

PROVIDER REIMBURSEMENT REVIEW BOARD DECISION

2014-D20

PROVIDERS –
Chestnut Hill Benevolent Association
The Leaves, Inc.
Arden Woods, Inc.
Broadview, Inc.

PROVIDER NOs.: Various
See Appendix I

vs.

INTERMEDIARY – Cahaba
Government Benefit Administrators/
Blue Cross and Blue Shield Association

DATE OF HEARING -
January 24, 2013

Cost Reporting Periods Ended –
December 31, 2002 – June 30, 2006

CASE NOs.: Various
See Appendix I

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ISSUE:

Whether the training offered by the Providers is necessary to enter the specialty of Christian Science nursing in a Religious Non-Medical Health Care Institution 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).¹

MEDICARE STATUTORY AND REGULATORY BACKGROUND:

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

The Medicare program was established under Title XVIII of the Social Security Act, as amended ("Act"), to provide health insurance to eligible individuals. Title XVIII of the Act was codified at 42 U.S.C. Chapter 7, Subchapter XVIII. The Centers for Medicare & Medicaid Services ("CMS"), formerly the Health Care Financing Administration ("HCFA"), is the operating component of the Department of Health and Human Services ("DHHS") charged with administering the Medicare program. CMS' payment and audit functions under the Medicare program are contracted to organizations known as fiscal intermediaries ("FIs") and Medicare administrative contractors ("MACs"). FIs and MACs² determine payment amounts due the providers under Medicare law, regulation and interpretative guidelines published by CMS.³

Providers are required to submit cost reports annually, with reporting periods based on the provider's accounting period. A cost report shows the costs incurred during the relevant accounting period and the portion of those costs allocated to the Medicare program.⁴ Each intermediary reviews the cost report, determines the total amount of Medicare reimbursement due the provider and issues the provider a Notice of Program Reimbursement ("NPR").⁵ A provider dissatisfied with the intermediary's final determination of total reimbursement may file an appeal with the Provider Reimbursement Review Board ("Board") within 180 days of the receipt of the NPR.⁶

MEDICARE COVERAGE OF NURSING AND ALLIED HEALTH EDUCATION ACTIVITIES

From the inception of the Medicare program in 1965, certain medical education expenses have been reimbursed on a reasonable cost basis.⁷ Both the House and Senate Committee reports accompanying the 1965 legislation⁸ suggest that Congress favored including medical educational expenses as allowable medical education costs under the Medicare program. That is demonstrated by the inclusion in both of these reports the following statements regarding the reimbursement of medical education costs as allowable expenses under the Medicare program:

¹ Transcript for Hearing on Jan. 24, 2013 ("Tr.") at 6-7.

² FIs and MACs are hereinafter referred to as intermediaries.

³ See 42 U.S.C. §§ 1395h and 1395kk-1; 42 C.F.R. §§ 413.20 and 413.24.

⁴ 42 C.F.R. § 413.20.

⁵ 42 C.F.R. § 405.1803.

⁶ See 42 U.S.C. § 1395oo(a); 42 C.F.R. § 405.1835.

⁷ See 42 U.S.C. § 1395x(v)(1)(A); 42 C.F.R. § 405.421 (1970); 57 Fed. Reg. 43659, 43661 (Sept. 22, 1992).

⁸ Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (1965).

Many hospitals engage in substantial educational activities, including the training of medical students, internship and residency programs, the training of nurses and the training of various paramedical personnel. Educational activities enhance the quality of care in an institution and it is intended, until the community undertakes to bear such education cost in some other way, that a part of the net cost of such activities (including stipends of trainees as well as compensation of teachers and other costs) should be considered as an element in the cost of patient care, to be borne to an appropriate extent by the hospital insurance program.⁹

Significantly, these reports specifically list nursing and paramedical (*i.e.*, allied health) education expenses as a type of medical education activity that “should be considered as an element in the cost of patient care, to be borne to an appropriate extent by the hospital insurance program [*i.e.*, the Medicare program].”

On November 22, 1966, CMS published a final rule promulgating regulations at 20 C.F.R. § 405.421 addressing when the costs of educational activities are allowable under the Medicare program.¹⁰ In 1975, CMS clarified that an approved nursing or allied health education program had to be operated by a provider for its costs to be allowable as the costs of approved educational activities.¹¹ In 1977, CMS redesignated the regulation as 42 C.F.R. § 405.421 without altering or amending subsection (c) of that regulation.¹²

In 1982, Congress determined that the Medicare Program should be modified to offer providers with better incentives to execute services more economically. Pursuant to the Tax Equity and Fiscal Responsibility Act of 1982 (“TEFRA”),¹³ Congress amended the law by imposing a ceiling on the rate of increase of inpatient operating costs reimbursable to a provider.¹⁴ 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 receive 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.

