

August 15, 2002

## MEMORANDUM #02-26

**TO:** Council of Deans  
Council of Academic Societies  
Council of Teaching Hospitals and Health Systems  
Organization of Resident Representatives  
Organization of Student Representatives

**FROM:** Jordan J. Cohen, M.D.

**SUBJECT:** Jung Litigation

### **Background**

As all of you know by now, a lawsuit was filed on May 7, 2002, which challenges on antitrust grounds the National Resident Matching Program (the "NRMP"), various accreditation policies of the Accreditation Council for Graduate Medical Education ("ACGME"), the housestaff stipend survey conducted by the AAMC, and the distribution of resident compensation information through the AMA's Fellowship and Residency Electronic Interactive Database ("FREIDA").

The initial lawsuit, Paul Jung, M.D., et al. v. Association of American Medical Colleges, et al., is pending in the United States District Court for the District of Columbia. A virtually identical lawsuit, Feinleib v. Association of American Medical Colleges, et al., No. 1:02CV01091 (D.D.C.) was filed in the same court on June 5, 2002. We anticipate that the two lawsuits will be consolidated. A copy of the Jung complaint is available on the AAMC web site at <http://www.aamc.org/newsroom/jungcomplaint/>.

There are three named plaintiffs in the Jung case, and one in the Feinleib case. All of them obtained at least one of their residency positions through the NRMP. According to the complaints, Paul Jung completed a three-year medical residency program in 2000 at Metro Health Medical Center in Cleveland, Ohio. At the time the complaint was filed he was a Robert Wood Johnson Clinical Scholar at the Johns Hopkins University. Luis Llerena is a sixth-year resident physician now working in a two-year fellowship program at Orlando Regional Medical Center. He completed a five-year residency program at Cooper Hospital in Camden, New Jersey in 2001 after spending three years in a residency program at MCP Hahnemann Hospital in Philadelphia. Denise Greene is in the fourth year of a five-year residency program at the University of California-Davis. Robert Feinleib is currently a general internist practicing in Ohio. In June 2000, he completed a three-year residency program at University Hospitals in Cleveland, Ohio.

Plaintiffs have divided the defendants into two categories, the so-called “organization defendants,” and the “institution defendants.” The “institution defendants” are 29 institutions (primarily hospitals) that sponsor medical residency programs. We do not yet know why the plaintiffs chose to name these particular institutions as defendants. The “organization defendants” are: the AAMC, the National Residency Matching Program (NRMP), the Accreditation Council for Graduate Medical Education (ACGME), the American Hospital Association (AHA), the American Medical Association (AMA), The American Board of Medical Specialties (ABMS), and the Council of Medical Specialty Societies (CMSS).

AAMC and the other defendants believe that these lawsuits are without legal merit, and will contest them vigorously. Nonetheless, if the plaintiffs were to succeed, these cases could have implications for all of graduate medical education. We therefore believe it is important to provide additional information about the lawsuits to all of our members.

### **The Plaintiffs’ Claims**

The plaintiffs have asserted claims under the federal antitrust laws. Though a dollar amount is not specified, they are seeking money damages for the harm that resident physicians purportedly suffered “as a result of a . . . conspiracy among defendants and others to illegally restrain competition in the market for resident physician services,” as well as “injunctive relief to end the illegal restraints.” (Complaint ¶ 1) The antitrust laws allow a successful plaintiff to recover treble damages, and the named plaintiffs are seeking such treble damages on behalf of all persons employed as residents in ACGME-accredited programs since May 7, 1998, which they estimate to be “more than 200,000 persons.” (Complaint ¶¶ 51, 52)

There are basically three elements to the alleged conspiracy: the matching program operated by the NRMP, the exchange of resident compensation information, and ACGME accreditation standards. According to the plaintiffs, the “Defendants and others have illegally contracted, combined and conspired among themselves to displace competition in the recruitment, hiring, employment and compensation of resident physicians, and to impose a scheme of restraints which have the purpose and effect of fixing, artificially depressing, standardizing and stabilizing resident physician compensation and other terms of employment.” (Complaint ¶ 2) More specifically, the plaintiffs allege that the defendants have “restrained competition in the employment of resident physicians by: (a) stabilizing wages below competitive levels by exchanging competitively sensitive information regarding resident physician compensation and other terms of employment; (b) eliminating competition in the recruitment and employment of resident physicians by assigning prospective resident physician employees to positions through the [NRMP]; and (c) establishing and complying with anticompetitive accreditation standards and requirements through the [ACGME].” (Complaint ¶ 3)

Plaintiffs are asking the court to certify a plaintiff class *and* a defendant class.

## **Requested Plaintiff Class**

The plaintiffs in both cases have sued on behalf of themselves and “on behalf of all persons employed as resident physicians in ACGME-accredited residency programs ... since May 7, 1998,” including “subspecialty programs commonly referred to as fellowships.” (Complaint ¶ 51) The plaintiffs estimate that the desired plaintiff class numbers “more than 200,000 persons ... dispersed throughout the United States....” (Complaint ¶ 52). It will be up to the Court to certify whether a plaintiff class exists.

