

UNIVERSITY OF CALIFORNIA, ACADEMIC SENATE

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SANTA BARBARA • SANTA CRUZ

Office of the Executive Director
Telephone: (510) 987-9458
Fax: (510) 763-0309
Email: maria.bertero-barcelo@ucop.edu

Assembly of the Academic Senate, Academic Council
University of California
1111 Franklin Street, 12th Floor
Oakland, California 94607-5200

April 19, 2005

**SYSTEM-WIDE COMMITTEE CHAIRS
DIVISION CHAIRS**

Re: University of California Draft Policy on Human Subject Injury and Draft Guidelines on Implementation.

Dear System-wide Committee and Division Chairs:

On behalf of Academic Council Chair Blumenthal, please find attached the above document, which is being sent to you for review by your committee or division as appropriate.

Chair Blumenthal would like to place this issue before the Council at its June 22 meeting. In order to do so, it would be necessary for us to receive your comments by **no later than Friday, June 10**.

Please note that only the draft policies are attached. I have been unsuccessful in obtaining electronic copies of the additional information noted in the memo, which I was unsuccessful in scanning. Hard copies of the complete package is available upon request.

As a reminder, please note that all requests for comments are sent out to all System-wide Committees and Divisions. **Each Committee and Division may decide whether or not to opine. For System-wide Committee Chairs** please notify the Senate Office either directly by emailing me or through your Committee Analyst, if your committee chooses not to participate in this review. **For Division Chairs**, please notify the Senate Office either directly by emailing me or through your Senate Director, if your Division chooses not to participate in this review.

Thank you for taking this matter under consideration.

Cordially,

Maria Bertero-Barcelo, Executive Director
Academic Senate

Encl: 1
Copy: Academic Senate Committee Analysts
Senate Directors



OFFICE OF THE PROVOST AND SENIOR VICE PRESIDENT—
ACADEMIC AFFAIRS

OFFICE OF THE PRESIDENT
1111 Franklin Street
Oakland, California 94607-5200

February 25, 2005

**CHANCELLORS
ACADEMIC SENATE CHAIR BLUMENTHAL**

RECEIVED

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Dear Chancellors and Academic Senate Chair Blumenthal:

ACADEMIC COUNCIL

Enclosed for your review and comment are a **University of California Draft Policy on Human Subject Injury** and accompanying **Draft Guidance on Implementation**. The draft policy, when finalized, will supersede current UC policy on human subject injury, *University Policy for Medical Treatment of Human Subjects for Injuries Resulting from Participation in Research (January 19, 1979)*. The draft guidance assists in applying the provisions of the draft policy.

The current 1979 policy on human subject injury provides that the University will pay the cost of medical care for a participant in a research study who is injured. The policy is silent on the question of the fund source for the cost of care for subject injury. The proposed draft policy affirms the University's position that research subjects should not bear the cost of medical care for research injury and directs each campus and program that funds human subject research to establish a funding mechanism to cover injury costs. The draft policy also incorporates recent legislation and government policy that allows a research subject's insurance to be billed for qualified clinical trials.

The enclosed drafts are the result of the deliberations of the Human Subject Injury Task Force which was convened by former Provost and Senior Vice President C. Judson King in January 2002. Enclosed is a summary of Task Force member comments on the most recent iterations of the draft policy and draft guidance and responses to those comments from the Office of Research at UCOP. Also enclosed are two legal opinions from University Counsel Dan Stein of the Office of General Counsel addressing two issues raised by Task Force members: 1) whether health insurance co-payments can be waived for research injury medical care; and 2) whether, under applicable governmental statutes and policies, insurance may be charged for a service or item in an industry sponsored trial if any subject in the trial receives a service or item free of charge from the sponsor.