In 1983, Congress enacted the Medicare inpatient prospective payment system (“IPPS”) under which the Medicare program reimburses hospitals for the “operating costs of inpatient hospital services” at a fixed, predetermined rate.¹⁵ Significantly, Congress excluded “approved educational activities” such as nursing and allied health education activities from IPPS.¹⁶ On September 1, 1983, CMS issued an interim final rule (“September 1983 Interim Final Rule”) to

⁹ S. Rep. No. 89-404, at 36 (1965); H.R. Rep. No. 89-213, at 32 (1965).

¹⁰ 31 Fed. Reg. 14808 (Nov. 22, 1966).

¹¹ Provider Reimbursement Manual, CMS Pub. No. 15-1, § 404.2.

¹² 42 Fed. Reg. 52826 (Sept. 30, 1977).

¹³ Pub. L. No. 97-248, 96 Stat. 324 (1982).

¹⁴ TEFRA § 101, 96 Stat. at 331-336.

¹⁵ See Social Security Amendments of 1983, Pub. L. No. 98-21, § 601(e); 42 U.S.C. § 1395ww(d).

¹⁶ 97 Stat. at 149 (codifying 42 U.S.C. § 1395ww(a)(4) which excluded “approved education activities” from the definition of “operating costs of inpatient hospital services”).

implement IPPS.¹⁷ Consistent with the statute, the September 1983 Interim Final Rule excluded certain approved medical education activities such as nursing and allied education activities from hospital operating costs under IPPS, and continued to pay these costs on a reasonable cost or “pass-through” basis.¹⁸

In addition, as part of the final rule dated January 3, 1984 (“January 1984 Final Rule”), CMS amended subsection (d)(6) of 42 C.F.R. § 405.421 to clarify that “the costs of clinical training for students enrolled in programs, *other than at the hospital*, are normal operating costs.”¹⁹ On September 30, 1986, CMS redesignated 42 C.F.R. § 405.421 as 42 C.F.R. § 413.85 without altering or amending subsection (c) of that regulation.²⁰

As part of the Omnibus Budget Reconciliation Act of 1989 (“OBRA-89”)²¹ and the Omnibus Budget Reconciliation Act of 1990 (“OBRA-90”),²² Congress revised the education cost rules as applied to nursing and allied health education expenses. In OBRA-89 § 6205(a), Congress created a temporary category of “hospital-based nursing schools” and allowed a hospital to claim the costs incurred in training students in a hospital-based nursing school as pass-through costs. This category was effective for cost reporting periods beginning on or after December 19, 1989 and on or before the date the Secretary issued a final rule on regulations for the payment of costs of approved nursing and allied health education programs. In particular, Congress directed CMS to clarify the criteria for reasonable cost reimbursement of nursing education costs to include:

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

Congress mandated that CMS issue these regulations by July 1, 1990 and that these regulations “shall not be effective prior to October 1, 1990, or 30 days after publication of the final rule in the Federal Register, whichever is later.”²³

CMS issued a final rule on January 12, 2001 (“2001 Final Rule”)²⁴ promulgating regulations at 42 C.F.R. § 413.85 to implement the OBRA-89 and OBRA-90 amendments.²⁵ CMS

¹⁷ 48 Fed. Reg. 39752 (Sept. 1, 1983).

¹⁸ See *id.* at 39797, 39811, 39844 (amending 42 C.F.R. § 405.421). See also 42 U.S.C. § 1395ww(a)(4).

¹⁹ 49 Fed. Reg. 234, 267 (Jan. 3, 1984) (emphasis added). See also *id.* at 313.

²⁰ 51 Fed. Reg. 34790, 34790-34791, 34813-34814 (Sept. 30, 1986).

²¹ Pub. L. No. 101-239, 103 Stat. 2106, 2243 (1989).

²² Pub. L. No. 101-508, 104 Stat. 1388, 1388-39 – 1388-40 (1990).

²³ OBRA 1989 § 6205(b)(2)(B)(iii).

²⁴ 66 Fed. Reg. 3358 (Jan. 12, 2001).

²⁵ 57 Fed. Reg. 43659 (Sept. 22, 1992).

subsequently revised these regulations during the time at issue through final rules published on August 1, 2003 and August 11, 2004 (“2003 Final Rule” and “2004 Final Rule” respectively).²⁶ As a result of these final rules, the regulations at 42 C.F.R. § 413.85 set forth the applicable principles for reimbursing the reasonable cost of nursing and allied health educational activities under the Medicare program and explicitly define the types of approved educational activities which are within the scope of these reimbursement principles. Specifically, 42 C.F.R. § 413.85 (2005) states in pertinent part:

(c) *Definitions.* For purposes of this section, the following definitions apply:

Approved educational activities means formally organized or planned programs of study of the type that:

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

Classroom instruction costs are those costs associated with formal, didactic instruction on a specific topic or subject in a class that meets at regular, scheduled intervals over a specific time period (for example, semester or quarter), and for which a student receives a grade.

