

THE AILING STUDENT EXCEPTION: MEDICAL RESIDENTS AND THE FEDERAL INSURANCE CONTRIBUTIONS ACT

ERIN ROGOZINSKI*

I. THE ORIGINS OF THE TAX POLICY.....	641
A. The Social Security Act of 1935 and the Federal Insurance Contributions	641
B. The Student Exception.....	641
1. Congressional Amendments	641
2. IRS Revisions to the Student Exception	644
II. ANATOMY OF MEDICAL RESIDENCY.....	645
III. EARLY JUDICIAL INTERPRETATIONS OF THE STUDENT EXCEPTION	648
A. Unambiguity in <i>Minnesota v. Apfel</i>	648
B. A Different Interpretation: <i>Detroit Medical Center</i>	650
C. <i>Mayo I.</i>	652
IV. POST-LITIGATION REGULATION REVISIONS	653
V. THE DIAGNOSIS: NO CURE AFTER <i>MAYO I.</i>	655
VI. THE PROGNOSIS OF THE STUDENT EXCEPTION	657

INTRODUCTION

The Federal Insurance Contributions Act of 1954 (FICA) is a payroll tax that imposes mandatory contributions to Social Security and Medicare upon both employees and their employers based on employee wages.¹ FICA defines “wages” broadly, as “all remuneration for employment,”² but the Internal Revenue Code also lists twenty-one exceptions to the payment of this tax,³ including a student exception.⁴ Students “enrolled and

* J.D., Notre Dame Law School, 2011; B.A., English, University of Notre Dame, 2008. I wish to thank my parents for their unwavering support over the years, Professor John Robinson for his guidance and encouragement in this endeavor, and Danielle Palkert and Alex Hermann for their careful review and thoughtful suggestions.

1. See Federal Insurance Contributions Act of 1954, 26 U.S.C. §§ 3101-3128 (2000).

2. § 3121(a).

3. § 3121(b)(1)-(20).

4. § 3121(b)(10).

regularly attending classes at [a] school, college, or university”⁵ are exempt from making FICA payments provided their work is a “service performed in the employ of a school, college, or university.”⁶ Despite the seemingly plain language used within this statute, an attempt to interpret the legislature’s intended meaning of the word “student” and determine exactly who may qualify for this FICA exception has resulted in years of litigation.⁷ For over a decade, the federal courts reached inconsistent conclusions on this matter, specifically in regard to whether medical residents should be categorized as students or employees.⁸

As a result of the continued controversy, the Supreme Court granted the Mayo Foundation’s petition for certiorari in 2010⁹ and issued a ruling for the Government on January 11, 2011.¹⁰ Employing the Chevron two-step,¹¹ the Court found § 3121’s reference to “student” ambiguous, and since Congress had not directly spoken to whether medical residents were students, the Court looked to the Treasury Department’s regulation and determined it was reasonable.¹² Therefore, medical residents will not be considered students for the purpose of exempting them and their employers from making Social Security contributions.

Before the Supreme Court’s ruling, the judicial branch had little assistance with its efforts on this issue, since the federal government as a whole had been unable to reach a definitive determination as to whether the student exception pertains to medical residents. The divisions and departments of the federal government had been unable to speak with a unified voice, as each division sought to classify medical residents as

5. § 3121(b)(10)(B).

6. *Id.*

7. Since 1998, over 7,000 FICA tax refund claims have been made for previous FICA contributions, amounting to well over one billion dollars. *See United States v. Mount Sinai Med. Ctr. of Fla., Inc.*, 353 F. Supp. 2d 1217, 1229 (S.D. Fla. 2005).

8. *Compare Minnesota v. Apfel*, 151 F.3d 742 (8th Cir. 1998) (applying factual inquiry into the nature of the relationship between medical students and universities and affirming the district court’s ruling that medical residents meet the requirements for the student exception) *and United States v. Mayo Found. for Med. Educ. & Research*, 282 F. Supp. 2d 997, 1010 (D. Minn. 2003) (*Mayo I*) (holding the student exception applicable to all medical residents at each of Mayo’s various institutions and ordering a refund for FICA taxes Mayo paid) *with United States v. Detroit Med. Ctr.*, No. 05-71722, 2006 WL 3497312 at *12 (E.D. Mich. Dec. 1, 2006) (finding the language of the exception ambiguous, requiring a review of statutory and legislative history, and holding that residents are categorically precluded from being students) *and Albany Med. Ctr. v. United States*, 2007 WL 119415 at *5 (N.D.N.Y. Jan. 10, 2007) (holding residents are categorically precluded from being students).

9. *Mayo Found. for Med. Ed. and Research v. United States*, 131 S.Ct. 704 (U.S. 2011).

10. *Id.* The Court’s ruling was a unanimous 8-0 decision. *Id.* at 708. Justice Elena Kagan took no part in the consideration or decision of the case. *Id.* at 716.

11. *Id.* at 711.

12. *Id.* at 714–15.

whatever would be most beneficial to it at that time.¹³ For example, while the Internal Revenue Service (IRS) argued that all medical residents should be categorically denied student status so as to collect more tax revenue,¹⁴ the National Labor Relations Board (NLRB) wavered back and forth for its own benefit.¹⁵ After initially determining that medical residents were students and not employees in order to prevent them from unionizing (and increasing the Board's workload),¹⁶ the Board overruled its prior holding, finding that medical residents could be students and employees simultaneously (and thereby still preventing unionization).¹⁷

Unlike the NLRB, the federal courts could not straddle both sides of the fence by granting medical residents dual status as both employees and students because of the distinction FICA requires.¹⁸ Ultimately, whether medical residents must contribute to Social Security hinges upon the critical classification of medical residents as either employees who must pay the tax or students who are explicitly exempt from paying that tax.

By the late 2000s, it seemed the United States Courts of Appeals had finally agreed that medical residents could not be categorically precluded

13. *Compare Cedars-Sinai*, 223 N.L.R.B. 251, 251–52 (1976) (holding medical residents are students) and *Boston Med. Ctr. Corp.*, 330 N.L.R.B. 152, 160 (1999) (holding medical residents hold dual status as both students and employees) with *Mayo Found. for Med. Educ. and Research, v. United States (Mayo II)*, 568 F.3d 675, 680–83 (8th Cir. 2009) (upholding IRS regulations that prevent residents from falling within the FICA student exception).

14. The IRS argued that medical residents were not students in the early 1990s by investigating the withholdings from the University of Minnesota's teaching hospital, and has yet to cease fighting for collecting FICA wages from medical residents and the schools, hospitals, and institutions at which they work. The Social Security Administration also claims that resident physicians are not students. S.S.R. 78-3, 1975-1982 Soc. Sec. Rep. Serv. 315.

15. See Sarah L. Geiger, Note, *The Ailing Labor Rights of Medical Residents: Curable Ill or a Lost Cause?*, 8 U. PA. J. LAB. & EMP. L. 523, 529–32 (2006).

16. *Cedars-Sinai*, 223 N.L.R.B. at 251–52. (citing grand rounds, teaching rounds, laboratory instruction, seminars, and lectures as educational rather than employment activities). The decision also noted that residents participate in these programs not for the purpose of earning a living, but instead in pursuit of fulfilling the requirement of graduate medical education necessary to enter into the practice of medicine. *Id.* at 253.

