CENTERS FOR MEDICARE AND MEDICAID SERVICES

Decision of the Administrator

In the case of:	**Claim for:**
Chestnut Hill Benevolent Association **The Leaves, Inc.** **Arden Wood, Inc.** **Broadview, Inc.** **Providers** **vs.** **Blue Cross /Blue Shield Association** **Riverbend Government Benefits Administration** **Intermediary**	**Provider Cost Reimbursement Determination for Cost Reporting Period Ending: Various** **Review of** **PRRB Dec. Nos. 2010-D16, 2010-17, 2010-D18, 2010-D19** **Dated: March 17, 2010**

These cases are 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)). Comments were received from Intermediary. Accordingly, the parties were notified of the Administrator's intention to review the Board's decision. Comments were also received from the respective Providers and CMS' Center for Medicare (CM).[1] All comments were timely received. Accordingly, this case is now before the Administrator for final agency review.[2]

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[1] The Center for Medicare was recently established and includes the policy component formerly referred to as the Centers for Medicare Management.

[2] These four appeals involve four Providers with the same issue. The cases were consolidated with Chestnut Hill Benevolent Association for hearing purposes. The parties agreed to use the exhibits and position paper used in Chestnut Hill Benevolet Association. See Board Decision at n. 4, Transcript of Oral Hearing (Tr.) at 7-8. The Providers are as follows: Chestnut Hill Benevolent Association ("CHBA) Provider No. 22-1990 (fiscal years ending (FYE) December 31, 2002, December 31, 2003, December 31, 2004, December 31, 2005); The Leaves, Inc., Provider No. 45-1990 (FYEs December 31, 2004, December 31, 2005); Arden Wood, Inc., Provider No.

ISSUE AND BOARD'S DECISION

The issue is whether the Intermediary improperly reclassified the Provider's nursing school costs and related statistics to a non-reimbursable cost center.

The Board held that the Intermediary improperly reclassified the Provider's nursing school costs to a non-reimbursable cost center. The Board concluded that "The Commission for Accreditation of Christian Science Nursing Organizations/Facilities" (hereafter referred to as the "commission") is the only existing accrediting agency that could accredit Christian Science sanatoria. Therefore, the Commission is a "recognized national professional organization" within the meaning of 42 C.F.R. §413.85(e) for purposes of awaiting the Provider's nursing education program. The Board disagreed with the Intermediary's position that the Commission did not have established standards by which to evaluate Christian Science nursing education programs. The Board found that while the standards used by the Commission was not as extensive as the standards used by the First Church of Christ, Scientist, the standards used by the Commission provided accrediting standards for nurse training programs. Finally, the Board found that the same entity can accredit both providers and education programs (i.e., the Joint Commission on the Accreditation of Healthcare Organizations (JCAHO) accredits both hospitals and nursing programs.)

SUMMARY OF COMMENTS

The Intermediary submitted comments contending that the Board's decision is contrary to Medicare regulations and should therefore be reversed. The Intermediary argued that the Commission does not have established standards by which to evaluate and measure the performance of nursing training program. Without these standards, the Commission cannot act as the accrediting organization for the "particular activity," that is, to accredit the nurse training program.

The CM submitted comments requesting that the Administrator reverse the Board's decision. CM disagreed with the Board's determination that the Commission is a qualifying accrediting agency under 42 C.F.R. § 413.85(e). The CM stated that Religious Nonmedical Health Care Institutions' (RNHCI) nursing education programs do not qualify as nursing or allied health education activities for Medicare

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05-1993 (FYE March 11, 2006); and Broadview, Inc., Provider No. 05-1991 (FYE June 30, 2005, June 30, 2006).

pass-through purposes since a Christian Science nurse is not required to receive Christian Science nurse training in order to practice in a RNHCI. According to the website of the Church of the Christ, Scientist, a Christian Science nurse can develop his or her nursing skills "in many different ways." Therefore, since nursing education is not required for a Christian Science nurse to practice in a RNHCI, CMS contends that the cost for these nurse training programs should be classified as "normal operating costs" under 42 C.F.R. 413.85(h)(3).

The CM recognized that the Commission is the only existing body that could accredit Christian Science sanatoria and their respective nursing education programs to conform. However, the Commission lacked independence to be considered a nationally recognized health care professional organization. CMM noted that the First Church of Christ, Scientist presides over both the Commission and Christian Science sanatoria and nurse training programs.

