditions of participation promulgated in 1999, the Accreditation Commission for Christian Science Organizations and Facilities issued standards (revised 2002 and 2005) for staff nursing credentials requiring staff inclusion on The Christian Journal Science listings and not based on the religious group nurse training programs. As clearly evident, neither CMS, nor the regulations setting forth the Medicare conditions of participation, specify the accreditation standards required, or the methods by which the conditions of participation for staffing can be met. Consequently, this statement by CMS is clearly not controlling with respect to indicating how RNHCIs as a class "standardize" their RNHCI nurse credentials, nor to Christian Science facilities specifically. The Administrator finds that the Providers have failed to meet their burden by a preponderance of the evidence that the industry norm for staffing the Medicare certified Christian Science nursing facility requires that staff have completed the subject nursing programs to meet hiring requirements.

The record shows that the only standard required for accreditation purposes for a Medicare certified Christian Science facility is that it be staffed by Journal-listed nursing staff. Therefore, because the identified nursing education programs in the respective entities are not required for a Christian Science nurse to practice in the Medicare certified RNHCI, the Providers' Christian Science nurse training programs cost are subject to 42 C.F.R. §413.85(h)(3). This provision treats the costs of programs that "do not lead to the ability to practice and begin employment in a nursing or allied health specialty" as normal operating costs. Moreover, as the Secretary stated in the 2001 final rule, while CMS recognizes such training may be valuable in enabling the nurse to treat patients with special needs and in improving the level of patient care, here the Christian Science nurse, upon completion of the program, continues to function as a Christian Science nurse and, thus, such costs are only paid as normal operating costs. Thus, under the policy specifically articulated as early as the 1991 proposed rule and later set forth as clarification pursuant to the 2001 final rule, these costs are paid as normal operating costs.

this means the care requires the judgment, skill, oversight, observation, or, direct care of a Journal-listed Christian Science nurse.")

⁵⁵ 68 Fed. Reg. 66710, 66713-66714 (November 28, 2003)(Final Rule)

For the reasons stated above, the Administrator finds that the Providers have not met their burden of proof that an individual's completion of the Nurse Training Program is required for purposes of entering the field of Christian Science nursing in the Medicare certified RNMCI. As such, the Providers' nursing educational costs cannot be reimbursed on a pass-through basis for the cost years in dispute. The cost associated with the Providers' Christian Science nurse training programs cost are to be treated as normal operating costs subject to the TEFRA limits.⁵⁶

⁵⁶ Each cost year stands on its own. Thus, to the extent these costs are alleged to have been allowed as pass-through costs in prior years, does not justify the continuation of the incorrect payment. The Secretary has also pointed out in the 2003 final rule the erroneous payment of continuing education costs as pass through in other instances such as a pharmacy residency program, which did not justify the continued payment.

DECISION

The decision of the Board is reversed in accordance with the foregoing opinion.

**THIS CONSTITUTES THE FINAL ADMINISTRATIVE DECISION
OF THE SECRETARY OF HEALTH AND HUMAN SERVICES**

Date: 10/21/14

/s/

Marilyn Tavenner
Administrator
Centers for Medicare & Medicaid Services