

Congress of the United States
Washington, DC 20510

April 3, 2012

Via Electronic Transmission

The Honorable Kathleen Sebelius
Secretary
Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, DC 20201

Dear Secretary Sebelius:

We are writing to express our concerns with the Patient Safety and Medical Liability Reform Demonstration and Planning grants being funded by the Department of Health and Human Services (HHS).

On September 9, 2009, President Obama, in a speech to a joint session of Congress on health care, directed you to move forward on an initiative aimed at reducing health care costs. Specifically, he stated:

..., many in this chamber – particularly on the Republican side of the aisle – have long insisted that reforming our medical malpractice laws can help bring down the cost of health care. I don't believe malpractice reform is a silver bullet, but I have talked to enough doctors to know that defensive medicine may be contributing to unnecessary costs. So I am 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 considered authorizing demonstration projects in individual states to test these issues. It's a good idea, and I am directing my Secretary of Health and Human Services to move forward on this initiative today.

(Emphasis added).

On June 11, 2010, pursuant to the President's orders, the HHS, through the Agency for Healthcare Research and Quality (AHRQ), awarded \$23.2 million to fund demonstration and planning projects. The AHRQ's press release confirmed that the "grants [we]re part

of the patient safety and medical liability initiative that President Obama announced during a September 9, 2009, address to a joint session of Congress.”¹ Specifically, the

AHRQ has funded seven demonstration grants for a total amount of \$19.7 million and 13 planning grants for a total amount of \$3.5 million. The demonstration projects are scheduled to take three years to complete and the planning projects are scheduled to take one year to complete. According to the AHRQ, the projects are supposed to allow States and health care systems to develop, implement and evaluate medical liability models that “(1) put patient safety first and work to reduce preventable injuries; (2) foster better communication between doctors and their patients; (3) ensure that patients are compensated in a fair and timely manner for medical injuries, while also reducing the incidence of frivolous lawsuits; and (4) reduce liability premiums.”²

Frivolous lawsuits, the high cost of malpractice insurance and excessive damages awards are dragging down our health care system.

The goal of “traditional” medical malpractice reforms is not to hinder meritorious lawsuits, but rather to reduce the incidence of frivolous lawsuits, inflated awards and inflated attorneys’ fees. Generally speaking, traditional malpractice reforms seek practical solutions to combatting frivolous lawsuits, such as caps on punitive damages, caps on noneconomic damages and limits on the percentage of an award that can be taken by a plaintiff’s attorney under a contingency fee agreement. Thus, traditional reforms are necessarily aimed at dealing with the medical system as it exists and influencing the behavior of lawyers and courts by altering legal parameters--substantive and procedural. Correspondingly, research on traditional reforms should be aimed at assessing the effects of specific legal changes on claims, lawsuits, awards and settlements, either through mathematical models, simulated jury studies or real data.

However, the AHRQ’s description of the research being funded does not mention, much less emphasize, reforms to medical malpractice laws, as was clearly implied by the President’s speech. Indeed, it does not appear that any of the entities that have received the \$23.2 million in grants have the expertise necessary to examine the effects of changes in substantive legal standards and procedural rules on the rate of malpractice claims, lawsuits, and awards.

President Obama’s September 9, 2009 speech included a reference to “demonstration projects” considered during President George W. Bush’s administration. The day after the President’s speech, Tevi Troy, who served as the Deputy Secretary of the HHS,

¹ AHRQ Press Release, “HHS Announces Patient Safety and Medical Liability Demonstration Projects:Funds Allocated to Develop, Implement, and Evaluate Patient Safety Approaches and Medical Liability Reform Models” (June 11, 2010) (available at <http://www.ahrq.gov/news/press/pr2010/hhsliabawpr.htm>).

² *Id.*

during the Bush Administration, responded to President's Obama's statement.³ Mr. Troy explained the nature of the demonstration projects considered during the Bush administration. In particular, he explained the limited purpose of those projects and the fact that they would not solve the crisis created by frivolous lawsuits. Mr. Troy's article also made it clear that "reducing the incidence of costly and ineffective medical malpractice lawsuits was a high priority of the [Bush] administration."

The President's speech gave the clear impression that taxpayers' monies would be spent, in significant part, on projects related to "traditional" medical malpractice reforms. Contrary to that clear impression, it appears that none of the \$23.2 million awarded has

gone to researching or implementing "traditional" medical malpractice reforms. In fact, it appears that all of the research funded by the AHRQ is aimed at proving the obvious: as the number of adverse events declines, the number of malpractice lawsuits also declines.

