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ONE HUNDRED ELEVENTH CONGRESS

# Congress of the United States

## House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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October 6, 2009

The Honorable Kathleen Sebelius  
Secretary  
U.S. Department of Health and Human Services  
200 Independence Avenue, SW  
Washington, D.C. 20201

Dear Secretary Sebelius:

Although the debate over health care has largely focused on how to cover the uninsured, issues relating to cost containment, particularly medical malpractice reform, have also been discussed. The additional costs imposed by the practice of defensive medicine, the “tort tax,” and escalating liability insurance premiums are major factors in the overall rise in health care spending, in both private and government-run health care programs. The costs associated with defensive medicine and frivolous malpractice lawsuits are a waste of taxpayer dollars. It is estimated that defensive medicine, a top area of wasteful spending in health care, accounts for \$210 billion annually. Tort reform can help lower these costs and must be a part of broader health care reform.

Tort reform is also necessary to address the country’s growing medical liability crisis. As a result of threats of frivolous malpractice lawsuits and exorbitant liability insurance premiums, access to care has been compromised. States with adverse liability climates are losing physicians who practice high-risk specialties, including obstetrics and neurosurgery, and new medical residents are avoiding going into those specialties altogether.<sup>1</sup> This has exacerbated the physician shortage, especially in rural areas.

In his address to the Joint Session of Congress, President Obama acknowledged the problem of defensive medicine saying:

I’ve talked to enough doctors to know that defensive medicine may be contributing to unnecessary costs. So I’m proposing that we move forward on a range of ideas about how to put patient safety first and let doctors focus on practicing medicine. I know that the Bush administration

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<sup>1</sup> Am. Medical Ass’n, *Medical Liability Reform – Now!*, Feb. 5, 2008.

considered authorizing demonstration projects in individual states to test these ideas. I think it's a good idea, and I'm directing my Secretary of Health and Human Services to move forward on this initiative today.<sup>2</sup>

While I applaud the President's decision to confront the medical malpractice and defensive medicine crisis, I have concerns about the manner in which the projects will be carried out.

Although demonstration projects may be useful in finding ways to limit defensive medicine and abuses of the civil justice system, many states have already instituted medical liability reform measures that have proven successful. In 1975, California passed the Medical Injury Compensation Reform Act (MICRA) which capped non-economic damages to \$250,000, and as a result, doctors in the state have seen "significantly lower medical malpractice premium growth."<sup>3</sup> After Texas passed medical liability reforms in 2003 and 2005, one of the largest malpractice insurance companies in the state cut premiums by 35%, which saved doctors \$217 million over four years.<sup>4</sup> In order to achieve real medical liability reform, the proposed demonstration projects cannot simply duplicate what these states have already done.

Additionally, I am concerned that medical liability reform efforts may be diluted by your previous work with the trial lawyers' lobby.<sup>5</sup> Although the trial bar has long been vocal in its opposition to medical liability reform, its recent injections into the health care reform debate are especially troubling. The Association for American Justice<sup>6</sup> (AAJ) has stated that there is "no correlation between malpractice payouts and insurance premiums,"<sup>7</sup> despite evidence to the contrary from states that have already enacted caps on jury awards.<sup>8</sup> Further, the AAJ has cast doubt on the concept of defensive medicine, in some cases attributing the practice to a doctor's desire to pad his bill, stating, "To the extent that defensive medicine does exist, research has found that the motivation behind it is not liability but rather a desire to simply help a patient or, in some cases, boost physician income."<sup>9</sup>

To better understand what actions HHS plans to undertake regarding defensive medicine and medical liability reform, please provide me with information and documents responsive to the following questions by October 20, 2009:

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<sup>2</sup> President Barack Obama, Address to a Joint Session of Congress (Sept. 9, 2009).

<sup>3</sup> Cong. Research Service, *Medical Malpractice Insurance: An Economic Introduction and Review of Historical Experience*, May 3, 2007.

<sup>4</sup> Joseph Nixon, *Why Doctors Are Heading for Texas*, Wall St. J., May 17, 2008.

<sup>5</sup> Advocacy role includes service as Director of the Kansas Trial Lawyers Association from 1978-1986. Additionally, while a candidate for Governor of Kansas in 2006, you raised \$723,882 from lawyers and lobbyists, including contributions from the Kansas Trial Lawyers Association.

<sup>6</sup> The Association for American Justice was formerly the American Trial Layers Association.

<sup>7</sup> Am. Ass'n for Justice, No Correlation Between Malpractice Payouts and Insurance Premiums, <http://www.justice.org/cps/rde/xchg/justice/hs.xsl/8689.htm> (last visited Sept. 22, 2009).

<sup>8</sup> Newt Gingrich and Wayne Oliver, *Verdict Already in on Medical Liability Reform*, Wichita Eagle, Sept. 19, 2009.

<sup>9</sup> Am. Ass'n for Justice, The Truth On "Defensive Medicine," <http://www.justice.org/cps/rde/xchg/justice/hs.xsl/8681.htm> (last visited Sept. 22, 2009).

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1. Who within HHS will be directly responsible for implementation of the demonstration projects?
2. What will be the management structure of the demonstration projects? Please provide a diagram of the management structure.
3. What will be the focus and scope of the demonstration projects?
4. What criteria will be used in choosing which states participate in the demonstration projects?
5. What oversight will the Department of Health and Human Services conduct regarding the demonstration projects in the states?
6. Have you requested the HHS Office of Inspector General have any role in overseeing the administration of the demonstration projects?
7. To what extent will you have direct oversight over the demonstration projects?

Thank you in advance for your prompt attention to this matter. Please contact Molly Boyl at 202-225-5074 should you require any additional information.

Sincerely,



Darrell Issa  
Ranking Member