

# PUBLICATION

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## Court Places Limits on Secretary's "No Reopening" Arguments [Ober|Kaler]

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**CMS has often argued that “base year” determinations cannot be revisited once the three-year reopening period has closed. Now, a recent decision from the U.S. Court of Appeals for the District of Columbia Circuit places those arguments in doubt.**

The case of *Kaiser Foundation Hospitals et al. v. Sebelius*, No. 12-5037 (D.C. Cir., March 5, 2013) presented the question of whether plaintiff hospitals could obtain, outside of the three-year reopening window, a corrected count of their full-time equivalent (FTE) residents in their base year for purposes of calculating their FTE caps to be applied to later years. Both the hospitals and the Secretary agreed that the FTE cap data was not accurate. The Secretary nevertheless countered that the data could not be corrected, and thus the caps could not be revised, because too much time had elapsed since the filing of the 1996 (cap year) cost reports, in which the disputed FTE counts were contained, as well as the 1998 cost report used to determine the caps.

The hospitals argued that they were not attempting to alter the reimbursement related to their 1996 cost reports but, instead, adjust only subsequent years' reimbursement utilizing a corrected base year GME FTE cap count. The Secretary, however, contended that any modification of the data underlying the count or the cap would constitute a reopening of the closed years even if it did not affect the hospitals' final reimbursement determinations for those years. The D.C. Circuit did not agree.

Quoting the Eighth Circuit decision in *HealthEast Bethesda Lutheran Hosp. & Rehab. Ctr. v. Shalala*, 164 F.3d 415, 418 (8th Cir. 1998) as support, the D.C. Circuit concluded that, under the reopening regulation, a cost report is “reopened” only when there is a change in the total amount of reimbursement actually paid to the provider for that year. The court further noted that in recent litigation the Secretary had argued that the reauditing and revision of IME FTE determinations made in the 1996 FTE cap base year cost report was permitted and reasonable, even though 1996 was beyond the three-year reopening window. The court then said as follows: “Seeing no reason to depart from the Secretary's recent wisdom, we hold 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.” Alternatively, the court held that it was arbitrary for the Secretary to treat similarly situated parties differently. The court said that CMS had “routinely championed” a “permissive” interpretation of her reopening regulation when the correction of predicate facts resulted in a windfall for the agency but had adopted a contrary and much more restrictive view when a broad interpretation would benefit the provider. This record, the court concluded, was “inherently suspicious,” suggesting a lack of reasoned, good faith decision making.

### Ober|Kaler's Comments

The *Kaiser* case is quite significant. First, it allows providers to revisit past GME and IME FTE counts that may have been understated when a cap was first calculated. Potentially more significant, however, is that the decision uses broad language to suggest that any time the Secretary employs a base year payment methodology, providers may challenge later year payments that rely on that methodology by revisiting the prior base year's “predicate facts.”