17. See *Boston Med. Ctr. Corp.*, 330 N.L.R.B. at 160 (“Ample evidence exists here to support our finding that interns, residents and fellows fall within the broad definition of ‘employee’ under Section 2(3), notwithstanding that a purpose of their being at a hospital may also be, in part, educational.”). Despite the dual status granted to medical residents by the NLRB, the decision did not purport to be a legal conclusion, but rather the reflection of a new board policy. Geiger, *supra* note 15, at 532 (“Residency programs did not undergo any significant changes which would warrant a renewed status for residents.”).

18. While FICA contributions may not greatly impact individual medical residents, the consequences for the teaching hospitals required to match each employee's individual FICA contributions are great indeed. See 26 U.S.C. § 3111(a)–(b) (2000) (“[T]here is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages . . . paid by him with respect to employment . . .”).

from classification as students.¹⁹ In 2009, however, the Eighth Circuit overturned two district court rulings and held that the recent IRS regulations excluding medical residents from student classification were indeed valid.²⁰ This decision further blurred the contours of the student exception by creating an incongruous dichotomy and left medical residents (as well as the hospitals and institutions for which they work) unsure of their statuses under FICA.

By exploring the history of the student exception from its legislative inception to its current form—a result of the interpretations of many federal courts and continuous revision by the IRS—this Note will discuss whether medical residents should be categorized as employees or students, and therefore whether they and the hospitals in which they learn and work must contribute to Social Security through the FICA tax. After much investigation and careful contemplation, the author of this Note believes that medical residents do not meet the criteria required to be exempt from contributing to FICA. While medical residents are still in the learning process of their profession, they have obtained advanced degrees, provide valuable services to hospitals and medical centers, often in excess of forty hours per week, and are paid wages for these services. When a person dedicates such a significant portion of his or her time to providing a service for which he or she is paid, effectively creating an employee–employer relationship, both the employee and the employer should contribute to the Social Security system envisioned by Congress.

I. THE ORIGINS OF THE TAX POLICY

A. The Social Security Act of 1935 and the Federal Insurance Contributions Act

The architects of the Social Security system considered a variety of potential tax schemes to provide social insurance for the general public.

19. See *United States v. Mem'l Sloan-Kettering Cancer Ctr.*, 563 F.3d 19, 24–28 (2d Cir. 2009) (holding that medical residents could not categorically be precluded from student status, and that questions as to whether a medical resident was a “student” and whether he was employed by a “school, college, or university” were separate factual inquiries that depended on the nature of the residency program in which the medical residents participated and the status of the employer); *United States v. Detroit Med. Ctr.*, 557 F.3d 412, 417–18 (6th Cir. 2009) (granting a continuance to permit additional discovery on issue of whether residents were students); *Univ. of Chi. Hosps. v. United States*, 545 F.3d 564, 570 (7th Cir. 2008) (holding that the student exception is not per se inapplicable to medical residents as a matter of law, and a case-by-case analysis is required to determine whether medical residents qualify for the student exemption); *United States v. Mount Sinai Med. Ctr. of Fla., Inc.* 486 F.3d 1248, 1250–53 (11th Cir. 2007) (holding that medical residents enrolled in graduate medical education programs are not precluded as a matter of law from seeking the student exemption).

20. *Mayo Found. for Med. Educ. and Research v. United States (Mayo II)*, 568 F.3d 675 (8th Cir. 2009).

Specifically, they examined whether the program should be funded by contributions from the federal government or self-supported.²¹ The drafters also deliberated about whether to allow persons with private pension plans to choose whether or not to participate in social insurance coverage, but Congress determined that an entirely self-supporting insurance program funded by mandated contributions from both employees and their employers would provide the best chance for the program to function successfully.²²

In 1939, the tax-withholding provisions of the Social Security Act of 1935 were repealed, but they were re-enacted along with the implementation of FICA.²³ The current Social Security system still functions under FICA, but with significant modifications.²⁴ The 1939 amendments placed more emphasis on ensuring that the tax would provide adequate benefits rather than its original goal of individual equity.²⁵ This Note will focus on the 1939 amendment establishing the student exception from mandated contribution to Social Security through FICA.

B. The Student Exception

1. Congressional Amendments

The student exception, codified at 26 U.S.C. § 3121(b)(10), has evolved into its current form under FICA since Congress originally enacted it in 1939.²⁶ The 1939 version of the student exception read:

The term "employment" means any service of whatever nature, performed within the United States by an employee for his employer, except . . . (8) [s]ervice performed in any calendar quarter in the employ of any organization exempt from income tax under section 101 of the Internal Revenue Code, if . . . (iii) such service is performed by a student who is enrolled and is regularly attending classes at a school, college, or university.²⁷

21. SYLVESTER J. SCHIEBER & JOHN B. SHOVEN, *THE REAL DEAL: THE HISTORY AND FUTURE OF SOCIAL SECURITY* 38 (1999).

22. *Id.* at 33, 38, 40–41.

23. *Id.* at 64.

24. See H.R. REP. NO. 728, 76th Cong., 1st Sess. 18, 1939-2 C.B. 538 (1939). See also Patrick Timothy Rowe, *The Impossible Student Exception to FICA Taxation and Its Applicability to Medical Residents*, 66 WASH. & LEE L. REV. 1369, 1390 n.127 (2009) (quoting the same House Report, which states: "The present bill is designed to widen the scope and to improve the adequacy and the administration of these [social welfare] programs without altering their essential features.") (alteration in original).

25. SCHIEBER & SHOVEN, *supra* note 21, at 59 ("Over the years, debate has continued over the relative weight that the equity and adequacy goals of the program should receive.").

26. See Federal Insurance Contributions Act of 1939, 26 U.S.C. §§ 1400–1431 (imposing additional tax on employees and their employers).

27. *Id.* § 1426(b).

While the history of the legislative intent behind the inclusion of the student exception is documented minimally, this comment to the exception explicates the contemporary congressional motivation:

In order to eliminate the nuisance of inconsequential tax payments the bill excludes certain services performed for fraternal benefit societies and other non-profit institutions exempt from income tax, and certain other groups. While the earnings of a substantial number of persons are excluded from this recommendation, the total amount of earnings involved is undoubtedly very small. . . . The intent of the amendment is to exclude those persons and those organizations in which the employment is part-time or intermittent and the total amount of earnings is only nominal, and the payment of the tax is inconsequential and a nuisance. The benefit rights built up are also inconsequential. Many of those affected, such as students . . . will have other employment which will enable them to develop insurance benefits. This amendment, therefore, should simplify the administration for the worker, the employer, and the Government.²⁸

Congress' incentive for including the student exception appears to have been a simple cost-benefit analysis: a fear that the ultimate costs accruing as a result of the collection of taxes from employees receiving minimal compensation, as well as their employers, would outweigh any benefit society would receive from the revenues of such a collection, creating a serious inefficiency and substantially decreasing the value of the overall program.²⁹ Since the Act's initiation, the potential impact an economical social welfare system could have on the country was apparent, as was the need to reassess the program to discover possible areas of weakness and opportunities for improvement over time.³⁰

In order to put FICA into action, the 1939 Internal Revenue Code assigned rulemaking authority for administration and oversight of the tax collection to the Secretary of the Treasury.³¹ The following year, the

28. H.R. REP. NO. 728, 76th Cong., 1st Sess. 18, 1939-2 C.B. 538, 543 (1939).

29. See Rowe, *supra* note 24, at 1391-92.

30. H.R. REP. NO. 728, 76th Cong., 1st Sess. 18, 1939-2 C.B. at 543 ("Tremendous as is the scope of [the Social Security] program, it was recognized from the beginning that changes would have to be made as experience and study indicated lines of revision and improvement.").