The Provider submitted comments requesting that the Administrator affirm the Board's determination. The Provider argued that the regulations at 42 C.F.R. § 413.85(e) only requires that the Provider's Christian Science nursing training programs be accredited by a recognized accrediting organization. It is undisputed that the Provider's nursing training program was, in fact, accredited by the Commission. Therefore, the Board's decision should be affirmed.[3] Finally, the Providers requested that CM's comments be stricken from the record since they seek reversal of the Board's decision on the basis of CM's interpretation of 42 C.F.R. §§ 413.85(h) rather than 413.85(e).

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.

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[3] The Providers also commented requesting that the Administrator strike from the record CM's comments because they claimed the comments were not timely submitted. The Administrator notes that in its Notice of Review to the parties dated March 30, 2010, reference is made to 42 C.F.R. § 405.1801(a), with respect to the definition of "date of receipt." Under 42 C.F.R. § 405.1801(a)(iii), "date of receipt" of the Notice of Review is "presumed to be 5 days after the date of issuance of an intermediary or a reviewing entity [i.e., the Administrator or Deputy Administrator of CMS]." Thus, the CM's comments were timely received on April 19, 2010, pursuant to the regulation.

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, section 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, not just those provided in Christian Science sanatoria. Section 4454 provides for coverage of inpatient hospital services and post-hospital extended care services furnished in qualified RNHCIs under Medicare. The BBA 1997 amendments make it possible for institutions other than Christian Science facilities to qualify as RNHCIs and to participate in Medicare. An RNHCI is paid under the reasonable cost methodology subject to the TEFRA target ceiling,[4] 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.

On November 30, 1999, CMS issued guidelines setting forth the requirements that an RNHCI must meet in order to participate in the Medicare or Medicaid program.[5] 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

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[4] *See* 42 C.F.R. §413.40.

[5] 64 Fed. Reg. 67,028 (Nov. 30, 1999).

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

Medicare historically has also 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.

The regulations at 42 C.F.R. §413.85(d), 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. Pursuant to 42 C.F.R. § 413.85(d), Medicare providers are entitled to reimbursement for the cost they incur providing nursing and allied health education activities that meet the following criteria: (1) an approved education activity that is recognized by a national approving body or State licensing authority as discussed in 42 C.F.R. § 413.85(e); (2) are part of a program operated by the provider as described at 42 C.F.R. § 413.85(f); and (3) enhances the quality of inpatient care at the provider, 42 C.F.R. § 413.85(d).

In determining whether educational activities are considered allowable as pass-through cost, the regulation at 42 C.F.R. § 413.85(e)(2004) states that:

> CMS will consider an activity an approved nursing and allied health education program if the program is a planned program of study that is *licensed by State law, or if licensing is not required, is accredited by the recognized national professional organization for the particular activity*. Such national accrediting bodies include, but are not limited to, the Commission on Accreditation of Allied health Education Programs, the national league of Nursing Accrediting Commission, the Association for clinical Pastoral Education, Inc., and the American Dietetic Association.[6]

[6] In 2001, CMS issued a final rule clarifying the policies for the payment of costs associated with nursing and allied health education activities. *See 66 Fed. Reg. 3358 (Jan. 23, 2001).* Prior to this rule, 42 C.F.R. § 413.85(e)(2000) contained a list of recognized and approved programs.

The Provider Reimbursement Manual (PRM) at § 402.1 further defines "approved educational activities" as formally organized or planned program of study operated or supported by an institution, as distinguished from on-the-job, in-service, or similar work-learning program. In order to be an allowable cost, the education activity must be:

> (A) Designed to enhance the quality of health care in the institution or to improve the administration of the institution.
> (B) Where required, licensed by the State law. (The cost of educational or training programs approved by a county or local agency but which are not licensed by the State as required will not be recognized as allowable cost.)
> (C) Where licensing is not required, approved by the recognized professional organization for the particular activity.

The PRM at § 402.4 defines "approved bodies" as "those organizations and association which recognized the professional stature of medical or paramedical education programs at the national level." Therefore, in order for a provider's nurse education cost to be paid on a "pass-through" basis and not subject to TEFRA ceiling limits, the Provider's nursing education program must be a planned program of study that is "licensed by State law" or if licensure is not required, a program accredited by a "recognized national professional organization for the particular activity."

