



## Resident Research Time Excluded from Hospitals' Medicare Reimbursement

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On August 18, 2011, in *Henry Ford Health System v. Department of Health and Human Services*, the Sixth Circuit Court of Appeals upheld a regulation promulgated by the Secretary of Health and Human Services which excluded from hospitals' Medicare reimbursements the time residents spent conducting pure research.

Teaching hospitals receive some reimbursement from Medicare to compensate for the inefficiencies and extra staffing demands incurred training their residents. The issue presented in the *Henry Ford* case was whether the federal government must reimburse teaching hospitals for the time their residents spent conducting pure research in the 1990s.

Henry Ford Hospital is a large teaching hospital in Detroit which applied for Medicare reimbursements for fiscal years 1991 through 1996 and 1998 through 1999. The government uses a formula to reimburse hospitals based on the number of full-time equivalent ("FTE") residents they teach. The government excluded from the hospital's FTE count all of the time residents spent conducting "pure research," which was research unrelated to the treatment of a patient.

Henry Ford Hospital prevailed in federal district court. However, in 2010, while the Secretary's appeal of the district court's decision was pending, Congress rewrote the rules for calculating hospitals' FTE counts in the Patient Protection and Affordable Care Act ("PPACA"). The relevant section of PPACA makes a distinction between residents' "patient care activities" and "non-patient care activities."

At issue in *Henry Ford* was the definition of "non-patient care activities." Under PPACA, the Secretary must include in hospitals' indirect FTE counts "all the time spent by an intern or resident in an approved medical residency training program in non-patient care activities, such as didactic conferences and seminars, **as such time and activities are defined by the Secretary**, that occurs in the hospital." (PPACA Section 5505(b)). (Emphasis added.) The Secretary

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then promulgated a regulation to define "such time and activities." In the regulation, residents' time conducting pure research is not included in eligible non-patient care activities.

While the Hospital claimed that the Secretary exceeded her authority in promulgating the rule, the Court in *Henry Ford* found that she did not exceed her authority and upheld the regulation. First, the Court stated that the words of the statute were not self-defining. Secondly, it found that the context did not remove the ambiguity of whether pure research qualified for reimbursement. Third, the Court noted that the statute expressly delegated to the Secretary the authority to define eligible "non-patient care activities." The Secretary noted that didactic conferences and seminars differed from pure research in that they may touch on the treatment of current patients. The Court noted that "the Secretary's conclusion that pure research differs from didactic conferences and seminars squares with the statute, and she therefore acted within her authority by excluding pure research from 'non-patient care activities, such as didactic conferences and seminars.'" The Court found that because her exclusion of pure research comports with the relevant statutes, the regulation had controlling weight.

Also at issue was whether the Secretary could promulgate regulations such as this one, with retroactive effect. The Court found that Congress had given her the authority to do so under PPACA. It should be noted that the regulation states that it is effective for cost reporting periods beginning on or after January 1, 1983, but that it "may not be applied in a manner that would require the reopening of settled cost reports, except those cost reports on which, as of March 23, 2010, there was a jurisdictionally proper appeal pending" relating to such payments. Obviously, this regulation applied to the cost reports at issue in the *Henry Ford* litigation.

Hospitals should watch for fallout from this case, including any appeals or regulations relating to it, and should pay close attention to their cost reporting on this issue. It is likely hospitals will decrease the amount of time they allow their residents to spend conducting pure research, which could ultimately be detrimental to residents' education and advances in health care in general.

If you have any questions, be let me know.