



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

The Honorable John D. Dingell
Chairman
Committee on Energy and Commerce
United States House of Representatives
Washington, DC 20515

May 6, 2008

Dear Mr. Chairman:

H.R. 1343, the Health Centers Renewal Act of 2008, reauthorizes the health centers program and amends the Public Health Service Act (42 U.S.C. §§ 233(g)-(m)). While the goals of the health center program, including improvement of access to medical care, are laudable, this legislation threatens to greatly expand the liability of the United States. For the reason set forth below, the Department of Justice has serious reservations about H.R. 1343.

Title 42 U.S.C. §§ 233(g)-(m) currently provides Federal Tort Claims Act (FTCA) immunity for medical malpractice claims arising out of the provision of health care services by health centers, their employees, and certain contractors who have been deemed by the Department of Health and Human Services (HHS) to be covered under the FTCA. Section 4 of H.R. 1343 would amend this statute to cover "volunteer practitioners" who provide health care services at either the health centers or at "sites designated" by the centers. Section 5 would further amend 42 U.S.C. §§ 233(g)-(m) to extend FTCA immunity to health center employees, certain contractors, and volunteers for claims arising from the provision of health care services in an "emergency area" during declared emergencies.

As drafted, Sections 4 and 5 would significantly expand the potential for FTCA liability by covering health care practitioners over whom the United States has no day-to-day control. According to recent data provided by HHS, approximately 896 health centers have been deemed eligible for coverage under the FTCA. In addition, approximately 41,000 health center providers are currently eligible for coverage under the FTCA. H.R. 1343 would increase the number of health care professionals covered under the FTCA by including "volunteer practitioners" with minimal attempt to provide even a modicum of control over the care they provide. This problem is compounded by the fact that "volunteer practitioners" are not required to be licensed or certified in the state where the health center is located. Section 4(b) of H.R. 1343 requires only that the "practitioner is a licensed physician, a licensed clinical psychologist, or other licensed or certified health care practitioner."

In addition, extending FTCA coverage for health care provided in an "emergency area" during declared emergencies likewise increases the risk of liability under the FTCA with minimal control mechanisms as to the type or quality of health care services provided or the level of supervision, quality assurance, and risk management in place at those locations. According to HHS data, since the passage of the Federally Supported Health Centers Assistance Act (FSHCAA) of 1992, HHS has received approximately 2,231 administrative claims seeking

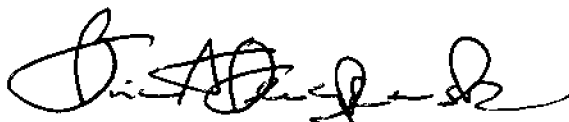
approximately \$13 billion dollars. It is highly likely that these claims will increase if H.R. 1343 is enacted.

The Department of Justice suggests that H.R. 1343 be revised so that "volunteer practitioners" and those health center practitioners who provide services in designated "emergency areas" would be protected under the Volunteer Protection Act of 1997 (VPA), 42 U.S.C. §§ 14501 *et seq.*, to the same extent as other volunteers. The VPA protects volunteers at non-profit institutions from liability for ordinary negligence, but allows for tort liability in the event of gross negligence, recklessness, or willful misconduct. Following the VPA approach would provide substantial protection against tort liability for such volunteers without "deeming" them to be Federal employees and thus making the Federal taxpayers liable in their stead. The VPA is a balanced measure that was enacted with broad support. In our view, this approach represents an appropriate balancing of the public's interest in encouraging volunteer activities, the volunteers' interest in protection against tort liability, the public's interest in compensation for and deterrence of gross negligence, recklessness, and willful misconduct, and the United States interest in protecting the public fisc.

We are also concerned that Section 5 of H.R. 1343 would introduce an odd and illogical exception to the VPA by providing "out-of-area practitioners" with protection from liability for their gross negligence, recklessness, and willful misconduct, and would make the United States liable for such torts. This exception is inconsistent with the protections provided to volunteers under the VPA.

We hope that this information is of assistance to the Committee. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "Brian A. Benczkowski", with a stylized flourish at the end.

Brian A. Benczkowski
Principal Deputy Assistant Attorney General

Cc: The Honorable Joe Barton, Ranking Member, Committee on Energy and Commerce