

A. Pediatric Medical Association

Sections 403.702, 403.730, and 440.170

Comment: One commenter suggested amending the conditions of participation explicitly to prohibit RNHCIs from providing care to any child, regardless of whether the individual is seeking payment under Medicare or Medicaid for that care. The comment is based on the statutory language that authorizes the Secretary to establish standards to ensure the health and safety of patients choosing to receive care in RNHCIs. The commenter believes that it is impossible to ensure the health and safety of children who are patients in an RNHCI because the patient is isolated from persons competent or willing to assess the need and appropriately secure medical care when the care is necessary to preserve the child's life or health. The commenter added that the Secretary has the authority to prohibit RNHCIs from providing services to children and should do so.

Response: We do not have the authority to exclude any patients, including children, from admission to an RNHCI. Nevertheless, our data indicate that no children have sought RNHCI services as program beneficiaries thus far. The reason for this situation is that, in at least some instances, children must undergo some type of medical examination before they can obtain benefits under Medicare and Medicaid. For example, a child can only receive Medicare benefits if he or she has undergone a medical physical examination and as a result was determined to meet Social Security criteria for disability. Such an examination is inconsistent with opposition to receipt of traditional medical care. For these reasons, we believe few if any children will be admitted to RNHCIs as Medicare or Medicaid beneficiaries. Therefore, we will not revise the conditions of participation as the commenter suggested.

B. Religious Nonmedical Organization Definitions and Terms—§ 403.702

Comment: The commenter requested that the definition for “religious nonmedical care or religious method of healing” be removed or revised as follows:

Religious nonmedical care or religious method of healing” means health care furnished in accordance with a religious belief or doctrine with which the acceptance of conventional or unconventional medical care by a beneficiary would be inconsistent.

The commenter argued that our current definition, “health care furnished under established religious tenets that prohibited conventional or unconventional medical care for the treatment of a beneficiary, and *the sole reliance on these religious tenets*,” if interpreted literally, could actually prohibit religious nonmedical nursing facilities from qualifying as RNHCIs that the Congress clearly intended to be qualified.

The commenter indicated that their method of healing did not include the use of conventional or unconventional care and that the teachings of this Church did not expressly “prohibit” the choice of medical treatment. The commenter stated that the choice of treatment rested with the individual, but an individual would not be practicing his or her religion while receiving medical care. The commenter further stated that this is why practicing members of the group, relying entirely on spiritual means for healing, required accommodation in order to participate in Medicare. The commenter indicated that many members of their group engaged in a number of practices that involved neither the acceptance of medical treatment nor reliance on religious “tenets” but were undertaken in the interest of practicing good care of their “health.” The commenter sought more flexibility for a beneficiary to select some forms of health care that are nonintrusive such as visiting dentists for oral hygiene; visiting an optometrist or wearing eyeglasses; or being fitted for or wearing a mechanical hearing aid.

Additionally, the commenter expressed that the definition of “religious nonmedical care or religious method of healing” was neither required by nor consistent with the Act, and that Constitutional issues have been raised regarding the use of the term “established religious tenets.”

Response: Both the statute and the related legislative history demonstrate a clear congressional intent to establish this benefit for those who for religious reasons are conscientiously opposed to acceptance of medical care and to provide parameters for nonexcepted medical treatment. Since both the law and the congressional deliberations are clear on the issue, the rule must follow the statutory intent and provide a framework for all religious groups that may use the benefit. The rule must be applicable to all in the intended benefit group, not to just a sector of the potential beneficiaries. With regard to a beneficiary's choice or need to receive such services as oral hygiene visits, optometry visits or eyeglasses, or testing and fitting for hearing aids, it should be

noted that Medicare does not cover these services and that they are the financial responsibility of the individual.

The use of the term “religious tenet” is considered appropriate to cover the basic beliefs of any religious group that is seeking participation in the RNHCI program. While the use of the term is not prescribed by the statute, the development of regulations does provide the opportunity to use other language and the term “religious tenets” is consistent with the Act. Federal courts have repeatedly upheld the constitutionality of these provisions. See, for example, *Kong v. Min De Parle*, No. C 00–4285 CRB, 2001 WL 1464549 (N.D.Cal. Nov. 13, 2001) (upholding constitutionality of section 4454 of the BBA); see also *Children's Healthcare is a Legal Duty, Inc. v. Min De Parle*, 212 F.3d 1084 (8th Cir. 2000), cert. den., 532 U.S. 957, 121 S.Ct. 1483 (2001) (same). We are making no changes to the terms “religious nonmedical care” or “religious method of healing.”

Comment: The commenter suggested that we provide a more flexible definition of “religious nonmedical nursing personnel” to provide the RNHCI more latitude in hiring outside their religious denomination, if they so choose. The commenter indicates that constitutional issues may be raised by the requirement that nursing personnel “be grounded in the religious beliefs of the RNHCI.” The commenter stated that the Act only requires personnel to be “experienced in caring for the physical needs of these patients.”

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

Response: Medical model health care settings use registered nurses or licensed practical nurses that have participated in educational programs and following graduation take standardized tests for licensure. The statute requires that for payment purposes a beneficiary would require hospital or skilled nursing facility care in order to qualify for admission to an RNHCI. In turn, by statute the RNHCI may provide only nonmedical nursing