

# PUBLICATION

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## Providers Challenge CMS's Non-Hospital Rotation Rules for GME and IME [Ober|Kaler]

October 17, 2014

**Prior to the enactment of the Affordable Care Act (ACA), CMS required hospitals to comply with a number of exacting payment and documentation rules in order to include as part of their graduate medical education (GME) and indirect medical education (IME) FTE counts, resident time spent in certain non-hospital rotations. In § 5504 of the ACA, however, Congress streamlined those requirements. Specifically, in § 5504(a)(3) (for GME) and § 5504(b)(2) (for IME) of the ACA, Congress declared that hospitals may include in the FTE counts, time spent by residents in activities related to patient care at non-provider sites if the hospital simply incurs the costs of the residents' salary and fringe benefits for the time that the residents spend training at those sites.**

The ACA changes are effective for cost reporting periods beginning on or after July 1, 2010 (for GME) and for discharges on or after July 1, 2010 (for IME). One provision of § 5504, however, also states that the amendments are not to be applied in a manner that requires reopening of any settled cost report “as to which there is not a jurisdictionally proper appeal pending as of the date of the enactment [of the ACA].” The meaning of this provision has been a source of controversy, leading to the litigation described below.

At issue in a recent case were certain non-hospital rotations for periods prior to 2010 that the fiscal intermediary had disallowed as not meeting CMS's pre-ACA rules. The provider, Eastern Maine Medical Center (EMMC), appealed the disallowances to the Provider Reimbursement Review Board (PRRB or Board) and did so prior to 2010, meaning that it had a jurisdictionally proper appeal pending as of the date of the ACA's enactment. EMMC argued that, as a result of this appeal, it was entitled to count the disallowed non-hospital rotations, which, while arguably impermissible prior to the ACA, fell within the broader language of the ACA's requirements. The intermediary, however, contended that the ACA contains no requirement that the provisions of § 5504 be applied retroactively. As support, the intermediary pointed out that in the November 2010 final rule, CMS stated quite plainly that § 5504 is fully prospective and that nothing in this statute overrides the July 1, 2010 effective date.

The PRRB sided with the provider. The Board concluded that, because the subject appeal was pending before the Board on the specific GME and IME issues addressed by the ACA, the ACA's provisions applied even though the costs years pre-dated the ACA. *Eastern Maine Med. Ctr. v. BCBS*, PRRB Hearing Dec. No. 2014-D10 (June 2, 2014), Medicare & Medicaid Guide ¶ 82,907. The Administrator, however, reversed the PRRB's decision. *Eastern Maine Med. Ctr. v. BlueCross BlueShield Ass'n.*, CMS Adm'r. Dec. (July 23, 2014), Medicare & Medicaid Guide ¶ 82,921. The Administrator concluded that the ACA's language does not require that the ACA be applied retroactively if there is an appeal concerning a final cost report that was pending when the ACA was enacted.

In late September, the provider appealed the Administrator's decision to the United States District Court for the District of Maine. *Eastern Maine Medical Center v. Burwell*, Case No. 1:14-cv-00382 (D. Maine, filed Sept. 26, 2014).

## Ober|Kaler's Comments

The ACA has provided some clarity on a number of rules governing the GME and IME calculations, including when hospitals may count non-hospital rotations as part of their GME and IME counts. Unfortunately, several provisions of the ACA and their application to past periods are not as clear as they could be. CMS, not surprisingly, has relied on this lack of clarity to limit hospitals' reimbursement for past periods. Whether CMS's actions or the hospitals' challenges to those actions will ultimately prevail remains to be seen.