The following issues are addressed in the draft policy and guidance:

Fund Source for Research Injury Costs – The Task Force discussed possible fund sources for research injury costs, including a shared risk pool for the entire UC system. After exploring the requirements to establish and maintain such a pool, the Task Force

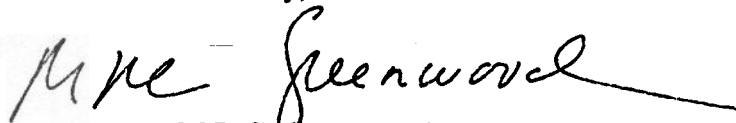
February 25, 2005

determined that the costs outweighed the benefits. The enclosed draft policy therefore directs each campus or UC program that funds human subject research to establish its own funding mechanism for injury costs arising from research initiated at or by the campus or program. A model for such a funding mechanism, adopted by UC San Diego in June 2004, is enclosed.

Statutes and Governmental Policies - The draft policy allows injury costs to be charged to a subject's insurance where allowed by federal or state statute or policy. This provision addresses recent governmental actions that allow insurance to be billed for clinical trial costs. The guidance provides further detail on the policies and statutes that allow injury costs to be charged to a subject's insurance, the Medicare National Coverage Decision for Clinical Trials and the Knox-Keene Act, California Health & Safety Code § 1370.6. Both the Medicare National Coverage Decision and the Knox-Keene Act exclude from coverage those costs that are customarily paid for by a research sponsor without charge to any subject in the study. Accordingly, in an industry sponsored trial, if any subject receives a service or item free of charge from the sponsor, then no subject in the study nor their insurance may be charged for the service or item.

I solicit your comments on the enclosed drafts and ask you to forward them to me by March 25, 2005. I thank you in advance for your input. I also invite you to share the drafts with officers on your campus, such as the Vice Chancellor for Research, the Director of the Human Subject Protection Program, and the Medical Director if applicable. If you have questions, please contact Rebecca Landes, the staff director for this project, at 510-987-9556 or <rebecca.landes@ucop.edu>.

Sincerely,



M.R.C. Greenwood
Provost and Senior Vice President
Academic Affairs

Encl.

cc: Vice Provost Coleman
Human Subject Injury Task Force Members
University Counsel Beam
Executive Director Auriti
Coordinator Landes

University of California Policy on Human Subject Injury February 2005

- I. **Preamble** - The University of California is committed to the ethical principles for the protection of human subjects in research set forth in the Belmont Report of the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research. The University recognizes and accepts responsibility, which it shares with its investigators and other researchers, for determining that research involving human subjects fulfills these ethical principles.

- II. **Policy and Definitions** - The University of California will provide all medical care reasonably necessary for any injury that results directly from participating in authorized UC research that comes under the UC Policy on the Protection of Human Subjects in Research. Medical care for research injury will be provided at no direct cost to the research subject. This policy addresses medical care for research injury only. This policy does not provide compensation to research subjects or to their families for any other direct or consequential damages such as loss of income or emotional pain and suffering. This Policy on Human Subject Injury is subject to the following definitions and conditions:
 - A. **Definition of "Injury"** - "Injury" is an event that generates medical costs and that is directly caused by the research study described in the research protocol and in the informed consent form. Injury specifically excludes the natural progression of an underlying or preexisting condition, unless the worsening condition is determined to be a direct result of the subject's participation in the research study described in the protocol and in the consent form.
 - B. **Definition of "Reasonably Necessary Medical Care"** - "Reasonably necessary medical care" is the accepted standard of care for the injury in question.
 - C. **Provision of Medical Care** – If possible, all medical care under this Policy shall be provided at the UC campus responsible for the research study. Research subjects may obtain medical care at non-UC locations, however, and such care will be reimbursed by UC at a reasonable

rate provided that the basis for use of the non-UC location and the claim for reimbursement are supported by sufficient written documentation.

III. Responsibilities of Parties - Responsibility for claiming, reporting, and paying for subject injury under this Policy on Human Subject Injury is as follows:

A. Responsibilities of Injured Research Subjects - If a research subject discovers an injury while or after participating in a study, the subject or the subject's representative should inform the study investigator or the local human subject protection program. At the discretion of the campus, research subjects may be asked to submit written notification of the injury to UC within a reasonable time of the occurrence of the injury or when the subject or the subject's representative becomes aware of, or reasonably should become aware of, the causal relationship between the injury and participation in the research.