31. 26 U.S.C. § 1429 (1939) ("Secretary shall make and publish such rules and regulations . . . as may be necessary to the efficient administration of the functions with which he is charged under this subchapter. The Commissioner, with the approval of the Secretary, shall make and publish rules and regulations for the enforcement of this subchapter."). Under current law, the Secretary of the Treasury has the authority to issue two types of regulations: legislative regulations pursuant to specific congressional delegation, or interpretive regulations pursuant to the Secretary's general rulemaking authority under 26 U.S.C. § 7805(a). See 26 U.S.C. § 7805(a) (2000) ("[T]he Secretary

Secretary used the granted authority to promulgate regulations for the student exception. Those regulations stated:

Services performed . . . by a student in the employ of a school, college, or university not exempt from income tax under section 101 of the Internal Revenue Code are excepted, provided: (a) The services are performed by a student who is enrolled and is regularly attending classes at such school, college, or university; and (b) The remuneration for such services performed . . . does not exceed \$45.³²

Although the 1940 regulations for the student exception concentrated on exempting only a specific, nominal amount of wages, Congress again edited the exclusions in 1950, this time consolidating many student exclusions together to locate them within one provision.³³ The 1950 amendments eliminated the compensation limitation and broadened the exception by maintaining the exclusion of wages earned at a non-profit organization.³⁴ Federal courts reinforced the position that the nominal amount a student earns is irrelevant in applying the student exception according to the plain language of the 1950 amendments.³⁵ Courts also

shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.”).

32. 20 C.F.R. § 403.821 (1940). The regulations continued:

[T]he type of services performed by the employee and the place where the services are performed are immaterial; the statutory tests are the character of the organization in whose employ the services are performed, the amount of remuneration for services performed by the employee in the calendar quarter, and the status of the employee as a student enrolled and regularly attending classes at the school, college, or university in whose employ he performs the services. The term "school, college, or university" within the meaning of this exception is to be taken in its commonly or generally accepted sense.

Id.

33. *See* Univ. of Chi. Hosps. v. United States, No. 05 C 5120, 2006 WL 2631974, at *4 (N.D. Ill. Sept. 8, 2006).

34. *Id.* (“Moreover, in 1950, when Congress consolidated the student exclusions, it opted not to include any limitation on remuneration [sic] but maintained it for the exclusion for wages earned at a nonprofit organization.”) (citing Social Security Act Amendments of 1950, Pub. L. No. 81–734, § 204(a), 64 Stat. 477, 531 (1950)).

35. *See* Univ. of Chi. Hosps., 2006 WL 2631974 at *3 (“In this case, the Treasury Regulation at issue . . . clearly states that the amount of remuneration [sic] earned by an individual is immaterial to the applicability of the student exclusion.”). The court also noted that “[b]ecause the plain language of the Treasury Regulation is clear, there is no need to resort to other sources, such as the agency’s interpretation of its regulation or the legislative history of the underlying statute, to determine its meaning.” *Id.* *See also* Det. Med. Ctr., 2006 WL 3497312, at *10 (agreeing with the district court in *University of Chicago Hospitals* that the regulation “unambiguously does not include a nominal compensation requirement.”). In *Detroit Medical Center*, the Government urged the court to review the student exception in the context of the Sixth Circuit’s treatment of the student “nurse exception,” which was enacted concurrently with the general student exception in 1939. *Id.* In *Johnson City Medical Center v. United States*, the Sixth Circuit faced the question of what, if any, deference should be given to an IRS agency

took notice of additional amendments enacted to the regulations in 1973, extending the scope of the student exception not only to schools, colleges, and universities, but also to non-profit employers affiliated with schools, colleges, and universities.³⁶

2. IRS Revisions to the Student Exception

In an effort to gain control, the IRS decided to narrow the services that could qualify for tax exemption under the student exception. The IRS released Revenue Procedure 98-16, which attempted to establish more lucid standards for determining whether services performed by those both enrolled in and working for colleges and universities qualified for the student exception.³⁷ The Revenue Procedure rejected the application of the student exception to medical residents, claiming the services medical residents provide were not qualified as “incidental to and for the purpose of pursuing a course of study.”³⁸

The State of Minnesota challenged this new IRS policy shortly after it was enacted by bringing an action against the Commissioner of Social Security for redetermination of the state’s liability for FICA tax contributions in *Minnesota v. Apfel*.³⁹ In *Apfel*, the Eighth Circuit affirmed the lower court by holding in favor of the taxpayer and finding that medical residents at the University of Minnesota were employed by the University, their services were compensated in the form of stipends, and that the residents were indeed “students.”⁴⁰ With this singular decision, the Eighth Circuit invalidated the substance of Revenue Procedure 98-16,⁴¹ sharply distinguishing the issue and granting leeway for the flood of future litigation in which institutions would have a clear incentive to seek FICA refunds from the IRS.⁴²

II. ANATOMY OF MEDICAL RESIDENCY

The Court of Appeals recognized that “[§ 3121(b)(10)] does not define ‘student’ but merely specifies where and how the student must be studying for the exemption to apply.”⁴³ Without an express definition of who may

ruling. *Johnson City Med. Ctr. v. United States*, 999 F.2d 973, 975–78 (6th Cir. 1993). A majority of the court held that the IRS ruling was entitled to *Chevron* deference and that the nominal amount requirement was a valid exercise of the IRS’ agency power. *Id.* at 977–98.

36. *Univ. of Chi. Hosps.*, 2006 WL 2631974, at *4 n.2.

37. *Rev. Proc. 98-16*, 1998-1 C.B. 403 (Feb. 2, 1998).

38. *Id.* at 2.02.

39. *See* 151 F.3d 742, 748 (8th Cir. 1998) (affirming the district court’s ruling in favor of the state).

40. *Id.* at 747-48.

41. *Id.* *See also* *Rowe*, *supra* note 24, at 1392.

42. *See also* *Rowe*, *supra* note 24, at 1392.

43. *United States v. Detroit Med. Ctr.*, 557 F.3d 412, 417 (6th Cir. 2009).

be categorized as a student, and thus qualify for the tax exclusion, federal courts have had much difficulty in determining whether medical residents may be classified as students. While many Courts of Appeals agreed that residents were not categorically precluded from being students,⁴⁴ the Eighth Circuit disagreed and held that the new regulations promulgated by the IRS were valid, creating an impossible dilemma for teaching hospitals and institutions as to whether or not to withhold potential FICA contributions made on behalf of their medical residents.⁴⁵ An investigation into what participants in a certified residency program do and under what circumstances⁴⁶ could alleviate the burden of many specific inquiries for individual cases by fleshing out a definition for “medical resident.”

The common path to becoming a licensed physician requires eight years of education beyond high school: generally four years of work toward a bachelor’s degree at an undergraduate college or university and four years of work for a Doctor of Medicine (M.D.) in medical school, in addition to another three to eight years of residency and/or fellowships.⁴⁷ Specifically, medical education in the United States consists of two distinct phases, both of which are required to gain a license to practice medicine.⁴⁸ While the first phase consists of attending four years of medical school to receive a medical degree, the second phase begins after graduation from medical school and is commonly referred to as Graduate Medical Education (GME). According to the American Medical Association (AMA),

[t]o provide direct patient care, physicians in the United States are required to complete a three to seven year graduate medical program . . . in one of the recognized medical specialties. Certification requirements, as determined by individual specialty boards, usually include formal training (residency) and the passing of a comprehensive examination.⁴⁹

Generally, GME consists of a residency or fellowship, both of which are

44. See *United States v. Mem’l Sloan-Kettering Cancer Ctr.*, 563 F.3d 19 (2d Cir. 2009); *United States v. Detroit Med. Ctr.*, 557 F.3d 412 (6th Cir. 2009); *Univ. of Chi. Hosps. v. United States*, 545 F.3d 564 (7th Cir. 2008).