## **Named Defendants**

According to the plaintiffs, “[e]ach of the named Defendants and members of the Defendant Class directly participate in the illegal contract, combination and conspiracy alleged herein, and are either employers of resident physicians, entities related to and/or affiliated with such employers, or professional organizations through which the illegal restraints set forth in this Complaint are accomplished.” (Complaint ¶ 5)

AAMC is one of seven “Organization Defendants.” All of the Organization Defendants are non-profit organizations. The complaint contains a description of each Organization Defendant including a description of the activity on which the lawsuit is focused:

- NRMP -- runs and establishes the policies for the Match program. As you know, the Match program matches fourth-year medical students with residency positions based on the relative ranked preferences of the medical student and the residency programs. (Complaint ¶ 15)
- AAMC -- operates the Match program under contract with the NRMP; has a membership section known as the Council of Teaching Hospitals and Health Systems (“COTH”); “surveys members of the COTH Section;” publishes the annual ‘Survey of Housestaff Stipends, Benefits and Funding;’ “one of five sponsors of both the NRMP and the ACGME.” (Complaint ¶¶ 15, 17, 74)
- ACGME -- accredits institutions that operate medical residency programs as well as the individual residency programs themselves. (Complaint ¶ 16)
- American Hospital Association (“AHA”) -- “membership includes approximately 5,000 hospitals, health systems, and other health care providers in the United States, including 1,250 hospitals employing resident physicians;” “one of five governing sponsors of both the NRMP and the ACGME.” (Complaint ¶ 19)
- American Medical Association (“AMA”) -- maintains “an electronic database” of residency programs known as FREIDA; also a sponsoring organization “of both the NRMP and the ACGME.” (Complaint ¶¶ 18, 80)
- American Board of Medical Specialties (“ABMS”) -- “one of five governing sponsors of both the NRMP and ACGME.” (Complaint ¶ 20)
- Council of Medical Specialty Societies (“CMSS”) -- “one of five governing sponsors of both the NRMP and ACGME.” (Complaint ¶ 21)

### **Requested Defendant Class**

The plaintiffs are asking the Court to certify a defendant class that consists of:

- (a) all NRMP Institutional Participants as of the date of certification of the defendant class, and entities that were NRMP Institutional Participants at any time since May 6, 1998;
- (b) all AAMC/COTH Member Hospitals as of the date of certification of the Defendant Class, and entities that were AAMC/COTH Member Hospitals at any time since May 7, 1998; and
- (c) all ACGME-accredited Sponsoring Institutions as of the date of certification of the Defendant Class, and entities that were ACGME-accredited Sponsoring Institutions at any time since May 7, 1998.... (Complaint ¶ 58)

The plaintiffs have expressly excluded from their proposed defendant class “all entities that are instrumentalities of federal, state or local government, including hospital districts and counties.” (Complaint ¶ 58)

The defendant class purportedly consists of “more than 1,000 entities,” located throughout the United States. (Complaint ¶ 59). The plaintiffs have asked that the 29 named Institutional Defendants be certified as “Class Representatives” of the requested defendant class, and that their counsel be designated as “Defendant Class Counsel.” (Complaint at p. 33). It is unusual for a court to certify a defendant class, but this has happened in other cases.

### **Status of the Litigation**

The current due date for the defendants to respond to the complaints is September 9, 2002. In the meantime, the attorneys for the defendants and the plaintiffs have begun to discuss a Case Management Order that will establish a proposed schedule for the case. If the case goes to trial, the trial would likely be years away.

Although the case is not yet three months old, the Jung case was recently assigned to a third judge. The first two judges removed themselves from the case (perhaps on the basis of their existing workloads). The case currently is assigned to the Honorable Judge Paul Friedman, of the United States District Court for the District of Columbia. The Feinleib case is currently assigned to a different judge of the same court. The plaintiffs have moved to consolidate the two cases.

### **Future Developments**

AAMC and the other defendants are considering all issues raised by the complaints, as well as all appropriate responses. We will keep you informed of developments.

## **To Learn More**

To better understand the claims in the lawsuit, and to learn more about related topics, you can look to the following resources:

A. NRMP

[www.nrmp.org](http://www.nrmp.org)

B. AAMC Housestaff Stipend Survey

<http://www.aamc.org/hlthcare/coth-hss/start.htm>

C. ACGME

<http://www.acgme.org>: For information on ACGME

D. FREIDA

<http://www.ama-assn.org/ama/pub/category/5670.html>: FREIDA Home Page

If you have questions or concerns please contact Robert Dickler (202-828-0490; [rdickler@aamc.org](mailto:rdickler@aamc.org)), Joseph Keyes (202-828-0555; [jkeyes@aamc.org](mailto:jkeyes@aamc.org)), or Ivy Baer (202-828-0490; [ibaer@aamc.org](mailto:ibaer@aamc.org)).

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