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Profs. Hawkins and Whitlock

Politics and Policy of Primary Care

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MEMORANDUM

To: Sen. Saxby Chambliss (R-GA)

From: Brad Wright, Health Policy Analyst

Re: **How can Congress increase access to primary care by encouraging more physician volunteerism?**

Background

In 2003, some 1,907,670 Georgians (22%) were unserved¹ because of barriers to healthcare access including physician shortage, a lack of enabling services (e.g., transportation and translation services), inability to pay (even if insured), and geographic proximity to a provider, among others. Health centers, which originated in 1965, reduce these barriers to access by providing primary care and enabling services in medically underserved areas or health professional shortage areas using a sliding fee scale.²

In Georgia, 22 health centers, with 94 total delivery sites, served 221,367 patients in 2003.³ Some 81.8% of these patients earned below 200% of poverty, 46.9% were uninsured, and 27.5% were on Medicaid or S-CHIP.⁴ Yet, of the 159 counties in Georgia, 31.8% of the population lives in one of 105 “poor counties,” only 38 of which have a

¹ Dan Hawkins and Michelle Proser. Special Topics Issue Brief #5, A Nation’s Health at Risk. NACHC, 2005. <http://www.nachc.com/piforum/files/UnservdReportSTIB5.pdf>

² R. M. Politzer, et al., “Inequality in America: The Contribution of Health Centers in Reducing and Eliminating Disparities in Access to Care,” *Medical Care Research and Review* 58 (2001): 234 – 248.

³ Health Center Fact Sheet, Georgia 2003. NACHC 2005. <http://www.nachc.com/research/files/georgiafactsheet.pdf>

⁴ *Ibid.*

health center, leaving 19.8% of Georgians living in poor counties without a health center, despite the fact that health centers are extremely cost efficient.⁵

With Medicaid consuming 19.2% of the state budget in 2004,⁶ it is notable that health centers can “save the Medicaid program around 30% [annually]...due to reduced inpatient, ER, and specialty care utilization.”⁷ In fact, the total cost per patient at a Georgia health center in 2003 was \$362,⁸ which is “\$250 less than the average annual expenditure for an office-based medical provider.”⁹ However, federal, state, and private funding are essential for health center expansion.¹⁰

One of the problems faced by health centers is inadequate staffing. Health centers frequently depend on volunteer physicians to provide many of their services, but ongoing concern over liability issues and the rising cost of medical malpractice coverage for volunteer physicians often restrains them. “Physicians today are retiring at younger ages in increasing numbers....[because of] the difficulty of practicing medicine in the U.S. in the face of...rising professional liability claims.”¹¹ While this leaves many physicians free to volunteer their time, many are hesitant to do so, and many health centers are finding it unaffordable to pay these physician’s malpractice premiums. Volunteers in Health Care conducted a survey in 2002, and found that clinics spent as much as

⁵ Michelle Proser, Peter Shin, and Dan Hawkins. Special Topics Issue Brief #9, A Nation’s Health at Risk III. March, 2005. <http://www.nachc.com/research/Files/poorcountiesSTIB9.pdf>

⁶ 2004 Access to Community Health Databook, Georgia. NACHC, 2005. <http://www.nachc.com/research/files/ga.pdf>

⁷ Proser, Shin, and Hawkins, 2005.

⁸ Health Center Fact Sheet, Georgia 2003.

⁹ America’s Health Centers Fact Sheet August 2004. NACHC, 2005. <http://www.nachc.com/research/Files/IntrotoHealthCenters8.04.pdf>

¹⁰ Proser, Shin, and Hawkins, 2005.

¹¹ Barry Manuel. No good deed goes unpunished. The Wall Street Journal. Oct. 21, 1994, p.A14.

“\$55,000 a year on malpractice insurance for volunteers; a cost that can account for 25% of their operating budget.”¹²

Past efforts have been made to address the issue of torts claims immunity for volunteers (physicians and others) under the 1948 Federal Tort Claims Act (FTCA),¹³ including the Volunteer Protection Act of 1997 (VPA), the Federally Supported Health Centers Assistance Acts of 1992 and 1995 (FSHCAA), and section 194 of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). In addition, “forty-three states have a form of volunteer protection legislation....[and] thirty-six states have specific protections for health care providers.”¹⁴

“The VPA (42 U.S.C.A. §14501 et seq.) provides that no volunteer of a nonprofit organization or governmental entity shall be liable for harm caused by an act or omission of the volunteer on behalf of the organization, so long as the required statutory conditions are met.”¹⁵ To be protected under the law, a volunteer must have been acting within the scope of their volunteer duties and be properly licensed (in the case of physicians). In addition, there must be no willful or criminal misconduct, and no involvement of a motor vehicle.¹⁶ The VPA grants volunteers immunity from punitive damages, but fails to expressly grant immunity from economic damages, which in the case of medical malpractice could be quite high (e.g., subsequent medical expenses).¹⁷ The VPA supercedes state laws, unless those state laws provide greater immunity, in essence