B. Responsibilities of Investigators - Investigators are responsible for reporting to the campus human subject protection program all subject injury events, including those occurring in collaborative research projects conducted at other institutions. Investigators are responsible for providing information about the University's subject injury policy to potential research subjects. Investigators are responsible for making sure that a subject's need for care stemming from research injury is met, by either providing or arranging for medical care, or by coordinating with care providers to make sure that medical care is delivered.

C. Responsibilities of Research Funders for Cost of Care for Research-Related Injury – Except in cases where negligence or malpractice is found, the responsibility of funders for cost of care for research-related injury is as follows:

1. **For-Profit Corporations** – When the research is initiated by a for-profit corporation and conducted pursuant to a protocol provided by the corporation, the for-profit corporation shall be responsible for reimbursing the University for the cost of care for research-related injury. In limited circumstances and only where explicitly authorized by federal or state statute, regulation, or policy, some or all of the cost of care for research-related injury may

be recovered from the subject's health insurance. The sponsor shall reimburse any costs to the subject not covered by insurance such as co-payments or deductibles. Specific guidance will be provided by the UC Office of the President concerning the statutes, regulations and policies, and the conditions and circumstances, under which a subject's health insurance may be billed for research injury. Research agreements with for-profit corporations shall make explicit that the sponsor assumes responsibility for reimbursing the University of California for human subject injury costs, and that the sponsor may not require the University of California to bill third party insurers.

2. **Government Agencies and Non-Profit Organizations** - When the research is funded by a government agency or a non-profit organization, the agency or non-profit organization shall be responsible for reimbursing the University for the cost of care for research-related injury insofar as claims for cost of care for injury are an allowable expense under the funding entity's regulations, policies, or standard practices.
3. **The University of California** – When the research is not initiated by a for-profit corporation or not funded by a nonprofit organization or government agency, or when the research is funded by a government agency or non-profit organization and claims for cost of care for injury are not an allowable expense under the regulations, policies, or standard practices of the agency or non-profit organization, the University of California shall be responsible for the cost of care for research-related injuries that result directly from such research. Each campus and each UC entity that funds human subject research shall identify a specific mechanism to pay for any reasonably necessary research-related medical care resulting from research for which the campus or program is responsible and to which research injury costs may be assigned. This mechanism shall identify which units, departments, divisions, or programs shall be responsible for paying for the cost of care for research injury. In limited circumstances and only where explicitly authorized by

federal or state statute, regulation, or policy, some or all of the cost of care for research-related injury may be recovered from the subject's health insurance.

IV. Collaborative Research - This policy applies to all research carried out under awards administered by the University of California. The University is not responsible for cost of care for injury resulting from collaborative research carried out under awards administered by other institutions.

V. Research in Foreign Countries - Responsibility for the cost of care for subject injury sustained in the course of research carried out in a foreign country shall be negotiated in advance of the study between the host entity and the investigator and shall be included in the research agreement.

GUIDANCE ON IMPLEMENTING UC POLICY ON HUMAN SUBJECT INJURY

University of California Office of the President

February 2005

I. Introduction -This Guidance is issued in conjunction with the University of California's Policy on Human Subject Injury (Policy). The Policy provides generally that individuals who volunteer to be research subjects shall not bear the cost of care for injury incurred as a direct result of that participation. This Guidance is provided to assist campuses in applying the Policy and in making determinations concerning the assignment of costs of medical care for research injury.