Finally, if the nursing or allied health education program is not licensed by State law or a recognized national professional organization, the regulation at 42 C.F.R. §413.85(h)(2003) outlines Medicare's treatment of costs incurred by the nursing or allied health education programs and states that:

> The cost of the following educational activities incurred by a provider… are recognized only as normal operating costs and paid in accordance with the reimbursement principles specified in Part 412 of this subchapter. They include:
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> (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.[7]

(4) Maintenance of a medical library.

(5) Training of a patient or patient's family in the use of medical appliances or other treatments….

As early as 1992, the Secretary proposed clarifying the language at 42 C.F.R. §413.85 with respect to identifying programs that would not meet the criteria for pass through costs and should be treated as normal operating costs. In particular, the Secretary stated in the proposed rule at 57 Fed. Reg. 43659 (Sept. 22, 1992), that:

> As discussed above, the final rule published January 3, 1984 attempted to clarify the Medicare policy for the classification of training costs incurred by providers as costs of approved educational activities paid on a reasonable cost basis. Since that time, questions have arisen about some types of training programs that are neither listed as approved programs in the current § 413.85(e) nor readily identifiable as the types of programs discussed in the current §413.85(d) as activities not within the scope of approved educational activities.
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> The programs included in our list of approved programs are generally programs of long duration that are 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 such a situation and one in which a registered nurse undergoes years of training to become a CRNA.
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> We believe that the costs of continuing education training programs should not be classified as costs of approved educational activities that are passed-through and paid on a reasonable cost basis. Rather, they

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[7] The regulation at 42 CFR 413.85(h)(3) read, prior to October 1, 2003, that: "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."

> should be 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. Accordingly, in the proposed §413.85(e)(3), we would modify the current language at §405.85(d)(3) 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."

Various congressional actions on the provider-operated criteria intervened delaying the final rule until 2001.[8] Relevant to this case, in 2001, the Secretary issued a final rule clarifying the policies for the payment of costs associated with nursing and allied health education activities.[9] In the final rule, the Secretary clarified Medicare 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.
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> 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

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[8] *See* 66 Fed. Reg.. 3358, 3360-61 for history of nursing education provisions.
[9] *See* 66 Fed. Reg. 3358 (Jan. 23, 2001).

> 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."[10] (Emphasis added.)

In addition, 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.[11] The Secretary explained that, "provider-operated programs that do not lead to any specific certification in a specialty would be classified as continuing education."[12] 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.
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> 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 *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

[10] *Id.* at 3370 (Jan. 23, 2001).
[11] *See* 68 Fed. Reg. 27209, 27210 (May 19, 2003).
[12] *Id.*

> operated by hospitals would be considered continuing education, and therefore, would be ineligible for pass-through reasonable cost payment.[13]

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 hospital 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….[14]

In these cases, the Administrator finds that the Provider's nursing education programs are not a "planned program of study that is licensed by State law (i.e., the State of Massachusetts)." Thus, in order for the Providers' nursing education programs to be treated as approved programs (in addition to the other requirements of 42 C.F.R. §413.85(d)) and paid on a pass-through basis, the Providers' programs must be "accredited by a recognized national professional organization for the particular activity."[15]

The Intermediary determined that the nursing training programs of the Providers' were not accredited by a "recognized national professional organization for the particular activity" as required by 42 C.F.R. § 413.85(e). The Intermediary asserted

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[13] *Id.*

[14] 68 Fed. Reg. 45425 (Aug. 1, 2003).

[15] The Administrator notes that all or the requirements of 42 C.F.R. 413.85(d) must be met in order for a Provider to receive payment for the net cost of its nursing education activities on a pass through reasonable cost basis. The Administrator notes however, that the only issue before the Board was whether or not the Provider were accredited by a "recognized national professional organization for the particular activity." The other requirements of the regulation were not address by the parties or the Board.

that the Commission for Accreditation of Christian Science Nursing organization/Facilities, Inc. (Commission) role was to accredit the Christian Science nursing facilities, not the Providers' Christian Science Nursing Arts Training Programs. However, the Providers argued and the Board agreed that the Commission was the proper approving entity for nursing education programs and, therefore, met the regulatory requirements of 42 C.F.R. § 413.85(e).