¹² Volunteers in Health Care. Volunteers at Free Clinics Get a Break on Medical Malpractice Insurance. <http://www.volunteersinhealthcare.org/press%20releases/Section%20194.pdf>

¹³ Edward P. Richards III, LSU Law Center’s Medical and Public Health Law Site, Federal Tort Claims Act. http://biotech.law.lsu.edu/cases/immunity/malpractice_ftca.htm

¹⁴ Joseph Milestone. Tort Claims Immunity for Healthcare Volunteers. <http://www.peick-usa.com/forms/Milestone%20re%20healthcare%20volunteers.pdf>

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*

setting a federal floor for liability protections.¹⁸ However, the failure of the VPA to cover the larger entity, while providing immunity from liability for the individual volunteer leaves a large loophole that needs to be addressed. Health centers often cannot afford to provide malpractice insurance to a staff of volunteer physicians, and many of these physicians do not want or cannot afford to provide their own malpractice insurance when they are receiving no compensation for their time. While this act “protects volunteer physicians from ‘ordinary negligence,’ a loophole in the law still allows claimants to sue volunteer physicians at [health centers] for ‘gross negligence.’”¹⁹

The FSHCAA (i.e., §245(b) health centers) limits the liability of paid physicians (either full or part time) at health centers receiving federal funds.²⁰ However, other “clinics...must still maintain malpractice insurance and Directors and Officers (D&O) liability insurance.”²¹ The original FSHCAA of 1992 was replaced by the FSHCAA of 1995, which eliminated the sunset provision of the law and made the program permanent. “The intent of the legislation was to increase the availability of funds for the provision of health care services by reducing the expenditure of health center funds for malpractice premiums.”²² While this legislation was an improvement, volunteer physicians remained subject to the loopholes in the VPA.

“Section 194 of the Health Insurance Portability and Accountability Act (HIPAA) makes certain qualified clinician volunteers working at free clinics employees of the U.S. Public Health Services and hence covered for malpractice liability by the federal

¹⁸ Joseph Milestone.

¹⁹ Rx: Health Care FYI #6. Rep. Tim Murphy.
http://murphy.house.gov/UploadedFiles/HealthCareFYI_6.pdf

²⁰ *Ibid.*

²¹ Joseph Milestone.

²² Marilyn Hughes Gaston. Clarification of Policy for Health Centers Deemed Covered under the Federal Tort Claims Act for Medical Malpractice. http://www.mtpca.org/pdf/FTCA_Clarification_2001-11.txt

government,” protecting volunteer physicians at free clinics from ‘gross negligence.’²³ However, the Department of Health and Human Services had not issued formal rules for this provision, and Congress had not acted to appropriate the funding necessary for the program to begin operating, leaving the law in limbo, until September 2004, when the Free Clinics Federal Tort Claims Act Medical Malpractice Program was implemented.²⁴ HIPAA was passed in 1996, meaning it took 8 years for section 194 to be implemented. After nearly a decade, some volunteer physicians have received liability protection, but a crucial gap remains.

“Congress granted FTCA coverage to paid physicians at [health centers] under the Federally Supported Health Centers Assistance Act[s] of 1992 [and 1995],...[and] granted FTCA coverage to volunteer physicians at free health clinics under the Health Insurance Portability and Accountability Act of 1996,” but has failed to grant FTCA coverage to volunteer physicians at health centers.²⁵ So, while volunteer physicians at free clinics have had their liability limited, and paid physicians at community health centers have had their liability limited, no such provision exists for volunteer physicians at community health centers.

Landscape

Physician interest groups and primary care associations support extending tort claims immunity to volunteer physicians at community health centers. The American College of Physicians, which advocates for universal access to care, strongly supports physician volunteerism, and realizes the net impact that providing such charity care has

²³ Joseph Milestone.

²⁴ Volunteers at Free Clinics Get a Break on Medical Malpractice Insurance. Volunteers in Health care.

²⁵ Rx: Health Care FYI#6. Rep. Tim Murphy.

on access to primary care for the underserved.²⁶ Similarly, “The AMA House of Delegates adopted a Board of Trustees report that found that many retired and semi-retired physicians want to volunteer their services to the indigent and uninsured.”²⁷ The National Association of Community Health Centers, the American Medical Association, the American College of Physicians, and the American Osteopathic Association all support legislation that extends the medical liability protections of the Federal Tort Claims Act to cover physicians who volunteer at community health centers.²⁸

A 2002 recommendation by the National Governors Association urged “that states reduce support for health centers.”²⁹ However, state efforts at tort reform for volunteers have seen mixed success. While “in at least two states, Washington and Kentucky, a state pool subsidizes professional liability premiums for physicians who volunteer their services,”³⁰ intense lobbying from the Massachusetts Association of Trial Attorneys and the Massachusetts Bar Association blocked similar legislation in Massachusetts.³¹ Ironically, while legal interest groups are the greatest opposition to tort reform, no one has filed a suit since the Washington and Kentucky pools were created. In another approach, Pennsylvania has enacted a law to grant volunteer physicians a special volunteer licensure, with the understanding that while performing their duties as such,

²⁶ Interested in Volunteering as a Physician? A Guide for Getting Started. American College of Physicians. http://www.acponline.org/college/membership/volunteer_brochure.htm

²⁷ Joel B. Finkelstein. HHS prodded to implement liability coverage for free clinic volunteers. June 28, 2004. <http://www.ama-assn.org/amednews/2004/06/28/gvsb0628.htm>

²⁸ Rep. Tim Murphy, Recent Floor Speeches, “Rep. Murphy Promotes Community Health Centers.” <http://murphy.house.gov/FloorSpeeches/>

²⁹ Dan Hawkins and Roger Schwartz, Health Centers and the States, *Journal of Ambulatory Care Management*, October – December 2003, p.285 – 95.