Clinical training costs means costs of training for acquisition and use of the skills of a nursing or allied health profession or trade in which these skills will be used by the student upon graduation. Clinical training may involve occasional or periodic meetings to discuss or analyze cases, critique performance, or discuss specific skills or techniques; it involves no classroom instruction. . . .

(d) *General payment rules.* (1) Payment for a provider’s net cost of nursing and allied health education activities is to be determined on a reasonable cost basis, subject to the following conditions and limitations:

- (i) An approved educational activity—
 - (A) Is recognized by a national approving body or State licensing authority as specified in paragraph (e) of this section;
 - (B) Meets the criteria specified in paragraph (f) of this section for identification as an operator of an approved education program.
 - (C) Enhances the quality of inpatient care at the provider. . . .

²⁶ The 2003 and 2004 Final Rules are located at 68 Fed. Reg. 45346 (Aug. 1, 2003) and 69 Fed. Reg. 48916 (Aug. 11, 2004) respectively.

- (f) *Criteria for identifying programs operated by a provider.*
- (1) Except as provided in paragraph (f)(2) of this section, for cost reporting periods beginning on or after October 1, 1983, in order to be considered the operator of an approved nursing or allied health education program, a provider must meet all the following requirements:
- (i) Directly incur the training costs.
 - (ii) Have direct control of the program curriculum. . . .
 - (iii) Control the administration of the program, including collection of tuition (where applicable), control the maintenance of payroll records of teaching staff or students, or both (where applicable), and be responsible for day-to-day program operation. . . .
 - (iv) Employ the teaching staff.
 - (v) Provide and control both classroom instruction and clinical training (where classroom instruction is a requirement for program completion)
- (2) Absent evidence to the contrary, the provider that issues the degree, diploma or other certificate upon successful completion of an approved education program is assumed to meet all of the criteria set forth in paragraph (f)(1) of this section and to be the operator of the program. . . .

- (h) *Costs of educational activities treated as normal operating costs.* The costs of the following educational activities incurred by a provider but not operated by that provider are recognized only as normal operating costs and paid in accordance with the reimbursement principles as specified in Part 412 of this subchapter [*i.e.*, IPPS]. They include:
- (1) Orientation and on-the-job training.
 - (2) Part-time education for bona fide full-time employees at properly accredited academic or technical institutions (including other providers) devoted to undergraduate or graduate work.
 - (3) Educational seminars, workshops, and continuing education programs in which the employees participate that enhance the quality of medical care or operating efficiency of the provider and, effective October 1, 2003, do not lead to the ability to practice and begin employment in a nursing or allied health specialty.

In the preamble to the 2001 Final Rule, CMS included the following discussion on the difference between provider-operated programs that are eligible to receive Medicare reasonable cost reimbursement as a pass-through cost and provider-operated continuing education programs that are normal operating costs paid under IPPS:

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 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 costs 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.²⁷

In the 2003 Final Rule, CMS included the following discussion to further clarify the difference between provider-operated programs that are eligible to receive Medicare reasonable cost reimbursement as a pass-through cost and provider-operated continuing education programs that are normal operating costs paid under IPPS:

Our intent is to ensure that Medicare reasonable cost 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 specialty in which he or she could not have been employed without completing the additional training, would not qualify for Medicare reasonable cost pass-through payment. Medicare provides payment for such educational activities, but only under the methodology applicable to payments for normal operating costs. Our intent was to provide clarification for the purpose of distinguishing between those educational programs that qualify for reasonable cost pass-through payment (that is, programs that enable an individual to begin employment in a specialty), and those programs that should be paid as normal operating costs (that is, activities that are intended to enhance the current skill set of an individual for a profession or advance an individual's professional career).²⁸

²⁷ 66 Fed. Reg. at 3370.

²⁸ 68 Fed. Reg. at 45428.

The preamble to the 2003 Final Rule also provides the following discussion on § 413.85(h)(3) to facilitate determining when “[e]ducational seminars, workshops, and continuing education programs . . . do not lead to the ability to practice and begin employment in a nursing or allied health specialty”:

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 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. . . .

However, we note that we do not completely defer to the information provided by industry representatives 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 begin 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.²⁹

MEDICARE COVERAGE OF CERTAIN RELIGIOUS NON-MEDICAL HEALTH CARE SERVICES

The Medicare program originally contained provisions authorizing payment for certain services furnished in Christian Science sanatoria.

In § 4454 of Budget Balanced Act of 1997 ("BBA")³⁰ Congress repealed the then-existing Medicare provision authorizing payment for services furnished in Christian Science sanatoria. Congress then replaced this provision with one authorizing Medicare payments for certain services provided in a Religious Non-Medical Health Care Institution ("RNHCI").³¹

Services furnished in any facility that meets the definition of an RNHCI³² may qualify for payment under the Medicare program, not just those provided in Christian Science sanatoria. Accordingly, the BBA 1997 amendments make it possible for institutions other than Christian Science facilities to qualify as RNHCI and to participate in the Medicare program.