II. Campus Authority for Subject Injury Issues - Each campus shall designate an authority, such as an office, official, or committee, to handle issues arising under the University of California's Policy on Human Subject Injury, and shall inform the Office of the President who that individual, office or committee is. The campus authority for subject injury shall handle issues such as: determining if the injury was directly caused by the research; authorizing reimbursement of costs when care is provided at a non-UC facility; and determining whether a subject injury cost should be billed to a sponsor, to the campus, to the UC funding program, or to the subject's insurance as allowed under the Policy. The campus authority for subject injury is also responsible for confirming that documentation is in place to support any instance of charging insurance for subject injury. The campus authority will also track research injury costs and other data, such as whether or not insurance was billed. The campus should carefully consider the organizational placement of the campus authority for subject injury issues so that the authority is in a position to act independently and objectively concerning injury costs.

III. Federal and State Statutes, Regulations, and Policies Governing Payment for Costs of Subject Injury - The University of California's Policy on Human Subject Injury allows cost of care for research-related injury to be charged to the subject's health insurance where explicitly authorized by federal or

state statute, regulation, or policy. The following federal and state statutes, regulations, and policies currently authorize health insurers to be charged for subject injury:

A. Medicare National Coverage Decision for Medicare Recipients Participating in Clinical

Trials - The Medicare National Coverage Decision for Clinical Trials (Medicare NCD) is a national coverage policy issued on September 19, 2000 by the Centers for Medicare and Medicaid Services (CMS) (formerly the Health Care Financing Administration). The Medicare NCD provides that Medicare may be charged for certain routine costs of qualifying clinical trials, including the costs of diagnosis and treatment of complications.

1. **Requirements to Qualify for Medicare NCD** – In order to receive Medicare coverage of routine costs, including cost of care for injury, a clinical trial must meet all of the following criteria:

- a. Has a Therapeutic Intent - The trial must have a therapeutic intent, i.e., the trial must not be designed exclusively to test toxicity or disease pathophysiology;
- b. Evaluates a Medicare Benefit - The subject or purpose of the trial must be the evaluation of an item or service that falls within a Medicare benefit category, e.g., physicians' service, durable medical equipment, or diagnostic test; the trial may not test an item or service that is statutorily excluded from coverage, e.g., cosmetic surgery, hearing aids; and
- c. Enrolls Diagnosed Beneficiaries - Trials of therapeutic interventions must enroll patients with diagnosed disease rather than healthy volunteers; trials of diagnostic interventions may enroll healthy patients in order to have a proper control group.
- d. Has Desirable Characteristics – The desirable characteristics are listed in the NCD.

2. **Deemed Trials with Desirable Characteristics** – Some clinical trials are considered automatically deemed as having desirable characteristics and therefore qualified under the Medicare NCD. They include:

- a. Trials funded by the National Institutes of Health (NIH), the Centers for Disease Control (CDC), the Agency for Healthcare Research and Quality (AHRQ), the Centers for

Medicare and Medicaid Services (CMS, formerly the Health Care Financing

Administration (HCFA)), the Department of Defense (DOD), and the Department of Veterans Affairs (VA);

b. Trials supported by centers or cooperative groups that are funded by the NIH, CDC, AHRQ, CMS, DOD and VA;

c. Trials conducted under an Investigational New Drug (IND) application reviewed by the Food and Drug Administration (FDA); and

d. Trials exempt from having an IND application under 21 CFR 312.2(b)(1) until such time as

3. **Trials Not Automatically Deemed** – Clinical trials that are not automatically deemed as having desirable characteristics will have to be registered by the investigator with a Medicare clinical trials registry. The Agency for Healthcare Research and Quality is charged with establishing the registry and with convening a federal panel that will develop qualifying criteria. As of February 2005 the registry has not been established.

4. **Routine Costs Eligible for Medicare Reimbursement** - Routine costs of a clinical trial eligible for Medicare reimbursement include all items and services that are otherwise generally available to Medicare beneficiaries that are provided in either the experimental or the control arms of a clinical trial. In the context of subject injury, routine patient care costs include items and services needed for reasonable and necessary care arising from the diagnosis or treatment of complications.

