

Court of Appeals Upholds *Kaiser* Decision: Major Impact for Graduate Medical Education Reimbursement

On March 5, 2013, the Court of Appeals for the D.C. Circuit issued its decision in *Kaiser Foundation Hospitals v. Sebelius*, No. 12-5037, affirming the trial court's decision that ten California hospitals could challenge their graduate medical education full-time equivalent ("GME FTE") cap years after the associated cost reports fell outside of the reopening period. This decision is an important development in GME reimbursement affecting all hospitals that provide graduate medical education. Hospitals should carefully evaluate whether their GME FTE caps are accurate and consider filing an appeal to correct any errors to potentially increase GME reimbursement going forward.

In 1997, Congress imposed a cap on the number of FTEs a hospital may include on its cost report for purposes of calculating GME payments, based on the number of FTEs the hospital had as of the cost reporting period ending on December 31, 1996. In *Kaiser*, the Hospitals' GME FTE caps were incorrect, resulting in lower reimbursement to the Hospitals. The Hospitals' intermediary and the Centers for Medicare and Medicaid Services ("CMS") agreed that the caps were incorrect, but argued that the caps could not be adjusted without violating 42 C.F.R. § 405.1885, which prohibits a "reopening" of a

hospital's cost report more than three years after the intermediary issues a Notice of Program Reimbursement ("NPR"). The Hospitals appealed to the Provider Reimbursement Review Board ("PRRB"), arguing that the intermediary could revise the GME FTE count without violating the reopening regulation because the Hospitals did not seek increased reimbursement for any years outside of the three-year reopening window. Instead, the Hospitals only wanted the intermediary to revise the GME FTE cap amount in those prior years—a "factual predicate" on which later cost reports relied—in order to correct the cap amount and reimbursement for years still subject to reopening. The PRRB agreed with the Hospitals' interpretation, but the CMS Administrator reversed the PRRB's decision. The Hospitals appealed to federal court, where the District Court granted summary judgment in favor of the Hospitals, directing CMS to allow the GME FTE caps to be revised.

CMS appealed the trial court's ruling, arguing that changes to the GME FTE caps in prior years would constitute impermissible reopenings. The Circuit Court dismissed the government's argument as a "narrow, arbitrarily applied interpretation" of the law, and held

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." The court also found that in a prior case, *Regions Hospital v. Shalala*, 522 U.S. 448 (1998), CMS made essentially the same argument as the Kaiser Hospitals when that interpretation of the reopening regulation would have resulted in a windfall for CMS, but the agency could not offer a good reason for its change in position in this case. The court did not tolerate CMS' self-serving change in its interpretation of the reopening regulation.

A copy of the court's decision is available [here](#). If you have questions about the *Kaiser* case and how it may impact your hospital's GME reimbursement, or are interested in filing a PRRB appeal, please contact Jim Daniel (jdaniel@hdjn.com), Mary Malone (mmalone@hdjn.com), Mike Newby (mnewby@hdjn.com), Jeanne Adams (jadams@hdjn.com), or Colin McCarthy (cmccarthy@hdjn.com). They can also be reached by phone at (866) 967-9604. Additional information about Hancock, Daniel, Johnson & Nagle, P.C. is available on the firm's website at www.hdjn.com.

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