A RNHCI is paid under the reasonable cost methodology subject to the TEFRA target ceiling.³³ Under this payment system, certain nursing education programs are paid on a reasonable cost basis without being subjected to the target limit, in other words, on a "pass-through" basis if they meet the standards set forth in 42 C.F.R. § 413.85.

On November 30, 1999, CMS issued guidelines setting forth the requirements that a RNHCI must meet in order to participate in the Medicare or Medicaid program.³⁴ To qualify as a RNHCI provider, the implementing regulation at 42 C.F.R. § 403.720 list ten qualifying provisions that a provider must satisfy in order to be reimbursement as a RNHCI for Medicare or Medicaid purposes. In addition, a RNHCI must meet the Conditions of Participation cited in 42 C.F.R. §§ 403.730 through 403.746. Of particular concern in this case is the Medicare Condition of Participation outlined at 42 C.F.R. § 403.740 which 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

²⁹ *Id.* at 45426-45427.

³⁰ Pub. L. No. 105-33, § 4454, 111 Stat. 251, 426-432 (1997).

³¹ See 42 U.S.C. §§ 1395i-5, 1395x(e), 1395x(y), 1395x(ss).

³² 42 U.S.C. § 1395x(ss)(1).

³³ See 42 C.F.R. § 413.40.

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

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.

The only issue in this case relates to whether the Provider's nurse-training programs are disqualified from pass-through reimbursement because they [do] not lead to the ability to practice and begin employment in a nursing or allied health specialty and whether the Providers' training is necessary to enter the specialty and therefore be eligible for pass-through reimbursement or whether continuing education should be treated as normal operating cost under 42 C.F.R. § 413.85(h)(3).³⁵

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

Chestnut Hill Benevolent Association, The Leaves, Arden Wood, Inc., and Broadview, Inc. ("Providers") are all Medicare-certified RNHCI located in Massachusetts, Texas, and California respectively. The Providers operate Christian Science Nursing Arts Training Programs ("Nursing Schools"). This case³⁶ concerns the Providers' appeal of nine cost reporting years covering each Provider's cost reporting periods ended December 31, 2002 ("FY 2002") through June 30, 2006 ("FY 2006").

The Board heard oral arguments on the sole 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, 2010.³⁷ On May 17, 2010, the CMS Administrator ("Administrator") reversed the Board's decision. The Administrator also determined that "nursing education is not required for a Christian Science nurse to practice in an RNHCI, the Providers' Christian Science nurse training programs are subject to 42 C.F.R. § 413.85(h)(3)."³⁸ The Providers filed a timely appeal of the Administrator's decision with the U.S. District Court for the District of Columbia ("D.C. Court"). On October 12, 2011, the D.C. Court remanded these cases back to the Board with the specific directive 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 costs' under 42 C.F.R. § 413.85(h)(3)."³⁹ Provider's nurse-training programs should be treated as normal operating

³⁵ See Administrator's order (Nov. 29, 2011).

³⁶ The Parties agreed that Case No. 07-2549 will serve as the lead case. See Tr. at 10 (Jan. 24, 2013).

³⁷ See PRRB Dec. Nos. 2010-D16, 2010-D17, 2010-D18 and 2010-D19 (Mar. 17, 2010).

³⁸ See Administrator's decision (May 17, 2010).

³⁹ Memorandum Opinion and Order, *Chestnut Hill Ass'n v. Sebelius*, Civ. Action No. 10-1206 (D.D.C. Oct. 12, 2011).

costs and, therefore, excluded from pass-through reimbursement. On December 2, 2011, the Administrator issued the remand of these cases to the Board 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.

The Providers were represented by Susan A. Turner, Esq., of Ober, Kaler, Grimes, & Shriver, P.C. The Intermediary was represented by Robin Sanders, Esq., of the Blue Cross Blue Shield Association.

PROVIDERS' CONTENTIONS:

The Providers contend that it is an industry norm to require completion of a formal nurse training program to begin employment as a Christian Science staff nurse in the Medicare-certified wing of a RNHCI as established by testimony and job descriptions entered into the record. The completion of a structured training program such as the programs operated by the Providers is the only way a Christian Science nurse can satisfy the Medicare conditions of participation related to nonmedical nurse staffing in a RNHCI. Specifically, the Medicare conditions of participation for RNHCIs at 42 C.F.R. § 403.702 expressly conditions Medicare payment on a RNHCI's demonstration that its nonmedical nursing personnel are "*trained and experienced in the principles of nonmedical care, and formally recognized as competent in the administration of care.*"⁴⁰