5. **Costs Ineligible for Medicare Reimbursement** - The following costs are not eligible for Medicare reimbursement:

a. The investigational item or service itself, except for certain devices that have been deemed eligible for Medicare coverage by CMS;

b. Items and services for which there is no Medicare benefit category, which are statutorily excluded, or that fall under a national noncoverage policy;

- c. Items and services furnished solely to satisfy data collection and analysis needs that are not used in the direct clinical management of the patient, e.g., monthly CAT scans for a condition usually requiring only a single scan;
- d. Items and services provided solely to determine trial eligibility;
- e. Items and services customarily provided by the industry sponsor free of charge to any subject in the trial. In other words, if the industry sponsor is obligated to pay for subject injury costs for non-Medicare subjects, then Medicare may not be charged for subject injury costs for any subject in the trial.

B. California Knox-Keene Act - The California Knox-Keene Act, Health & Safety Code § 1370.6, requires health plans, health insurers and Medi-Cal to provide coverage for all routine patient care costs arising in cancer clinical trials, including the costs of health care services for treatment of complications.

1. **Requirements for Trial Qualification** - To be eligible for the Knox-Keene Act, the cancer clinical trial must:

- a. Have a therapeutic intent; and
- b. Meet one of the following requirements:
 - i. Involve a drug that is exempt under federal regulations from a new drug application; or
 - ii. Be approved by:
 - 1. One of the National Institutes of Health;
 - 2. The federal Food and Drug Administration, in the form of an investigational new drug application;
 - 3. The United States Department of Defense; or
 - 4. The United States Veterans Administration.

2. **Requirements for Subject Qualification** - To be eligible for the Knox-Keene Act, the research subject in the cancer clinical trial must meet all of the following criteria:

- a. The subject must have a diagnosis of cancer;

- b. The subject must be enrolled in a Phase I, Phase II, Phase III, or Phase IV cancer clinical trial; and
 - c. The subject's treating physician providing covered health care services to the subject under the subject's health plan must recommend participation in the clinical trial after determining that such participation has a meaningful potential to benefit the subject.
3. **Documentation of Eligibility** - The following procedures must be met to document subject eligibility:
- a. If the treating physician who recommends participation in the clinical trial is also a member of the clinical trial research team, the principal investigator must obtain independent verification from another qualified physician who is not a member of the research team that participation in the clinical trial has a meaningful potential to benefit the subject; and
 - b. The recommendation of the treating or other qualified physician that the subject be allowed to participate in the cancer clinical trial must be obtained prior to submission of any charge to the subject's insurer.
4. **Eligible Costs** – The Knox-Keene Act defines routine patient care costs as the costs associated with the provision of health care services, including drugs, items, devices, and services that would otherwise be covered under the health plan or contract if those drugs, items, devices, and services were not provided in connection with a clinical trial. In the context of subject injury, routine patient care costs include costs of health care services needed for reasonable and necessary care in diagnosis or treatment of complications arising from participation in the trial.
5. **Ineligible Costs** - Routine patient care costs do not include costs associated with the provision of:
- a. Health care services customarily provided by the industry sponsor free of charge for any enrollee in the trial. In other words, if uninsured subjects would not be charged for cost of care for injury in industry-sponsored research, then insurance may not be charged for any subject in the trial.

- b. Drugs or devices that have not been approved by the federal Food and Drug Administration and that are associated with the clinical trial.
- c. Any item or service that is provided solely to satisfy data collection and analysis needs and that is not used in the clinical management of the patient.
- d. Health care services that, except for the fact that they are being provided in a clinical trial, are otherwise specifically excluded from coverage under the enrollee's health plan.