45. See *Mayo Found. for Med. Educ. & Research*, 568 F.3d 675, 684 (8th Cir. 2009).

46. See, e.g., *United States v. Detroit Med. Ctr.*, 557 F.3d 412, 417–18 (6th Cir. 2009).

47. United States Dept. of Labor, Bureau of Labor Statistics, Physicians and Surgeons, Occupational Outlook Handbook 2010–2011, <http://www.bls.gov/oco/ocos074.htm> (last visited Jan. 7, 2010).

48. Nat’l Resident Matching Program, *Why the Match?* 1 (Jan. 3, 2003), at <http://www.aamc.org/newsroom/jungcomplaint/whythematch.pdf>; Melinda Creasman, Note, *Resuscitating the National Resident Matching Program: Improving Medical Resident Placement Through Binding Dual Matching*, 56 VAND. L. REV. 1439 (2003).

49. Nat’l Resident Matching Program (NRMP), *Residency Match: About Residency*, http://www.nrmp.org/res_match/about_res/index.html (last visited Jan. 7, 2010) (emphasis added).

periods of clinical training.⁵⁰ During GME, “the second phase, novice physicians work in teaching hospitals [or academic health centers] where they gain in-depth training under the supervision of senior residents and attending physicians.”⁵¹ All states require participation in a residency program of at least one year before allowing a physician to obtain a license and begin to practice medicine,⁵² making GME a prerequisite for entry into the medical profession.⁵³ Beyond state requirements, each medical field typically requires a residency of three or more years.⁵⁴

Residency programs are accredited by the Accreditation Council of Graduate Medical Education (ACGME), which requires any residency program to be an organized educational program that combines didactic curriculum with direct exposure to patient care under the supervision of attending physicians in order to qualify.⁵⁵ “[T]he seminal 1910 Flexner Report helped to define standards and structures for medical education. This definition resulted in a process-based continuum of medical education that was predicated on a system in which students would spend a defined amount of time in medical school and residency training, with exposure to a standard yet evolving curriculum.”⁵⁶ As a condition of accreditation, the ACGME mandates that hospitals provide residents with the financial support needed to ensure the residents’ participation in the residency programs.⁵⁷

Residency at a teaching hospital is a continuation of medical school.⁵⁸

50. *United States v. Mem'l Sloan-Kettering Cancer Ctr.*, 563 F.3d 19, 21 (2d Cir. 2009).

51. Creasman, *supra* note 48 at 1442.

52. Carl Bianco, M.D., *How Becoming a Doctor Works*, available at <http://money.howstuffworks.com/becoming-a-doctor15.htm>. For example, in Michigan, two years of postgraduate medical training are required before a doctor can take a state medical board examination. *Detroit Med. Ctr.*, 557 F.3d at 413. New York requires physicians to complete a residency program of at least one year before becoming eligible for a medical license. *Mem'l Sloan-Kettering Cancer Ctr.*, 563 F.3d at 21.

53. Katherine Huang, Note, *Graduate Medical Education: The Federal Government's Opportunity to Shape the Nation's Physician Workforce*, 16 YALE J. ON REG. 175, 175 (1999).

54. Bianco, *supra* note 52.

55. *United States v. Mem'l Sloan-Kettering Cancer Ctr.*, 563 F.3d 19, 21–22 (2d Cir. 2009).

56. Lynne M. Kirk, M.D. and Linda L. Blank, *Professional Behavior – A Learner's Permit for Licensure*, 353 NEW ENG. J. MED. 2709, 2709 (2005). See also DAVID EWING DUNCAN, *RESIDENTS: THE PERILS AND PROMISE OF EDUCATING YOUNG DOCTORS* 51 Scribner (1996) (in the report, Flexner accused some medical schools of failing to grant students a standard clinical experience).

57. *United States v. Mem'l Sloan-Kettering Cancer Ctr.*, 563 F.3d 19, 22 (2d Cir. 2009).

58. *United States v. Mount Sinai Med. Ctr. of Fla., Inc.*, 486 F.3d at 125. See also Dustin M. Covello, Jacquelyn L. Griffin, and Svetoslav S. Minkov, *Federal Taxation*, 60 MERCER L. REV. 1235, 1251 (2009).

Residency programs differ very little from the third and fourth years of medical school when students begin treating patients. Furthermore upon completing a residency program, participants receive a certificate of completion and participate in a graduation ceremony.⁵⁹ Most importantly, graduates of medical schools are still not eligible to take board certification examinations necessary to work in the area of their specialty or sub-specialty until they have completed a residency program.⁶⁰

While residencies and fellowships provide a further degree of education through classroom lectures and exams as well as hands-on experiences,⁶¹ medical residents are compensated for their work. Residents provide much of the patient care in teaching hospitals and comprise an important group of inexpensive yet highly skilled health professionals, enabling hospitals to function at lower costs.⁶² Medical residents often work more than forty hours per week, with the majority of their time spent providing services to patients within hospitals. Although most of the work residents do is eventually overseen by a doctor with more experience, many initial healthcare decisions are made by the residents themselves, granting the more experienced doctors time to perform more intricate procedures requiring their specialty.

III. EARLY JUDICIAL INTERPRETATIONS OF THE STUDENT EXCEPTION

For years, federal courts wrestled with the facts in trying to classify the roles medical residents perform as primarily student-focused or primarily employee-driven. The courts' inconsistent conclusions derived from their divergent viewpoints on whether the language of § 3121(b)(10) is ambiguous,⁶³ the issue on which the Supreme Court ultimately ruled in the Government's favor, finding the language ambiguous and the Treasury Department's clarification reasonable.⁶⁴

59. Mayo I, 252 F. Supp. 2d at 1004; Mount Sinai, 486 F.3d at 126. See also Covello, Griffin, and Minkov, *supra* note 58, at 1251.

60. Mayo I 252 F. Supp. 2d at 1004; Mount Sinai, 486 F.3d at 127. See also Covello, Griffin, and Minkov, *supra* note 58, at 1251.

61. See DUNCAN, *supra* note 56 at 51–63 (analyzing the “plunge-in” method of resident education and emphasizing the critical nature of hands-on learning experiences). “The goal of our program is to train a person once and for all almost automatically how to move effectively into managing a medical problem, a medical emergency,” says John Potts, Chief of Internal Medicine at Boston’s Massachusetts General Hospital. His program is well known for placing interns in the midst of a busy ward from the moment they begin their training, giving them maximum responsibility and minimal interference by attendings. *Id.* at 55.

62. Huang, *supra* note 53, at 176.

63. Compare *Minnesota v. Apfel*, 151 F.3d 742, 748 (finding that student exception is unambiguous) with *United States v. Detroit Med. Ctr.*, No. 05-71722, 2006 WL 3497312 at *8 (E.D. Mich. Dec. 1, 2006) (arguing the student exception is ambiguous and legislative intent should be investigated).

64. *Mayo Found. for Med. Ed. and Research v. United States*, 131 S.Ct. 704, 714–15 (2011).