Applying the relevant law and program policy to the foregoing facts, The Administrator finds that the Providers' nursing education programs were not approved by a "recognized national professional organization." In these cases, the Provider is a Christian Science nursing facility and, for Medicare payment purposes, known as a Religious Nonmedical Health Care Institution (RNHCI).[16] In addition, to providing religious nonmedical items and services to its patients, the Providers operate a Christian Science Nursing Arts Training Program. The Providers' nursing schools provide, among other things, instruction in the necessary skills to provide physical care to patients of Christian Science RNHCIs consistent with the religious beliefs of the Christian Science church. An RNHCI is paid under the reasonable cost methodology subject to the Tax Equity and Fiscal Responsibility Act (TEFRA) target ceiling,[17] 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.

Relevant to the above, the Intermediary asserted that the Commission's evaluation and inspections, as evidence by the Provider's testimony and exhibits, were done to meet the certification criteria as a Christian Science facility—not to evaluate, and thus, accredit the Provider's nurse education program. The Administrator finds that the record supports the Intermediary's contentions in this regard. For example, Provider's Exhibit P-17, dated May 6, 2006, is a letter from the Commission, awarding the Provider and its Visiting Nurse services a three-year accreditation. Nowhere in this document is there any mention of the Provider's nursing program being awarded accreditation from the Commission. The Administrator finds that if the Commission did function as the recognized national professional organization to accredit the particular activity of nursing education, this letter would have specifically articulated accreditation of the nursing training program. The Administrator finds that the lack of reference to the nursing education program in Provider's Exhibit P-17 does not demonstrate, contrary to the Provider claims, that the Commission accredited the Provider's nursing education program in fiscal year 2005 or that the Commission was the recognized national professional organization

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[16] *See* 42 C.F.R. § 403.700 *et seq*.
[17] *See* 42 C.F.R. § 413.40.

for the particular activity of nursing education programs as required by 42 C.F.R. § 413.85(e) to accredit the program in lieu of State licensure.

Furthermore, testimony from Provider's witness, Mr. Mark Schierloh demonstrates that the Provider's nursing education program was not "approved" i.e., accredited by the Commission. For example when Provider's witness, Mr. Mark Schierloh was question by Board member Hayes he struggled to explain why accreditation of the Provider's Nursing Arts Program was not mention in the letter. When asked why this Exhibit (P-17) did not single out the Provider's Nursing Arts Training Program, but instead the Visiting Nurse Program, Mr. Mark Schierloh stated:

> That's a good question. I think that I was—in some cases, folks have asked for it, as an example or it was tradition to have a separate certification because sometimes they are a stand alone, in which case, it's not under a facility, it is—there will be a board that runs the visiting nurse program…. They'll have their own Board…we could have always have done a separate piece of paper, as I said for the nursing programs.[18]

The Board found that the Commission had accreditation standards to evaluate and accredited Christian Science nurse training programs. To support this position the Board relied on Provider's Exhibit P-18, titled "Accreditation Standards For Christian Science Nursing Facilities. Specifically, the Board relied on accreditation standard C. "Responsibilities of Christian Science Nurses In the Facility" to support their position that the Provider had standard to evaluate and accredit Christian Science Nurse Education Program. Specifically, on page 9 it states:

> 8. The organization provides documentation of regular and on-going training or review of the skills and practices necessary to insure proper care is provided to patients.
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> 9. Facilities engage in training maintain documentation of on-going instruction, evaluation and on the job training/mentoring/side by side nursing.

The Administrator does not agree with the Board's determination that the Commission had standards to accredit, Christian Science Nurse Training Programs. A review of section C. titled "Responsibilities of Christian Science Nurses In the Facility" shows that these standards were used to meet the Condition of Participation regarding staffing and to meet the criteria to be certified as a Christian Science

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[18] Transcript (Tr.) at 201-202.

Nursing Facility. For example, 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-manage, etc.) whose card appears in the Christian Science Journal.
5. The organization provides a through 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.
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….[19]

Notably, absent from the above list of standards are standards regarding the accreditation of Christian Science Nursing Training Programs. In the absence of standards to evaluate the Provider's Nurse Training Program, the Administrator finds that Provider's Exhibit P-18 does not demonstrate that the Provider's Christian Science Nurse Training Program was "accredited" by a recognized national professional organization as required by 42 C.F.R. § 413.85(e). A review of this document only shows standards for accrediting the nursing facility and no standards for accrediting a nurse education program.[20]