The Providers operate a four level (Levels I through IV) core nursing training program.⁴¹ This program is not continuing education because it is a program of long duration (generally three to three and 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 individuals that have completed the formal training program (*i.e.*, Levels I through IV) and are of short duration.⁴²

The Provider contends that it is entitled to pass-through reimbursement because the nurse training programs furnished at the Nursing Schools meet the criteria for pass-through payment under the Medicare program as set forth in 42 C.F.R. § 413.85. The Provider disputes the CMS Administrator's conclusion that these costs should be considered normal operating cost for continuing education as set forth in 42 C.F.R. § 413.85(h)(3). All of the criteria in 42 C.F.R. § 413.85(h)(3) must be met to treat training as normal operating costs, including that the continuing education program *not* be operated by the provider and "do[es] not lead to the ability to practice and begin employment in a nursing or allied health specialty." The Providers stress that their nurse training programs do not meet any of the criteria set forth in § 413.85(h)(3) because their programs are operated by the Providers, are not continuing education, and *do* lead

⁴⁰ (Emphasis added.) See also 42 C.F.R. §§ 403.740(a), (b); 68 Fed. Reg. 66710, 66714 (Nov. 28, 2003); Providers' Post-Hearing Brief at 18-25.

⁴¹ Tr. at 47.

⁴² See Providers Post-Hearing Brief at 12-17.

to the ability to practice and begin employment as a Christian Science staff nurse in the Medicare-certified wing of a RNHCI.⁴³

INTERMEDIARY'S CONTENTIONS:

The Intermediary contends that the Providers' nurse-training programs are continuing education and should be treated as normal operating costs under 42 C.F.R. § 413.85(h)(3). The Intermediary asserts that, based on evidence in the record, including witness testimony and documentation, there are numerous ways in which an individual may enter the specialty nursing field of Christian Science nursing, including, but not limited to, the completion of the Providers' training programs.

The Intermediary further asserts that individuals may enter the allied health specialty field of Christian Science nursing at a RNHCI without completing a formal nurse training program like those at the Providers. Therefore, the Providers' training programs should be considered continuing education under 42 C.F.R. § 413.85(h)(3) and the costs associated with running these training programs would be normal operating costs.

The Intermediary argues that the Providers bear the burden of proving by a preponderance of evidence that they are entitled to the disputed Medicare reimbursement under the applicable rules and regulations.⁴⁴ The Intermediary asserts that, notwithstanding the guidance in the preamble to the 2003 Final Rule, the Providers have not shown by a preponderance of evidence that, pursuant to an "industry norm" standard, completion of their training programs are necessary before an individual may be employed at a Medicare-certified RNHCI as a Christian Science nurse.⁴⁵ The Intermediary maintains that the Providers' requirement to complete a nurse training program does not establish that its hiring criteria and standards are consistent with the "industry norm." The Intermediary points to information from Sunland Home Foundations⁴⁶ to support its assertion that other RNHCI have hiring standards that contradict the Providers' position that a structured training program is required to begin employment as a Christian Science nurse at a RNHCI.⁴⁷

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

After considering the Medicare law and program instructions, the parties contentions and evidence presented, the Board finds and concludes that the Providers' nurse training programs are not continuing education but rather they are necessary to enter the specialty of Christian

⁴³ See Providers' Post-Hearing Brief at 26-35.

⁴⁴ See *LAC & USC Med. Center Los Angeles, CA v. Blue Cross Blue Shield Ass'n*, PRRB Dec. No. 2003-D26 at 7 (May 2, 2003), *declined review*, CMS Administrator (Jun. 21, 2003). See also 5 U.S.C. § 556(d) ("the proponent of a rule or order has the burden of proof").

⁴⁵ 68 Fed. Reg. at 45424 (establishing that an "industry norm" standard is used for purposes of determining whether education is considered continuing education under 42 C.F.R. § 413.85(h)(3)). See Intermediary Post-Hearing brief at 9-10.

⁴⁶ Provider Exhibits P-38 through P-42.

⁴⁷ See Intermediary Post-Hearing Brief at 14.

Science nursing in a Medicare-certified RNHCI and, therefore, eligible for pass-through reimbursement under 42 C.F.R. § 413.85.

The Board reviewed the regulations at 42 C.F.R. Part 403, Subpart G that specify the conditions for participation in the Medicare program as a RNHCI. The regulation at § 403.720(a)(4) is relevant to this case as it addresses the staffing requirements for nonmedical nursing personnel. In particular, this regulation specifies that a RNCHI “[f]urnishes nonmedical items and services exclusively through nonmedical nursing personnel who are *experienced* in caring for the physical needs of nonmedical patients.”⁴⁸ The following statement in the preamble to the final rule published on November 28, 2003 suggests that RNHCIs could satisfy this requirement only through nurse training programs:

Currently, the only standardization for RNHCI nurse credentials exists for those individuals prepared in a religious group nurse training programs and involved in the practice of that religion.⁴⁹

Consistent with 42 C.F.R. § 403.740, the Providers maintain that the nurse training programs they operate provides individuals with the foundational skills and techniques necessary to perform their duties and responsibilities as nonmedical nurses in a RNHCI and that the completion of such training is necessary to be employed as a Christian Science staff nurse in the Medicare-certified wing of a RNHCI.