According to well settled administrative law principles, if the court finds the statute's language ambiguous, a review of the statutory history is required, but if the statute is determined to be unambiguous, judgments must be made based solely upon the plain meaning of the words of the statute.⁶⁵ The early cases of *Minnesota v. Apfel*⁶⁶ and *United States v. Detroit Medical Center*⁶⁷ illustrate the dichotomy of the two approaches within the federal court system and the opposite conclusions reached with differing perspectives.⁶⁸

A. Unambiguity in *Minnesota v. Apfel*

In 1955, Minnesota executed a section 418 Agreement with the Social Security Commissioner, affording the state and its political subdivisions the opportunity to participate in the national Social Security system.⁶⁹ According to section 418, states have the ability to define the specific details of their agreements with the Commissioner so long as the provisions of the agreement are not "inconsistent with the provisions of" section 418."⁷⁰

In 1958, Minnesota modified the initial Agreement to extend coverage to more groups of state employees, including the employees of the University of Minnesota.⁷¹ This modification also listed several exclusions, among them any service performed by a student.⁷² Consequently, the University of Minnesota did not withhold Social Security contributions from stipends paid to medical residents for over thirty years after the modifications took effect.⁷³

In 1989, however, the Social Security Administration (SSA) initiated an investigation into the status of medical residents, and in 1990, the Commissioner issued a formal notice of statutory assessment claiming that

65. *Detroit Med. Ctr.*, 2006 WL 3497312 at *11 (arguing that because the "student exclusion" provision is ambiguous, "[e]xtrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms" (quoting *Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 568 (2005))).

66. 151 F.3d 742 (8th Cir. 1998).

67. No. 05-71722, 2006 WL 3497312 (E.D. Mich. Dec. 1, 2006).

68. See *Rowe*, *supra* note 24, at 1372.

69. *Apfel*, 151 F.3d at 744. When the Social Security Act of 1935 was first enacted, there was some question as to whether Congress could compel states and their political subdivisions to participate in the Social Security System, necessitating the adoption of 42 U.S.C. § 418(a)(1) in 1950. *Id.* A section 418 agreement allows state, county, and municipal employees to earn credit toward social security and disability benefits by making the employees and their employing agencies subject to the mandatory social security contributions. *Id.*

70. *Id.* (quoting 42 U.S.C. § 418(a)(1)).

71. *Id.* at 744.

72. *Id.*

73. *Id.*

the State was liable for the unpaid Social Security contributions, totaling almost \$8 million for the years of 1985 and 1986.⁷⁴ The State sought review of this assessment through an administrative appeal, which affirmed the assessment, and the State then appealed the administrative decision to the district court.⁷⁵ The district court overturned the assessment on two distinct grounds: 1) the medical residents were not “employees” of the University of Minnesota within the meaning of the 1958 modification; and 2) even if the residents were employees as expressed in the modification, they were excluded from coverage under the modification’s student exclusion.⁷⁶ In determining that the medical residents were not employees, the court reviewed the 1958 modifications and its terms under contract law, examining the intent of both parties⁷⁷ and noting that unless Congress altered any terms of the section 418 agreements, the parties’ intent would stand.⁷⁸

More importantly for the purpose of the issue at hand, the district court also found that even if the residents were employees, they would still be excluded under the 1958 modifications.⁷⁹ Following the regulation implementing the student-exclusion exception,⁸⁰ the Court of Appeals ultimately determined that “[t]he undisputed facts make it clear . . . that the primary purpose for the residents’ participation in the program is to pursue a course of study rather than to earn a livelihood.”⁸¹ Since the residents were enrolled at the University, paid tuition, and registered for fifteen credit hours per semester, the court deemed them students despite the fact

74. *Apfel*, 151 F.3d at 744.

75. *Id.*

76. *Id.* at 744–45. Section 418(c)(5) then provided that “[s]uch agreement shall, if the State requests it, exclude (in the case of any coverage group) any agricultural labor, or service performed by a student, designated by the State.” *Id.* at 747. This section also cross-referenced the general student exclusion, then codified at § 410(a)(10), which applied to service performed in the employ of a school, college, or university “if such service is performed by a student who is enrolled and regularly attending classes at such school, college, or university.” *Id.*

77. *Id.* at 745. In note seven of its opinion, the court acknowledged that many factors supported their finding that medical residents were not intended to be covered after the modification, specifically: that the modification expressly stated its intention to cover 225 employees while there were 422 medical residents enrolled at the time; minutes from a Board of Regents meeting that acknowledged the intention of covering only certain faculty positions; an IRS Ruling indicating that stipends paid to medical residents were excluded from wages because such stipends were primarily paid to further residents’ education and training; and the 30-year consistency of the university’s treatment of medical residents. *Id.* at 745 n.7.

78. *Id.* at 747.

79. *Id.*

80. 20 C.F.R. § 404.1028(c) (“Whether you are a student for purposes of this section depends on your relationship with your employer. If your main purpose is pursuing a course of study rather than earning a livelihood, we consider you to be a student and your work is not considered employment.”).

81. *Apfel*, 151 F.3d at 748.

that they provided patient services that benefited the hospital, as an employee would.

B. A Different Interpretation: *Detroit Medical Center*

The District Court for the Eastern District of Michigan believed that the student exception displayed a clear congressional intent to include all medical residents within FICA's coverage.⁸² In *United States v. Detroit Medical Center*,⁸³ the Government brought suit against the Detroit Medical Center (DMC) for repayment of Social Security tax refunds that DMC had successfully requested in 2003.⁸⁴ In responding to the Government's repayment action, DMC offered two grounds for claiming entitlement to the refund, one of which was its assertion that the student exemption should be held applicable to DMC's medical residents.⁸⁵ The court disregarded the approach followed in *Apfel*, however, and determined that the treasury regulation was ambiguous as to whether the medical residency program fell within the meaning of a "school, college, or university."⁸⁶ The court also found the regulation ambiguous as to whether residents were "students" under § 3121(b)(10), so it resorted to the history of the student exception.⁸⁷

The court first turned to Congress's 1965 repeal of the student intern exception, which Congress enacted concurrently with the student exception in 1939.⁸⁸ The court believed this repeal was evidence that Congress

82. See *Detroit Med Ctr.*, 2006 WL 3497312 at *12 ("To exempt medical residents conflicts with Congress' intent to have young doctors covered by social security as shown by the statutory history.").

83. See *id.* at *14 (granting summary judgment in favor of the United States and finding student exception from FICA taxation inapplicable to stipends paid by defendant to its medical residents).

84. *Id.* at *1. DMC had based its original refund petition on the theory that its medical residents qualified for the student exemption under § 3121(b)(10). *Id.*

85. See *id.* (noting DMC's introduction of the argument that the stipends constituted "noncompensatory scholarships"). The District Court rejected DMC's scholarship theory, noting that even if DMC's program was "educational in nature . . . the residents' stipends [were] given as a substantial *quid pro quo* for patient care . . ." *Id.* at *4. DMC also brought a counterclaim against the United States for denials of FICA refunds for taxable years 1995, 1996, 1997, 2002, and 2003. *Id.* at *1.

86. See *Detroit Med. Ctr.*, 2006 WL 3497312, at *10 ("Although GME programs provide a type of education to their residents, they are educational in a way similar to an apprenticeship or a position that involves on the job training."). Note how differently this court views "on-the-job training" in the context of GME programs from the court in *Mayo I*.