We are concerned that these developments do not fulfill the President's commitment to move forward on medical malpractice reform. Accordingly, please respond to the following requests for information:

1. Explain how the HHS' spending \$23.2 million on studying "nontraditional" liability reform fulfills the President's promise that his administration would examine a "range of ideas," including the "traditional" malpractice reforms noted above and advocated by Republican Members of Congress?
2. Do you agree that the projects funded by the Patient Safety and Medical Liability Reform Demonstration and Planning grants are not researching "traditional" malpractice reform, but rather are exploring "nontraditional liability reforms"?⁴ If you disagree, explain the basis for your disagreement in detail. Also, identify which projects are researching "traditional" malpractice reforms and how much from the \$23.2 million in grants is being spent on studying "traditional" malpractice reforms.
3. Do you agree that the AHRQ is not the most qualified agency to undertake or oversee research related to "traditional" malpractice reforms? If you disagree, explain in detail how the AHRQ is the most qualified agency within the federal government to undertake or oversee research related to "traditional" malpractice reforms.

³ Tevi Troy, "Med Mal Pal?," Critical Condition, NATIONAL REVIEW ONLINE'S HEALTHCARE BLOG (Sept. 10, 2009)(available at <http://www.nationalreview.com/critical-condition/48345/med-mal-pal/tevi-troy>).

⁴ See Allen Kachalia & Michelle M. Mello, New Directions in Medical Liability Reform, 364 N. ENGL. J. MED. 1564 (Apr. 2011) (available at <http://www.nejm.org/doi/full/10.1056/NEJMhpr1012821>) (acknowledging the definition of "traditional" medical malpractice reforms and confirming that the AHRQ's demonstration and planning projects are studying "nontraditional liability reforms.").

4. How, if at all, will the results of each of the 20 demonstration and planning projects directly help to reduce the incidence of frivolous lawsuits and reduce high malpractice insurance premiums, as represented by the AHRQ? Also, if a project will have no direct impact on reducing frivolous lawsuits and insurance premiums expressly acknowledge that fact.
5. Explain in detail how the results of each of the 20 Patient Safety and Medical Liability Reform Demonstration and Planning projects will directly benefit American taxpayers. If American taxpayers will benefit from the results of these projects, when will those benefits be seen?
6. Explain in detail how the results of each of the 20 projects will directly contribute to lowering health care costs, as stated by the President?
7. Describe in detail how the HHS and/or the AHRQ will utilize the information generated by each of the 20 Patient Safety and Medical Liability Reform Demonstration and Planning projects?
8. Is each of the 20 Patient Safety and Medical Liability Reform Demonstration and Planning projects unique or are they similar to previous studies? If any of the current projects are similar to previous studies, explain the HHS's justification for funding that project or projects?
9. When was it decided that the Patient Safety and Medical Liability Reform Demonstration and Planning grants would fund research of "nontraditional liability reforms," as opposed to "traditional" malpractice reforms? Who made that decision? If it was a group decision, identify all of the individuals who participated in the group.
10. Did anyone other than an employee of the federal government participate (in any manner whatsoever) in the drafting of the requests for proposals issued in connection with the Patient Safety and Medical Liability Reform Demonstration and Planning grants? If so, identify the individual(s) and the group he or she was representing. Also, if applicable, set forth in detail the substance and nature of the individual's participation.
11. Did anyone other than an employee of the federal government participate in the selection of any of the recipients of the Patient Safety and Medical Liability Reform Demonstration and Planning grants? If so, identify the individual(s) and the group he or she was representing. Also, if applicable, set forth in detail the substance and nature of each individual's participation.

12. Is one of goals or purposes (official or unofficial) of the Patient Safety and Medical Liability Reform Demonstration and Planning grants to produce studies that will discredit or counter “traditional” malpractice reforms?
13. Is the HHS or any other agency of the federal government currently conducting, participating in or funding research, the (official or unofficial) purpose of which is to discredit or counter “traditional” malpractice reforms? If so, set forth the details of each such project, including who will conduct the research and who will oversee it.
14. In addition to the \$23.2 million being spent on the demonstration and planning projects, another component of the initiative ordered by President Obama is an evaluation project. JBA/RAND was awarded \$2 million for the evaluation project. According to the AHRQ, the \$2 million has been “allocated to evaluate the overall knowledge that is gained from this initiative.”⁵
 - (a) Explain in detail the substance and goals of the evaluation project and explain why it is necessary.
 - (b) Are salaried federal employees at the AHRQ or in another unit of the HHS capable of understanding and evaluating the results of the demonstration and planning projects? If so, why weren’t they assigned the task of conducting the evaluation project or its equivalent? If they are not capable, explain how the HHS and the AHRQ will be able to work with any of the information generated by the projects.
 - (c) How, if at all, will the results of the evaluation project directly benefit American taxpayers? If American taxpayers will benefit from the results of the evaluation project, when will those benefits be seen?

If the HHS and/or the AHRQ possess documents relating to the subject matter of any of the foregoing questions, provide copies of those documents.

We ask that you provide written answers and documents by May 3, 2012.

Sincerely,

⁵ Carolyn M. Clancy, AHRQ Commentary, “Patient Safety and Medical Liability Reform: Putting the Patient First” (available at <http://www.ahrq.gov/news/commentaries/compsafty.htm>).

Charles E. Grassley
Ranking Member
Senate Judiciary Committee

Lamar Smith
Chairman
House Judiciary Committee

Orrin G. Hatch
Ranking Member
Senate Finance Committee