The Board reviewed the guidance that CMS gave in distinguishing between nursing and allied health education programs that are eligible for pass-through payment and continuing education programs that are considered normal operating costs. The following chart summarizes some of characteristics associated with provider operated nursing and allied health education programs and continuing education programs that CMS gave in the preamble to the 2001 Final Rule to assist in distinguishing one from the other:

CHARACTERISTICS LISTED IN THE PREAMBLE TO THE <u>2001</u> FINAL RULE FOR	
NURSING AND ALLIED HEALTH EDUCATION PROGRAMS	CONTINUING EDUCATION PROGRAMS
“programs of long duration”	“program of a month to a year in duration”
“designed to develop trained practitioners in a nursing or allied health discipline, such as professional nursing or occupational therapy”	“practitioner, such as a registered nurse, received training in a specialized skill [and] continues to function as a registered nurse, albeit one with special skills”

⁴⁸ (Emphasis added.)

⁴⁹ 68 Fed. Reg. 66710, 66714 (Nov. 28, 2003).

This guidance covers all of the cost reporting periods at issue, *i.e.*, FYs 2002 through 2006.

CMS provided additional guidance in the 2003 Final Rule and revised 42 C.F.R. § 413.85(h)(3) to incorporate this guidance. The following chart summarizes additional characteristics associated with provider operated nursing and allied health education programs and continuing education programs that CMS gave in the preamble to the 2003 Final Rule to assist in distinguishing one from the other:

CHARACTERISTICS LISTED IN THE PREAMBLE TO THE <u>2003</u> FINAL RULE FOR	
NURSING AND ALLIED HEALTH EDUCATION PROGRAMS	CONTINUING EDUCATION PROGRAMS
“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”	“training that enhances an individual’s competencies, but does not permit that individual to be employed in a new specialty in which he or she could not have been employed without completing the additional training”
“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”	“activities that are intended to enhance the current skill set of an individual for a profession or advance an individual’s professional career”
“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 before an individual man be employed in a specialty. . . . [W]e do not completely defer to the information provided by industry representatives in order to determine ‘industry norm’ [and], 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.”	
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This additional guidance consistent with the revisions made to § 413.85(h)(3) was effective October 1, 2003. As a result, it is only applicable to a subset of the cost reporting periods at issue, specifically those cost reporting period beginning on or after October 1, 2003, *i.e.*, FYs 2004 through 2006.

At the outset, the Board recognizes that the Mother Church provides guidance on becoming a Christian Science nurse.⁵⁰ As explained in the guidance, the Mother Church has the authority to designate and list an individual as a Christian Science nurse and specifies that there are numerous ways in which an individual may accomplish developing Christian Science nursing skills, including:

- experience in nursing family members;
- one-to-one training from an experienced Christian Science nurse;
- courses provided by Christian Science Nursing organizations.⁵¹

However, this guidance is not a directive to RNHCIs or Christian Science nursing facilities on their employment standards or hiring practices, but rather is directed to individuals interested in becoming a Christian Science nurse.⁵²

Further, the Board notes that there is a distinction between a Christian Science nurse in a Christian Science facility and a Christian Science *staff* nurse in a Medicare-certified RNHCI. The Christian Science *staff* nurse is an individual at the entry level position to provide nonmedical nursing care in the Medicare-certified wing of a RNHCI. As discussed more fully below, the preponderance of the evidence establishes that the completion of the foundational Christian Science nurse training program (Levels I to IV) is a specialty analogous to a registered nurse and that, in order to be hired as a Christian Science staff nurse in the Medicare-certified wing of a RNHCI, it is necessary for the individual to have successfully completed this foundational Christian Science nurse training program. Further, in order to qualify for *Medicare certification* as RNHCI and, thereby, be eligible to participate in the Medicare program as a RNHCI, the nursing staff for the RNHCI must furnish nonmedical *skilled* care and must be trained to perform their duties and responsibilities.⁵³ To this end, similar to long term care facilities,⁵⁴ RNHCIs typically have Medicare-certified wings where Medicare-covered services

⁵⁰ See Intermediary Exhibit I-7. See also Intermediary Exhibit I-16 (application form from the Mother Church for “listing” or advertising as a Christian Science Nurse in The Christian Science Journal).

⁵¹ See Tr. at 146-155; Intermediary Exhibit I-7 (entitled “Christian Science Nurses: Becoming a Christian Science Nurse”).

⁵² See Tr. at 195. See also Tr. at 193 (stating that the Mother Church does not own, operate, or control the Christian Science nursing facilities and RNHCIs and does not direct their employment standards or hiring practices).