87. *Detroit Med. Ctr.*, 2006 WL 3497312, at *11–13. The court rejected DMC's argument that use of extrinsic evidence was improper under *Exxon Mobil Corporation v. Allapattah Services*. See *id.*

88. *Detroit Med. Ctr.*, 2006 WL 3497312, at *12 (noting that in 1939, Congress recognized a difference between students and medical interns as well as between resident doctors and medical interns). "The legislative history of the 1939 Amendment in the form of a House Report explained the intern exception covered only an intern, 'as distinguished from a resident doctor.'" *Id.* (quoting H.R. REP. NO. 76-728 at 550–

intended to protect all “actual and future doctors once their undergraduate schooling [was] complete” through FICA coverage,⁸⁹ but this argument is misguided, since it is generally accepted that the concept of “intern” is no longer part of the medical education construct.⁹⁰ While *Apfel* appears to be the first case in which the student exception made its appearance in conjunction with residency programs and medical residents, this does not suggest the general student exception was previously unavailable to medical residents. Nevertheless, the court stated that, while applicability of the student exception in the wake of the repeal of the intern exception may have some merit, it was for Congress—and not the judiciary—to make such a clarification.⁹¹ Accordingly, the court found that, as a matter of law, the student exception under § 3121(b)(10) was inapplicable to DMC and its medical residents.⁹²

On appeal, the Sixth Circuit overruled the district court’s determination that the statute’s language was ambiguous and returned to the *Apfel* analysis.⁹³ The court stated:

We assume that in the absence of a congressional definition of “student,” this common word in § 3121 was intended to have its usual and ordinary meaning of a person pursuing studies at an appropriate institution, which the Act defines as a “school, college, or university” for the purposes of the exemption.⁹⁴

In this case, the court reversed the grant of summary judgment for the Government, and granted a continuance in order to allow the parties to gather evidence pertaining to the activities and nature of the residents’ work within the Detroit Medical Center.⁹⁵

In response to the *Apfel* decision, numerous teaching hospitals and health care organizations made claims seeking refunds of hundreds of millions of dollars in FICA taxes based on the Eighth Circuit’s interpretation of the student exception.⁹⁶ In general, the decisions following

51 (1939)).

89. *Id.*

90. While interns and resident doctors might once have been separate and distinct labels for “young doctors,” that distinction no longer exists.

91. *Detroit Med. Ctr.*, 2006 WL 3497312, at *13.

92. *Id.* at *14.

93. *United States v. Detroit Med. Ctr.*, 557 F.3d 412 (6th Cir. 2009).

94. *Id.* at 417.

95. *Id.*

96. See *Detroit Med. Ctr.*, 2006 WL 3497312, at *8 (“A majority of district courts, relying on *Apfel*, have determined that . . . GME programs may establish through a facts and circumstances inquiry that their residents qualify for the student exception.”). In support of this assertion, the court cited four cases that utilized the majority approach: *Univ. of Chi. Hosps. v. United States*, No. 05 C 5120, 2006 U.S. Dist. LEXIS 68695 (N.D. Ill. Sept. 8, 2006); *Ctr. for Family Med. v. United States*, 456 F. Supp. 2d 1115 (D.S.D. 2006); *United States v. Univ. Hosp., Inc.*, No. 1:05CV445, 2006 WL 1173455 (S.D. Ohio Mar. 29, 2006); and *United States v. Mayo Found. for Med.*

Apfel narrowly held that the FICA exception was unambiguous, allowing the statute to be interpreted through the plain meaning of the words and examining residency programs on a case-by-case basis to see if the residents' activities could be classified as educational.⁹⁷

C. *Mayo I*

Similar to the facts of *Apfel*, the issue in *Mayo I* turned on whether the court believed the implementing regulations of § 3121(b)(10) allowed medical residents to fall under the protection of the student exception.⁹⁸ Finding that the Mayo Foundation employed the medical residents⁹⁹ and that the several institutions comprising the Foundation could properly be considered a "school, college, or university" under the exception,¹⁰⁰ the court focused upon whether the residents learning and working at the Mayo Foundation could qualify as students under the statute and its implementing regulations.¹⁰¹ To analyze the relationship between the Mayo Foundation and the residents, the court examined the elements at the basis of a student-school relationship: enrollment, regular attendance, residents' purposes for participating, and rendering services as an incident to and for the purpose of pursuing a course of study.¹⁰² The court found each element existed,¹⁰³

Educ. & Research, 282 F. Supp. 2d 997 (D. Minn. 2003).

97. *United States v. Mount Sinai Med. Ctr. of Florida*, 486 F.3d 1248 (11th Cir. 2007); *United States v. Mem'l Sloan-Kettering Cancer Ctr.*, 563 F.3d 19 (2d. Cir. 2009); *United States v. Detroit Med. Ctr.*, 557 F.3d 412 (6th Cir. 2009); *Univ. of Chi. Hosps. v. United States*, 545 F.3d 564 (7th Cir. 2008). *See also* Rowe, *supra* note 24, at 1376–77.

98. *Mayo I*, 282 F. Supp. 2d 997, 1010–11 (D. Minn. 2003) (adopting the two-part test prescribed by 26 C.F.R. § 3121(b)(10) for the student exception qualifications). The court stated that the defendants would have to show that "the character of the organization in the employ of which the services [were] performed [was] a school, college, or university..." and that the residents were "enrolled and regularly attending classes at the school, college, or university by which [they were] employed or with which [their] employer is affiliated." *Id.* at 1010 (quoting Treas. Reg. §§ 31.3121(b)(10)-1(b)(1)-(2)(2003) (alterations in original)).

99. *See id.* at 1011–13 (examining the Mayo Foundation's influence over the medical residents and finding that the Foundation qualified as the residents' employer).

100. *See id.* at 1013–15 (rejecting the Government's primary purpose test for determining whether an institution qualified under the exemption and finding the "Mayo Foundation, a non-profit, charitable, tax-exempt institution, constitutes a 'school' within the term 'school, college, or university' for purposes of § 3121(b)(10).").

101. *Id.* at 1015.

102. *Id.* at 1015–18.

103. *Id.* Specifically, the court found that admission into the Mayo Graduate School of Medicine was based entirely on merit and that the admissions process showed that the residents were enrolled instead of hired or contracted for. The court also cited various educational conferences, teaching rounds, and mandatory lectures as sufficient to establish that residents "regularly attended classes." Furthermore, the residents testified that they participated to gain knowledge through hands-on

and in this case, the medical residents could be classified as students and protected from paying FICA taxes.¹⁰⁴ Employing the same case-by-case analysis as *Apfel*, *Mayo I* illustrated to the IRS a need to examine its current regulations, since those same regulations were ultimately being defeated by the majority of the residency programs it attempted to challenge.

IV. POST-LITIGATION REGULATION REVISIONS

In response to judicial defeat¹⁰⁵ and in recognition of the danger of the case-by-case analysis supported by *Apfel* and *Mayo I*, the IRS published a Notice of Proposed Rulemaking to amend existing guidelines defining “student” and “school, college, or university” on February 25, 2004.¹⁰⁶ The IRS was concerned that residency programs were actually more akin to “on-the-job training” than education and, as categorized, were being improperly included in the FICA student exception.¹⁰⁷ Before the 2004 amendments, the regulations stated: “The term ‘school, college, or university’ within the meaning of [the student exception] is to be taken in its commonly or generally accepted sense.”¹⁰⁸

After extensive public comment and a hearing, final regulations were published on December 21, 2004, and became effective on April 1, 2005.¹⁰⁹ With the promulgation of the final regulations, the IRS hoped to take interpretive powers away from the courts and to gain ultimate control as to which employers could be classified as a “school, college or university,” and which employees could be considered “students” for purposes of the FICA student exception.¹¹⁰

experience. *Id.*

104. *Id.*

105. See *Minnesota v. Apfel*, 151 F.3d 742, 748 (8th Cir. 1998) (affirming the district court’s ruling against the IRS); *United States v. Mayo Found. for Med. Educ. & Research (Mayo I)*, 282 F. Supp. 2d 997 (D. Minn. 2003).