IV. Waiver of Beneficiary Cost Sharing Fees - The Federal Anti-kickback Statute, 42 U.S.C. §1320a-7b(b), and the Federal Civil Monetary Penalty Statute, 42 U.S.C. §1320a-7a(a)(5), place limitations on the circumstances in which a health care provider may waive a beneficiary's cost sharing fees such as co-payments and deductibles. These statutes are designed in part to prevent inducement of referrals of patients, items, or services for reimbursement by a federal healthcare program. After consultation with the Office of General Counsel, the University of California Office of the President has determined that the federal statutes governing waiver of cost-sharing fees do not prohibit the University of California from waiving an injured research subject's co-payment or deductible, as permitted by the Policy. This is, in part, because the University's research injury policy is a limited, cost sharing waiver program that applies only to injured research subjects participating in non-industry sponsored research, which research inures to the public benefit. The policy is consistent with prevailing ethical and legal norms requiring investigators and research institutions to minimize risks to research subjects, including financial risks, and does not entail fraudulent or abusive billing practices.

V. Ethical Issues to Consider In Determining Whether to Charge Insurance - In addition to determining whether the eligibility requirements outlined above are met, the campus authority for subject injury issues should consider whether a charge to insurance will have a negative consequence for the research subject. For example, the campus authority should consider whether the subject will exceed the lifetime capitalization limits of his or her coverage, or whether annual premiums will increase due to claim activity, or whether the subject is at risk of becoming uninsurable due to claims activity. While UC

policy allows insurance to be billed where authorized, this does not mean insurance should necessarily be billed irrespective of the negative financial consequences to the subject.

VI. Mitigating Impact on Subject of Injury Billing Processes - Campus billing processes should mitigate any negative short-term financial impact on the research subject. Campuses should establish billing processes for subject injury costs that ensure that the subject will have no out-of-pocket expenses, e.g., co-payments or medical bills that must be reimbursed. If the subject is treated at a UC campus, he or she should not be charged out-of-pocket for any co-payments, deductibles, or increased premiums. If the subject is treated at a non-UC location, the campus or program responsible for the research should establish a procedure for prompt reimbursement to the subject of any out-of-pocket expenses, such as a cash account for immediate reimbursements.

VII. Fund Source for Unreimbursed Injury Costs - In trials in which the industry sponsor has assumed the obligation to pay for subject injury or in which the government or non-profit research funder will pay for injury costs, all unreimbursed injury costs should be charged directly to the study budget or to the clinical trial account. In studies that are not sponsored or for which there is no outside source for subject injury costs, all unreimbursed injury costs should be charged to the funding mechanism established by the campus or program as required under the UC Policy on Human Subject Injury.

VIII. Clinical Trial Contracts - In clinical trial agreements with industry sponsors, UC contracting officers should continue to use current standard subject injury contract language that requires the sponsor to reimburse the University of California for cost of care for subject injury. In the unlikely event that an industry initiated trial is eligible for the Medicare NCD or the Knox-Keen Act, the sponsor should be informed that the costs of subject injury may be billed to the subject's insurer or third party payor, consistent with this guidance. The university should not be contractually obligated to charge insurance in the case of subject injury.

IX. Informed Consent Form – The informed consent form should advise the subject to the effect that: “If you are injured as a direct result of participating in this study, you will be given reasonable and

necessary medical care to treat the injury at no cost to you. The University of California does not provide any other form of compensation for injury.”

X. When Medical Care is Obtained at a Non-UC Location - The University of California’s Policy on Human Subject Injury allows a UC research subject to obtain medical care for research injury at a non-UC facility. This provision recognizes that the UC campus where the research occurred may not have a medical center or that the subject may need medical care when he or she is outside the service area of the UC campus where the research took place. In cases where treatment is obtained at a non-UC location, the rate of reimbursement shall be at a reasonable rate or at the existing negotiated rate that is established with the non-UC institution.

XI. Changes or Additions to Guidance on UC Policy on Human Subject Injury - The Office of Research at the University of California Office of the President will monitor federal and state legislative and regulatory activity pertaining to subject injury issues. In the event that current law or policy is modified or new law or policy is enacted, the Office of Research will modify this guidance accordingly. Changes to this guidance will be consistent with the University of California’s Policy on Human Subject Injury. This guidance may be modified only by the Office of the President.