⁵³ See Tr. at 165-171. See also Medicare Benefit Policy Manual, CMS Pub. No. 100-02, Ch. 1, § 130.1 (stating that, in order to have an effective election for RNHCI services, the Medicare beneficiary must “have a condition that would qualify for Medicare Part A inpatient hospital or posthospital extended care services if the beneficiary were an inpatient of a hospital or a resident of a SNF that is not a RNHCI”).

⁵⁴ Long term care facilities are often organized with wings for Medicare-certified skilled care that qualifies for Medicare coverage and wings for unskilled or custodial care that does not qualify for Medicare coverage.

are provided by trained nurses and non-Medicare wings where light care may be provided for by trained and/or untrained nurses.⁵⁵ Thus, the Board finds that the issue in this case is more specifically whether the training provided by the Providers through their nurse training programs (Levels I to IV) is necessary in order to be employed as a Christian Science *staff* nurse in the Medicare-certified wing of a RNHCI.

Based on the guidance from the preambles to the 2001 and 2003 Final Rules, the Board finds that the nurse-training programs at issue do not meet the requirements of “normal operating cost” under 42 C.F.R. § 413.85(h)(3). Specifically, the Board finds that the nurse-training programs are operated by the Providers, are *not* on-the-job training, educational seminars, workshops or continuing education because the Providers’ nurse training programs are neither short in duration nor intended to only enhance the current skill set of an individual for a profession. The typical individual entering the nurse training programs at Level I generally has no background in Christian Science nursing.⁵⁶

The Board further finds that the Provider’s training programs are 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 a RNHCI as a Christian Science staff nurse.⁵⁷ The Providers’ training programs (Levels I to IV) are not “continuing education” because the Providers’ programs are designed to teach foundational non-medical nursing skills to individuals and do not provide specialized skills to or enhance the skills of previously trained professionals.⁵⁸ This foundational teaching is conducted both in the classroom and through mentorship⁵⁹ and is not offered in a non-Christian-Science environment.⁶⁰

Finally, the Board finds that the Providers’ nurse training programs lead to the ability to both to practice and begin employment as a Christian Science staff nurse in a Medicare-certified RNHCI. Specifically, based on the record before the Board, the Board finds that the entry-level nursing position in the Medicare-certified wing of a RNHCI is a Christian Science staff nurse and that an individual must complete the nurse training program (Levels I to IV) in order to be hired as a Christian Science staff nurse in the Medicare-certified wing of a RNHCI.⁶¹ The

⁵⁵ See, e.g., Tr. at 50-51, 118-119, 165-173.

⁵⁶ See Tr. at 105-106, 130-136. A journal-listed Christian Science nurse may apply to the Provider’s nursing programs and, in these instances, it is typically an individual who has previously gone through at least one or two levels of training but not through all four levels. See Tr. at 174.

⁵⁷ See Tr. at 68-69; Intermediary Exhibit I-17 at 5-6 (website materials from the Chestnut Hill Benevolent Association describing Levels I through IV).

⁵⁸ In contrast, the Board notes that, while it is not at issue in this case, the Providers do offer continuing education for Christian Science staff nurses (*i.e.*, those individuals who have completed the foundational training in Levels I through IV). This continuing education consists of Levels V to X and is only offered to Christian Science staff nurses. See Tr. at 114-115.

⁵⁹ See, e.g., Tr. at 110-112.

⁶⁰ See Tr. at 76-77.

⁶¹ See Tr. at 44-48, 50-51, 54-55, 57-59, 61, 64, 78-79, 105-106, 146-147, 171-176. The Board places great weight on Providers’ witness who was the Director of Christian Science Nurses Training at Chestnut Hill and her personal knowledge of hiring practices at 10 RNHCI as demonstrated by the fact that typically 50 percent of Chestnut Hill students come from other facilities and some facilities send individuals to Chestnut Hill for the classroom portion and then coordinate with Chestnut Hill for the mentoring portion of the training. See Tr. at 112, 118-119, 142. Further, the job descriptions for the Christian Science staff nurse confirms that completion of Levels I to IV is a requisite for the position. See Provider Exhibits P-36A, P-36B, P41 (Christian Science Nurse 4 (Journal-listed)),

Board concludes that, by a preponderance of the evidence, these findings represent the industry norm for RNHCIs (*i.e.*, 10 of 17 RNHCIs which is greater than 50 percent).⁶² In establishing an “industry norm,” the Board notes that this standard only applies to FYs 2004 to 2006 as issued in the 2003 Final Rule which was effective for cost reporting periods beginning on or after October 1, 2003. Further, contrary to the Intermediary’s assertion, the preamble to the 2003 Final Rule clearly states that an industry norm is established by showing that greater than 50 percent of the industry require the relevant training for employment particularly when there is no evidence to suggest that there are any outliers.⁶³