106. See Student FICA Exception, 69 Fed. Reg. 8604 (proposed Feb. 25, 2004). Agencies may amend regulations to respond to adverse judicial decisions, or for other reasons, provided that the amended regulation is a permissible interpretation of the statute. See *Dickman v. Comm’r*, 465 U.S. 330, 343 (1984); *Morrissey v. Comm’r*, 296 U.S. 344 354–56 (1935). “[W]ords must be construed in context, and when the context is a provision of the Internal Revenue Code, a Treasury Regulation interpreting the words is nearly always appropriate.” *Mayo Foundation for Med. Educ. And Research v. U.S.*, 568 F. 3d 675, 680 (8th Cir. 2009).

107. See *Mayo Found. for Med. Educ. & Research v. United States*, 503 F. Supp. 2d 1164, 1168 (D. Minn. 2007) (discussing the IRS’ motivation for readdressing those issues which had been “resolved” already by both the Eighth Circuit in *Apfel* and the District Court in *Mayo I*).

108. 26 C.F.R. § 31.3121(b)(10)-2(d) (2003). This general sense allowed courts to interpret the words in their broadest sense, granting medical residents easy access to the FICA student exception.

109. Rules & Regulations, Student FICA Exception, 69 Fed. Reg. 76404-01 (Dec. 21, 2004).

110. *Id.*

Per the 2004 revisions, the regulations read:

[a]n organization is a school, college or university within the meaning of section 3121(b)(10) if its primary function is the presentation of formal instruction, it normally maintains a regular faculty and curriculum, and it normally has a regularly enrolled body of students in attendance at the place where its education activities are regularly carried on.¹¹¹

The amended regulations also include a full-time employee exception declaring that “an employee whose normal work schedule is 40 hours or more per week is considered a full-time employee,”¹¹² and the regulations further claimed that services performed by full-time employees are “not incident to and for the purpose of pursuing a course of study.”¹¹³ Even if “the services performed by that employee may have an educational, instructional, or training aspect,”¹¹⁴ the “normal work schedule”¹¹⁵ will not be affected. As medical residents work far beyond forty hours per week,¹¹⁶ these amended regulations would explicitly exclude them from protection under the student exception if the courts uphold them as valid.

V. THE DIAGNOSIS: NO CURE AFTER *MAYO II*

A majority of the Courts of Appeals reviewing the statute as construed in prior regulations agreed that the student-exception statute is unambiguous and does not limit the types of services that qualify for the exemption, which would preclude the government from amending the statute to its liking and then consequently being able to succeed on its claim that medical residents are categorically ineligible for the student exception.¹¹⁷ In the last three years, four circuits have held that the amended regulations to the student exception are invalid because the student exception statute as originally written is simply and clearly unambiguous.¹¹⁸ These courts determined that since judges are well aware of what is a “school,” who is a “student,” and what it means to be “enrolled and regularly attending classes,” the Treasury Regulation interpreting the very common terms is invalid because Congress had already spoken in plain terms.¹¹⁹

111. 26 C.F.R. § 3121(b)(10)-2(c) (2008) (emphasis added).

112. 26 C.F.R. § 3121(b)(10)-2(d)(3)(iii).

113. *Id.*

114. *Id.*

115. *Id.*

116. *See supra* Part II.

117. *See* United States v. Mount Sinai Med. Ctr. of Fla., Inc., 486 F.3d 1248, 1251–56 (11th Cir. 2007); United States v. Mem’l Sloan-Kettering Cancer Ctr., 563 F.3d 19, 27 (2nd Cir. 2009); United States v. Detroit Med. Ctr., 557 F.3d 412 417–18 (6th Cir. 2009); Univ. of Chicago Hosps. v. United States, 545 F.3d 564, 567 (7th Cir. 2008).

118. *Id.*

119. *See* Mayo Foundation for Med. Educ. And Research v. U.S., 568 F. 3d 675, 679 (8th Cir. 2009).

However, “if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”¹²⁰ Treasury Regulations interpreting the Internal Revenue Code are entitled to substantial deference,¹²¹ but a reviewing court must first question “whether Congress has directly spoken to the precise question at issue.”¹²² If Congress has spoken to the issue, both the court and the agency must give effect to the unambiguously expressed intent of Congress.¹²³

The Eighth Circuit voiced disagreement with the other circuit courts by validating the most recent Treasury Regulations, thus precluding medical residents from qualifying for the student exception.¹²⁴ On appeal, *Mayo II* determined that the statute was silent or ambiguous as to whether a medical resident working for the school full-time is a “student who is enrolled and regularly attending classes” for the purposes of 26 U.S.C. § 3121(b)(10).¹²⁵ After finding the student-exception statute silent or ambiguous regarding its application to medical residents, the Court of Appeals then turned to the second part of the *Chevron* analysis: whether the Commissioner’s amended regulation is a permissible interpretation of the statute.¹²⁶

In order to make this determination, the court looked to *National Muffler*, in which the Supreme Court held:

In determining whether a particular regulation carries out the congressional mandate in a proper manner, we look to see whether the regulation harmonizes with the plain language of the statute, its origin, and its purpose. A regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent. If the regulation dates from a later period, the manner in which it evolved merits inquiry. Other relevant considerations are the length of time the regulation has been in effect, the reliance placed on it, the consistency of the Commissioner's interpretation, and the degree of scrutiny Congress has devoted to the regulation during subsequent re-

120. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

121. *Boeing Co. v. United States*, 537 U.S. 437, 448 (2003).

122. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.* 467 U.S. 837, 842-43 (1984).

123. *Id.* at 842-43.

124. *Mayo II*, 568 F.3d at 679.

125. *Id.* at 680. The Court did find the government’s argument that Mayo is not a “school, college, or university” within the meaning of the student exception because its “primary function” is not education arbitrary and unreasonable. *Id.* at 683–84. Unfortunately for the medical residents and Foundation, this finding is not enough to except FICA payments.

126. *Mayo II*, 568 F. 3d at 680. For a more detailed explanation of the original analysis, see *Chevron*, 467 U.S. at 843.

enactments of the statute.¹²⁷

The Eighth Circuit determined that the amended regulation modified the “incident to” test and consequently, harmonized with the plain language of the statute.¹²⁸ The historical record illustrates that the generally worded “incident to” regulation did not include full-time employees. Since the Commissioner responded to the holdings against the government by amending regulations to improve the policy, this modification was not only valid, but helpful,¹²⁹ as the Court cited the fact that the “IRS and Treasury believe that Congress has shown the specific intent to provide social security coverage to individuals who work long hours, serve as highly skilled professionals, and typically share some or all of the terms of employment of career employees, particularly medical residents and interns.”¹³⁰

Furthermore, the Court of Appeals looked to the Supreme Court, which has consistently upheld Treasury Regulations construing words in tax statutes that have a different meaning, even if common or plain, in other contexts.¹³¹ If words are of a general or not obviously self-defining nature, the Court has allowed administrative interpretation for elucidation.¹³² Courts must defer to Treasury Regulations, properly originated, so long as they are reasonable.¹³³ Since the full-time employee regulation is a permissible interpretation of the statutory student exception, the residents’ compensation for health care and patient services was subject to FICA taxes.¹³⁴ By upholding the Treasury Regulations and splintering off from the jurisprudence of the other Courts of Appeals, the Eighth Circuit further compounded the medical resident conundrum, encouraging the Supreme

127. *National Muffler Dealers Association, Inc. v. U.S.*, 440 U.S. 472, 477 (1979).

