

## Teaching Hospitals May Adjust Number of Residents and Interns for Medicare Payment Past Three-Year Review Period, D.C. Appeals Court Rules

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Teaching hospitals may adjust the number of full-time equivalent (FTE) residents and intern physicians that they submit to the Medicare program for reimbursement of the costs of the FTEs' graduate medical education (GME) past the three-year regulatory window for review of reimbursement determinations, a federal appeals court ruled in [\*Kaiser Foundation Hospitals v. Sebelius\*, No. 12-5037 \(D.C. Cir. Mar. 5, 2013\)](#).

An accurate GME FTE number is critical to teaching hospitals because in 1997 Congress capped the number of GME FTEs teaching hospitals may include in their annual Medicare cost reports to the number of GME FTEs they had in 1996. Fiscal intermediaries that contract with the federal government in turn weigh this capped number when reviewing a hospital's cost reports to determine the reimbursement that it is due. Under federal regulations, a party may reopen an intermediary's reimbursement determination if it so requests within three years of the determination.

In *Kaiser Foundation Hospitals*, an intermediary used an inaccurate GME FTE number from 1996 and 1998 cost reports that excluded clinic-based residents to generate artificially low GME FTE caps for a consortium of teaching hospitals. The hospitals sought to adjust this number through a timely appeal of their reimbursement determinations from 1999 through 2003, but this adjustment hinged on them challenging their GME FTE count as it appeared in their 1996 and 1998 cost reports, the reimbursement determinations for which they conceded could not be reopened under the three-year review restriction. Thus, the issue arose whether the regulations governing review precluded modification of the data underlying the GME FTE caps, even if such modification only affected reimbursement determinations that the hospitals had timely contested. The hospitals argued that the regulations did not bar such modification, but the government disagreed.

The U.S. Court of Appeals for the D.C. Circuit sided with the hospitals, holding that "the reopening regulation allows for modification of predicate facts in closed years provided the change will only impact the total reimbursement determination in open years." This result, the court reasoned, was compelled by the plain language of the regulations, which made clear that the three-year review limitation applied only to reopening an actual reimbursement determination. Alternatively, the court held, the government "acted arbitrarily in treating similarly situated parties differently," given that it "routinely championed a permissive interpretation of the reopening regulation when correction of the

predicate facts would have resulted in a windfall for the agency, but adopted a contrary view here, where the benefits would inure to the provider.” Similarly, the court explained, the government’s conflicting position in previous cases undermined its additional argument that “even if the modification of predicate facts in a closed year does not itself amount to a reopening, the change will necessitate an adjustment of that year’s reimbursement, which all parties agree constitutes an impermissible reopening.”

As a victory for teaching hospitals, *Kaiser Foundation Hospitals* incentivizes hospitals to review their GME FTE numbers. If they can identify undercounted GME FTE numbers, as the hospitals did in that case, they may have ground to challenge, within the three-year review period, reimbursement determinations that were based on such undercounting and may be able to claim greater reimbursements on a forward-looking basis.

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