The Board also found that the Commission's Checklist for Inspecting Nursing Organizations/Facilities for Christian Scientist (Provider's Exhibit P-19) further supported the adequacy of the Commission's accreditation process. Specifically, the Board found that the Checklist at pages 9 and 10 provided standards for evaluating any educational activities. However, the Administrator finds that Provider's Exhibit P-19 contains necessary questions regarding the standards for Christian Science nursing practice and for the facilities providing care to its patients. Provider's Exhibit P-19 does not provide standards by which to evaluate Christian Science Nursing Education Programs. For instance, on pages 9 and 10 of Provider's Exhibit P-19 reference is made to "facilities that have Nursing Schools/Education programs." Unlike other section within the Checklist that delineate a list of questions to be asked during the inspection of a Christian Science Nursing Organization Facility, this section simply refers readers to the "Manual By-Law for Christian Science nurse (Article VII, Section 31)" as the standard for any educational activities. Moreover, the "Manual-By-law for Christian Science (Article VIII, Section 31) does not provide specific guidance or standards for a nursing program.[21] Thus, the Provider

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[19] Provider's Exhibit P-19 pages 8-9.

[20] *Compare* i.e., Accreditation standards for the National League for Nursing Accrediting Commission, Inc., http://www.nlnac.org/manuals/SC2008.htm; and for Commission on Collegiate Nursing Education (CCNE), http://www.aacn.nche.edu/Accreditation/index.htm.

[21] Article VIII states: "Christian Science Nurse. SECT. 31. A member of the Mother Church who represents himself or herself as a Christian Science nurse shall be one

has not demonstrated that the Commission or the incorporated Manual section lays out a standard for evaluating and accrediting the Providers' Christian Science Nurse Training Programs.

Moreover, in order to be considered a nationally recognized accreditation organization, the organization must be independent from the program which it is accrediting.[22] In this instance, the accrediting institution is presided over by the First Church of Christ, Scientist, the same entity that presides over the Christian Science sanatoria and nursing program being accredited. Consequently, the Commission is not "an organizations and association which recognizes the professional stature of medical or paramedical education programs at the national level." The Commission and the providers and nursing programs are all guided by the First Church of Christ, Scientist. As the provider itself acknowledged, CMS took over the certification function for RNHC in order to avoid the appearance that Medicare certification was being performed by an organization affiliated with any particular religious sect. In this instance, both the accrediting body and the sanatoria/programs are affiliated with and guided by the First Church of Christ, Scientist.

As explained above regarding the types of training programs that would be paid on a reasonable cost pass through basis and those cost which would be classified as normal operating cost, the Administrator finds that the Provider's Christian Science nursing education program cost do not qualify for Medicare pass-through payments since the Provider's Christian Science nurses do not need to participate in a Christian Science nurse education program before they begin practicing nursing in a RNHCI. A review of Intermediary's Exhibit 1-7 titled "Christian Science Nurses: Becoming a Christian Science Nurse" shows that a Christian Science nurse can develop his or her nursing skills in many different ways, including:

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

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who has a demonstrable knowledge of Christian Science practice, who thoroughly understands the practical wisdom necessary in a sick room, and who can take proper care of the sick. The cards of such persons may be inserted in The Christian Science Jouranl under rules established by the publishers."

[22]To not require that the accrediting body be separate and independent from the entity it is accrediting would otherwise negate the underlying purpose of the accrediting body in the first place-to ensure that the programs CMS pays for meet minimum standards of accreditation. When the parties are affiliated, the end purpose is compromised. Such a principle can also be seen in other Federal standards for recognizing "accrediting" national bodies. *See*, e,g., 34 C.F.R. 602.14.

Therefore, effective October 1, 2003, because nursing education is not required for a Christian Science nurse to practice in an 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.

Accordingly, when the record is viewed in its totality the Administrator finds that the Provider's Christian Science Nurse Training Program was not accredited by a "recognized national professional organization" for the particular activity. As such, the Providers' nursing educational costs cannot be reimbursed on a pass-through basis for the cost years in dispute. Furthermore, since the Providers' nurse educational training is not required to practice as a Christian Science nurse, the Provider's Christian Science nurse training programs cost are to be treated as normal operating costs subject to the TEFRA limits.[23]

[23] 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, such an action does not direct that the costs must be allowed as pass-through in these cases for these years. The fact that incorrect payments may have been made in the past 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 again did not justify the continued payment.

DECISION

The decisions of the Board are reversed in accordance with the foregoing opinion.

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

Date: 5/17/2010

/s/

Marilyn Tavenner
Acting Administrator
Centers for Medicare & Medicaid Services