

March 3, 1994

MEMORANDUM

TO: Carol H. Rasco

FR: Sara Rosenbaum and Donsia Strong

RE: Meeting with HHS and DOJ regarding Federal Tort Claims Act Amendments *file*

This memorandum reports on our meeting with the two agencies regarding implementation of legislation enacted in 1992 which extended malpractice coverage under the Federal Tort Claims Act (FTCA) to several hundred federally funded community and migrant health centers. We believe that we were able to reach an agreement that will permit implementation efforts to proceed.

Background

The need for a meeting became evident following recent efforts by DOJ to kill House passage of legislative amendments to the 1992 Act. The FTCA amendments were among the items (along with portions of the Senate Labor Committee's childhood immunization package) that were stripped from OBRA 1993 under the Byrd Rule. The House and Senate budget bills both contained the FTCA amendments which were drafted in response to concerns in both Houses over DOJ's obstruction of the Act's implementation.

The original act grew out of mounting evidence that, despite the very low prevalence of malpractice claims against health centers, health centers were being charged exorbitant fees (over \$50 million in 1992 alone) for malpractice coverage. Many centers were being threatened with the complete loss of coverage because of the high risk profile of their patients. Without malpractice coverage, center physicians would be unable to hold hospital staff privileges, and centers would lose their grants. The crisis was particularly severe in the area of obstetrical coverage. The cost of the malpractice coverage in 1992 equalled the cost of supporting 100 additional health centers.

Jurisdiction over the FTCA as it applies to Public Health Service Employees is shared in certain respects between DOJ and HHS. When it came time to implement the 1992 Act, DOJ proceeded to read the law so restrictively that for all practical purposes the Act's principal goal -- to replace \$50+ million worth of purchased coverage with government insurance - was defeated. HHS has realized only a fraction of the savings it has anticipated. Two years worth of funding that might have gone into new clinics or services have been lost. Specifically, DOJ took the position that when health center staff are carrying out activities that are part of their employment (such as hospital coverage rotation as part of their hospital staff privilege duties), there is no

coverage under the Act. This leaves a coverage gap so large that centers had to keep their coverage -- sometimes at prices higher than those paid prior to passage of the Act.

FTCA amendments to remedy the gaps resulting from the DOJ interpretation were introduced in 1993. Along with some of the immunization reforms, the amendments were dropped from OBRA 93. They then passed the Senate late last year as part of the remaining immunization reform package. In the fall, DOJ had attempted to persuade Senator Mitchell to strip the FTCA amendments from the Labor Committee package but its first letter was killed after Senator Kennedy personally intervened with OMB. DOJ sought to send the same letter to Dingell and Brooks this year. It was at this point that OMB forwarded the letter to DPC and we became involved.

The attorney in the Civil Division who handles this issue also was in charge of the matter under the Bush Justice Department for Stuart Gerson. DOJ fought the original bill and nearly succeeded in killing the original measure, which had strong bi-partisan support in both Houses.

After being rebuffed in his effort to send the DOJ letter in the fall, the attorney apparently contacted House and Senate staff members in an effort to stop the bill.

The Meeting

The meeting was attended by policy and legislative representatives of both Departments as well as by OMB. At the meeting we and OMB listened to both the DOJ and HHS presentations. Several things became evident to all of us (including the DOJ attorney's political superiors):

- The DOJ lawyer's reading of the Act was so restrictive that it prevents coverage of health professionals acting well within their normal scope of employment
- DOJ's reading of the Act is not only unnecessarily restrictive but arguably is not supported by the plain language of the Act
- DOJ's reading of the Act led to an unnecessary set of legislative amendments and has caused a great deal of unhappiness in both Houses as a prime example of an inability on the Administration's part to carefully and reasonably resolve issues without confusion and mixed signals to the Hill.
- Hundreds of health centers are still buying unnecessary coverage and wasting tens of millions of dollars.
- It is possible to develop regulations that both guard against potential abuse of the new coverage (e.g., doctors working a few hours a week at a health center and getting free coverage for their entire practice) and at the same time assure appropriate and complete coverage for all professional acts undertaken within the scope of employment at a health

center.

The need for regulatory action is important since we want to aggressively use health centers to reach children as part of the new Vaccines for Children initiative. The DOJ reading of the statute had a potentially chilling effect on centers' ability to undertake aggressive vaccination outreach efforts.

The Resolution

At the end of the meeting we concluded that as the agency with principal authority over the PHS provisions of the FTCA HHS should develop rules implementing the 1992 Act and that DOJ should comment on the rules prior to clearance (as would normally be the case). No further effort will be made to pursue legislative relief unless HHS encounters some unanticipated legal barrier in its rulemaking. We will work with DOJ and HHS to apprise the House and Senate of the decision. We will explain the genesis of the 1993 amendments, our conclusion about the meaning of the 1992 law, and our conclusion that we can deal with the issue on a rulemaking basis without seeking more legislative amendments unless they really are necessary.



CENTER FOR HEALTH POLICY RESEARCH

August 4, 1994

MEMORANDUM

TO: Carol Rasco

FR: Sara Rosenbaum

RE: Federal Tort Claims Act meeting. *file*

The OMB meeting to clear HHS FTCA regulations took place yesterday. The rules pertain to the scope of liability coverage of health center clinicians under the Federal Tort Claims Act. The rule was cleared pending some very minor editorial changes to be completed by HHS and returned to OMB.

The pending HHS rules in question clarify that coverage is available for clinicians acting within the scope of their employment in certain cases in which care is furnished to non-registered patients of the centers. Legislation to effectuate these changes was passed in the Senate last year as part of the Organ Transplant Amendments and is now in conference. Senator Kennedy was eager to have the issue resolved in regulation, since (for jurisdictional reasons) successfully conferencing the matter with the House is next to impossible.

The HHS proposed rules allow coverage for services to non-patients following pre-clearance by the Secretary. Under the rules, instances in which coverage is available are: community public health activities (such as childhood immunization drives involving immunization of children who may not otherwise be center patients); activities that clinicians must undertake as part of their medical responsibilities (e.g., emergency room coverage as a condition of getting hospital staff privileges); and other instances in which service to non-patients is necessary for the Center's operations.

You may recall that DOJ objected to this extension of coverage to services furnished to non-patients for unclear reasons. At a meeting called in March to discuss DOJ objections, no clear objections were offered. HHS then proceeded to draft the rule and sent the rule for clearance a month and a half ago.

After 43 days of non-response by DOJ to the OMB clearance process, OMB scheduled yesterday's meeting. DOJ's final comments were minor and the meeting took approximately a half

hour. No substantive changes in the HHS rules were made.

I am hopeful that this will end the saga of the rules. To date, exactly two claims have been filed against the U.S. (the FTCA extension law has been on the books for three years, during which time health centers have served about 20 million patients). The use of the FTCA to cover doctors and nurses in the place of commercial malpractice coverage means annual savings to the program of somewhere around \$50 million -- enough money to serve about a half million additional patients each year. If this is not an example of Reinventing Government, I do not know what is.

The FTCA coverage statute is scheduled to sunset in 1996. I strongly recommend that the President call for continuation of the program at that time, unless something dramatic happens to change the cost-effectiveness picture. Even if the program were not as cost effective as it appears to be, the fact is that many of these clinics were having trouble getting coverage at any price because of the high risk nature of their patients. Without coverage, hiring staff and getting hospital privileges or HMO membership is impossible.