³⁰ Barry Manuel.

³¹ *Ibid.*

they are exempt from civil liability, so long as the clinic where they are working prominently displays a notice to that effect.³²

Federal support is strong. The President's "initiative to increase federal funding [for] 1,200 new and expanded health center sites to serve an additional 6.1 million patients," has grown into plans to establish a health center in every poor county in America.³³ Meanwhile, Congress, which authorizes federal spending, has supported health centers with "the largest increases in funding over the program's entire history."³⁴ However, expanding health centers means increasing the number of physicians working to staff them, and this is unlikely to be achieved without a tremendous amount of volunteerism, which will be inhibited without proper liability legislation. In fact, it is estimated that 12,000 clinicians would be needed to fulfill the President's agenda.³⁵ Recognizing that passing tort reform legislation will help them realize their agenda of health center expansion, Republican support should be strong, and Democratic opposition should be limited.

Recommendation: Work in Congress to Pass New Liability Legislation Nationally

Current Georgia law provides civil immunity to volunteer physicians except in cases of gross negligence or misconduct, if patients are informed of this provision prior to being treated.³⁶ However, the problem at hand is larger than the state of Georgia. It is important to realize that the problem of volunteer physician liability is a nationwide issue that states have been attempting to patch together on their own with limited success. A

³² Unconsolidated Pennsylvania Statutes. Volunteer Health Services Act.
<http://members.aol.com/StatutesP3/35.Cp.1G.html>

³³ Proser, Shin, and Hawkins, 2005.

³⁴ Hawkins and Schwartz, 2003.

³⁵ Rx: Health Care FYI #6. Rep. Tim Murphy.

³⁶ American Medical Association, State licensing and liability laws for volunteer physicians.
<http://www.ama-assn.org/ama/pub/category/12455.html>

comprehensive national plan would consolidate all of these efforts into one floor level of liability limitation, which states could then enhance as they chose. It is also imperative that any legislation passed encompass all venues where physicians are likely to volunteer their time from community health centers to free clinics.

The Community Health Center Volunteer Physician Protection Act of 2005, H.R. 1313, was introduced March 15, 2005 by Rep. Tim Murphy (R-PA), and proposed to close the last remaining loophole in volunteer physician liability law. The bill “encourages physicians to volunteer...at [health centers] by including them under FTCA coverage (medical liability protection from gross negligence and punitive damages) – the same medical liability protections currently provided to volunteer physicians at free health clinics, ensures the protection of [health centers] from medical liability lawsuits, [and] closes the Volunteer Protection Act of 1997 loophole that allows claimants to automatically sue volunteer physicians at [health centers] for gross negligence.”³⁷ “Granting volunteer physician liability coverage through the program under section 224(g) of the Public Health Service Act...would significantly increase the number of physicians available onsite at such health centers.” “Federal studies have concluded that by offering liability coverage, such centers are able to redirect funds to recruit full-time physicians and provide needed health care services to their communities. In addition, an increase in volunteer physicians at the health centers will result in a direct improvement in the ability of the centers to offer quality health care services where the services are needed most.”³⁸ The bill stipulates only that the volunteer physician must be licensed and

³⁷ Rx: Health Care FYI#6. Rep. Tim Murphy.

³⁸ H.R. 1313 IH, <http://www.congress.gov>

receive no compensation, but does not limit the number of hours that the physician may volunteer.

H.R. 1313, which Rep. Jack Kingston (R – GA, District 1) has already signed onto, has a high degree of political feasibility and would be easy to implement based on existing precedents. This legislation is not a novel concept, but rather an application of a widely accepted belief (that those who volunteer their time should be protected from frivolous lawsuits) to close a current legislative loophole. Incremental approaches such as this are seldom met with the kind of political resistance encountered by major reforms and overhauls.

Passing this new legislation will reduce health center expenditures, and expand access to primary care. More clinicians will be likely to volunteer once they know that their liability is limited, and the funds previously paid for malpractice premiums could be redirected to hiring more staff. Simultaneously, the cost effectiveness of health centers may reduce Medicaid costs because it will reduce utilization of more expensive emergency room and specialty care. In sum, the Community Health Center Volunteer Physician Protection Act of 2005 represents a policy solution to a growing problem, which all can openly embrace. By offering an appealing incentive to the charitable physician to give freely of their time, the act will ease the burdens not only of the underserved but also those who serve them.