128. *Mayo II*, 568 F.3d at 681. The Regulation clarified the specificity of the “incident to” test with the provision, “[t]he services of a full-time employee are not incident to and for the purpose of a course of study,” and went even further by defining an employee who works forty hours or more per week as “full-time.” *Treas. Reg.* § 31.3121(b)(10)-2(d)(iii).

129. *Mayo II*, 568 F.3d at 683.

130. *Id.* at 683 (quoting 69 Fed. Reg. 8604 at 8608).

131. *See Mayo II*, 568 F.3d at 679 (“For example, in *Helvering v. Reynolds*, the Court upheld a regulation construing the statutory term ‘acquisition’ of a contingent remainder interest in property devised by will to mean when the decedent died, not when the remainderman obtained title many years later. . . . ‘However unambiguous that word might be as respects other transactions . . . its meaning in this statutory setting was far from clear.’”) (quoting *Helvering v. Reynolds*, 313 U.S. 428, 433 (1941) (citations omitted)).

132. *See Magruder v. Washington, Baltimore & Annapolis Realty Corp.*, 316 U.S. 69, 73 (1942); *United States v. Correll*, 389 U.S. 299, 304 (1967); *Nat’l Muffler Dealers Ass’n v. Comm’r*, 499 U.S. 554, 559–1 (1991). *But see*, *Knight v. Comm’r*, 552 U.S. 181 (2008); *Mass v. Higgins*, 312 U.S. 443 (1941).

133. *Cottage Savings Ass’n, v. Comm’r*, 499 U.S. 554, 560–61 (1991).

134. *Mayo II*, 568 F.3d at 683.

Court to take this case and issue a final decision to bind all jurisdictions.¹³⁵

VI. THE PROGNOSIS OF THE STUDENT EXCEPTION

The previous circuit split among the federal appellate courts forced both medical residents and hospitals not only to wonder about the future of their Social Security contributions, but also left them unaware of how to proceed in the present. Whether or not these doctors-in-training and the hospitals in which they learn and work should be forced to make payments hung upon a single thread: whether or not the Supreme Court would find the language of the student exception ambiguous, calling for a subsequent judgment about the reasonableness of the Treasury Regulations, or clearly written for direct application, granting protection to medical residents and teaching hospitals. On January 11, 2011, the Supreme Court issued its decision. Chief Justice Roberts published the opinion, which ultimately held that the definition of “student” as used in the student exception was ambiguous, and that the Court would defer to the Department of the Treasury, provided its regulations were reasonable, which the Court found they were.¹³⁶

Many anticipated a long and hard fight for the protection of medical residents and teaching hospitals under FICA’s student-exception provision. With a penchant for encouraging participation, especially the participation of skilled workers, in national programs, the Court seemed unlikely to grant medical residents the student exemption, and as predicted, the Court ruled in favor of the Government.¹³⁷

From the vantage point of broad policy considerations, it also appears that the money residents and the hospitals would pay through the FICA tax may be most helpful if contributed into Social Security. While the money does not amount to a significant quantity of funds for an individual, if each medical resident contributed his or her share, the total would be a vast sum. For a crude calculation, consider that approximately 80,000 physicians are in residency or fellowship programs at any particular time in one of the 701 teaching hospitals offering residency programs in the United States¹³⁸ and that the mean salary for a first-year resident in 1998–99 was \$34,104 (with a mean increase of \$1,451 for each year of experience).¹³⁹ With those numbers, well over \$5.4 billion would be available each year for taxation if medical residents were excluded from the student exception, creating a significant surplus in the federal budget.¹⁴⁰ Moreover, “[i]n the context of

135. See *Mayo Found. for Med. Ed. and Research v. United States*, 131 S.Ct. 704 (2011).

136. *Id.* at 715–16.

137. *Id.*

138. Bianco, *supra* note 52.

139. *Id.*

140. It is also interesting to note that currently, the federal government is the main financier of graduate medical education, “contributing \$6.8 billion through Medicare, plus additional sums through the Department of Defense and Veteran Affairs.” Huang,

Social Security, taxpayer protection against future hardship (such as decreased earning potential resulting from old-age [*sic*], disability, or the loss of a spousal wage-earner) comes at the price of our mutual contribution to the Social Security System.”¹⁴¹ Consequently, taxpayers are urged to contribute into the Social Security System as soon as they are eligible.¹⁴²

On the other hand, the nature of GME programs and their uniform accreditation system through the ACGME presents a strong case for allowing teaching hospitals to operate outside the realm of FICA.¹⁴³ Since most medical residents cannot be licensed within their specialty or by a state without first completing a residency program, it is easy to paint the picture of the residency program as another rung on the ladder of a medical doctor’s higher education rather than as a full-time employment position. Furthermore, granting the providers of graduate medical education this tax exemption could reduce costs of GME programs, allowing for better programs, better facilities, and better doctors within the medical system.¹⁴⁴

While it appeared medical residents and GME programs were going to be given the benefit of the doubt and granted exemption from the FICA taxes, the Court of Appeals’ decision in *Mayo II* created a serious roadblock in what had been a clear path toward ending over a decade of constant litigation. In an effort to solve this persistent dilemma, the Supreme Court has ruled, basing its decision on firmly entrenched principles within administrative law.

In agreement with the Eighth Circuit’s analysis and following the framework presented in *Chevron*, the Supreme Court recognized that Congress did not address medical residents specifically, nor did the legislature clearly and explicitly define “student” when it wrote the student exemption.¹⁴⁵ The Court found the use of “student” ambiguous in this context, so it then evaluated the Treasury Department’s regulation categorically excluding medical residents from attaining “student” status and determined it was reasonable.¹⁴⁶ While this result may provide consternation for some who believe medical residents should be categorized as students, the Supreme Court’s definitive ruling now allows providers of GME to focus their attention on other, more pressing matters

supra note 53, at 176–77 (citing James A. Reuter, The Balanced Budget Act of 1997: Implications for Graduate Medical Education I (1997)).

141. Rowe, *supra* note 24, at 1398 (citing 1939-2 C.B. 538 (June 2, 1939)).

142. *Id.* (citing Social Security: Coverage for Medical Residents, G.A.O. No. B-284947, at 9 (Aug. 31, 2000), available at <http://www.gao.gov/archive/2000/h200184r.pdf> (noting that “treating residents as students could have other potential consequences for the medical residents, such as not earning credits toward retirement, survivor and disability benefits”)).

143. See Rowe, *supra* note 24, at 1406.

144. Rowe, *supra* note 24, at 1406.

145. *Mayo Found. for Med. Ed. and Research*, 131 S.Ct. 704, 711 (2011).

146. *Id.* at 711–15.

of life and death, in addition to creating an important source of funding for the United States government, especially in the current economic climate.

