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## First Circuit Adopts CMS' Interpretation of IME Regulation to Exclude Research Time

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The United States Court of Appeals for the First Circuit dealt a blow to graduate medical education programs on November 17, 2008, when it issued an opinion upholding the Secretary of the Department of Health and Human Services' ("Secretary") interpretation of the IME regulation excluding time spent by residents engaged in research activities. In *Rhode Island Hospital v. Leavitt*, No. 07-2673 (1st Cir. Nov. 17, 2008), Rhode Island Hospital (RIH) appealed the Centers for Medicare and Medicaid Services' (CMS) reduction of its full-time equivalent (FTE) resident count used to calculate its IME adjustment by 12.06 FTE residents in fiscal year (FY) 1996. CMS claimed that the governing Medicare regulations precluded including research time in the FTE count. The United States District Court for the District of Rhode Island had previously ruled that the Secretary's denial of research time was contrary to the plain language of the governing FTE regulation, 42 C.F.R. § 412.105(g)(1), but the First Circuit disagreed.

The IME regulation includes two basic requirements for a resident's time to be included in the FTE count. First, the resident must be enrolled in an approved teaching program. Second, the resident must be assigned to an area of the hospital subject to the inpatient prospective payment system ("IPPS") or an outpatient department, or assigned to an entity under the ownership or control of the hospital if certain requirements are met. The District Court had concluded that CMS could not exclude time spent by residents in research if they were enrolled in an approved teaching program and assigned to a qualifying area of the hospital.

In overturning the District Court's decision, the First Circuit Court held that, although the IME regulation requires that residents be counted if assigned to an area of the hospital reimbursed under IPPS or an outpatient department, the terms "assigned," "portion" and "area" are ambiguous and often have a functional connotation. Thus, the court ruled that the Secretary's argument — that a person is not "assigned" to an area or portion of the hospital subject to IPPS or an outpatient department when engaged in a research rotation — is not strained, unnatural, or plainly erroneous. The court found persuasive that the residents were "assigned" to a purely educational research rotation and, thus, were not integrated into a unit of the hospital dedicated to patient care

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services reimbursable under IPPS. The court also rejected RIH's argument that the Secretary's reading of the assignment requirement was at odds with the regulatory requirement that a resident be enrolled in an approved teaching program where such approval requires residents to engage in research activities.

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The court further concluded that the IME statutory language and its legislative history are similarly ambiguous and that nothing in the plain language or history suggests that Congress wished to abrogate the Secretary's authority to "regulate the proper calculation of an indeterminate variable, such as a hospital's ratio of FTEs to beds, in the IME equation." Recognizing that the legislative history indicates that the FTE resident count was only a "proxy" to estimate the various factors contributing to increased costs for teaching hospitals, the court found that the Secretary's reading of the FTE regulation does not frustrate this policy. Specifically, the court found that the IME adjustment was intended to reimburse hospital for increased *patient care* costs associated with having a teaching program and that the purpose of the IME regulation, as construed by the Secretary, was to exclude resident time from the FTE count that does not contribute to added patient care costs, including time spent in research.

**Ober|Kaler's Comments:** The First Circuit decision represents a departure from prior decisions in which the courts have rejected the Secretary's attempts to read a "related to patient care" requirement into the arguably unambiguous IME regulation. Specifically, in *Riverside Methodist Hospital v. Thompson*, No. C2-02-94, 2003 WL 22658129 (S.D. Ohio July 31, 2003) (appeal dismissed) and *University Med. Ctr. Corp. v. Leavitt*, No. 05-cv-495, 2007 WL 891195 (D. Ariz. Mar. 21, 2007) (appeal dismissed), the United States District Courts for the Southern District of Ohio and the District of Arizona rejected the Secretary's application of the IME regulation to exclude resident time spent in research or didactic activities and held that all such time must be counted in the providers' FTE resident count. In the *Rhode Island Hospital* case, a court for the first time has accepted a functionality test — a test that is at odds with these other opinions in which the courts have found the language of the IME regulation to be unambiguous.

Other cases involving research time are proceeding through administrative channels and judicial review. Providers and their counsel should monitor those cases.

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