Consistent with this industry norm, testimony established that: (1) while a student nurse is going through the nurse training program, they are hired as a student nurse with the side-by-side mentoring and supervision of Christian Science staff nurses similar to other graduate medical education program;⁶⁴ (2) the completion of the nurse training program at the Providers would be recognized by the 17 RNHCIs for purposes of hiring Christian Science staff nurses;⁶⁵ and (3) when a student nurse does not complete the training program (*e.g.*, decides to stop at Level II) but desires work in the RNHCI, then the student nurse could not stay in the Medicare-certified wing but could be hired to work in the non-Medicare wing.⁶⁶

DECISION AND ORDER:

The Board finds that the nurse-training programs operated by the Provider qualify for pass-through reimbursement under 42 C.F.R. § 413.85(e). The Board finds that the completion of training provided in the Providers’ nurse-training programs (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 RNHCIs.

P42 (Christian Science Nurse 4 (Journal-Listed CSN)). The Board gave no weight to the examples of job postings for “the position of Journal-listed Christian Science nurse” at Sunland Home Foundation (“Sunland”) that the Intermediary entered as Intermediary Exhibits I-13 and I-14 and the letter from Sunland at Provider Exhibit P-38 because it is unclear whether the positions discussed were in a Medicare-certified wing of a RNHCI versus a non-Medicare wing or involved student nurse versus staff nurses. Similarly, the Board gave no weight to the Sunland application for employment entered as Intermediary Exhibit I-15 because it is a generic application form that could be applicable for either the Medicare-certified wing or non-Medicare certified wing of a RNHCI.

⁶² See Tr. at 117-119 (testimony establishing that at least 10 RNHCIs hire individuals as Christian Science staff nurses only if they have completed Levels I through IV of the nurse training programs); Tr. at 17, 93, 158 (testimony that there are only 17 RNHCIs in the U.S.); Provider Exhibit P-22 (showing 13 RNHCIs, *i.e.*, Christian Science nursing facilities that accept Medicare); Tr. at 178-179.

⁶³ The Intermediary tries to suggest that CMS’ discussion of excluding outliers from a sample to suggest that if the universe is small (*e.g.*, 17 RNHCIs), it is impossible to develop a “random statistically valid sample” and that the Providers are required to establish that *all* 17 RNHCIs require their nurses to have completed a structured training program prior to beginning employment as a Christian Science nurse. See Intermediary Post-Hearing Brief at 10n.6. The Board notes that CMS does not require a random sample to establish an industry norm but rather we will defer to the information provided by industry representatives in order to determine the “industry norm” unless CMS obtains information that calls our view of industry norms into question. See 68 Fed. Reg. 45426-45427.

⁶⁴ See Tr. at 64-65; Provider Exhibit P-40 at 19-20 (Section G of the 1990 Accreditation Standards for Nursing Organizations/Facilities for Christian Scientists discusses the standard for the mentoring portion of the nurse training programs). See also 68 Fed. Reg. at 66714 (stating that “[w]hile nursing trainees can provide care under the supervision of an RNHCI nurse, any cost or payment attributed to the trainee is not to be considered a component of the Medicare or Medicaid per diem rate”).

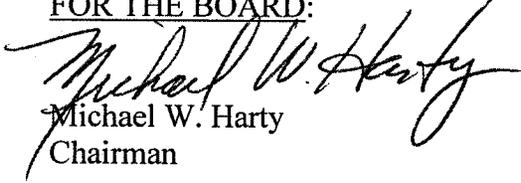
⁶⁵ See Tr. at 47-48, 101-102, 120, 158.

⁶⁶ See Tr. at 49-50, 65-66.

BOARD MEMBERS PARTICIPATING:

Michael W. Harty
John Gary Bowers, C.P.A.
Clayton J. Nix, Esq.

FOR THE BOARD:


Michael W. Harty
Chairman

DATE: AUG 28 2014

Appendix I

PROVIDER NAME-PROVIDER NO.: Chestnut Hill Benevolent Association – 22-1990
PRRB Case No. 07-2549R – FYE 12/31/2005
PRRB Case No. 07-2546R – FYE 12/31/2002
PRRB Case No. 07-2547R – FYE 12/31/2003
PRRB Case No. 07-2548R – FYE 12/31/2004

PROVIDER NAME-PROVIDER NO.: The Leaves, Inc. – 45-1990
PRRB Case No. 07-2538R – FYE 12/31/2004
PRRB Case No. 07-2544R – FYE 12/31/2005

PROVIDER NAME-PROVIDER NO.: Arden Wood, Inc. – 05-1993
PRRB Case No. 07-2532R – FYE 03/31/2006

PROVIDER NAME-PROVIDER NO.: Broadview, Inc. – 05-1991
PRRB Case No. 07-2533R – FYE 06/30/2005
PRRB Case No. 08-0470R – FYE 06/30/2006