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June 20, 2006

The Honorable Michael B. Enzi
Chairman
Committee on Health, Education
Labor and Pensions
United States Senate
Washington, D.C. 20510

The Honorable Edward M. Kennedy
Ranking Member
Committee on Health, Education,
Labor and Pensions
United States Senate
Washington, D.C. 20510

Dear Chairman Enzi and Senator Kennedy:

We understand the Health, Education, Labor and Pensions Committee will be holding a hearing this week on several bills to promote patient safety and reduce litigation stemming from medical error and injury.

We are supportive of the concept envisioned in S. 1784 of a national patient safety database that would permit the comprehensive collection and analysis of data about medical error. The disclosure and compensation program also proposed in S. 1784, which draws on the experience of existing voluntary programs including the Rush Mediation Program in Chicago, appears to be a common sense reform in cases of medical error where liability is clear. These programs have been successful because the parties participate voluntarily using a mediator to resolve compensation issues. They do not take away the claimant's right to litigation if the parties fail to come to agreement.

The state demonstration programs proposed in S. 1337, on the other hand, would eliminate medical litigation entirely. In order to apply for the demonstration funding, states must "develop an alternative to current tort litigation for resolving disputes over injuries allegedly caused by health care providers or health care organizations." Injured patients would be subject to a mandatory alternative system for resolving compensation claims, and their right to a jury trial would be eliminated. Experience with other alternative compensation systems, on which these programs are based, strongly suggests that they will provide worse protection for patients than the civil justice system currently provides.

While S. 1337 gives states a choice of three different demonstration models, they all share the same characteristics. The jury trial is replaced by a vaguely defined administrative bureaucracy run by political appointees charged with developing uniform schedules of compensation for specific medical injuries. These schedules in reality act as the kind of damage cap that a number of state courts have found unconstitutional. The development of a rigid payout schedule for compensation is particularly problematic because it remains unclear whether the schedule can be determined in a fair manner.

All three of these models may be unconstitutional under both federal and state law because they preempt all constitutional guarantees to trial by jury without providing the constitutionally necessary quid pro quo of eliminating the injured parties' burden of proving fault. While the models appear to mimic the workers' compensation no-fault administrative concept, injured parties would retain the burden of proving fault.

Finally, we are deeply concerned about replacing state civil justice systems, some of which have functioned for centuries, with what are frankly unknown quantities lacking any kind of established operating procedures. One key question is how patients will get access to information regarding their claims and injuries. In civil litigation, parties are entitled to discovery of facts from the other side. With respect to the models in S. 1337, it is unclear whether patients would be entitled to review medical records and interview potential witnesses. It is also unclear how much information patients will be entitled to obtain before filing a claim, how much information patients will be provided after a claim is filed, what kind of evidence will be allowed, whether expert witnesses may be called, and what standards would be used to determine admissibility.

Given the dearth of information about how these models would work, it is difficult to understand how S. 1337 achieves its purpose "to restore fairness and reliability to the medical justice system." The civil justice system is not perfect, but like democracy, it's better than the unknown alternative. Problems with the way medical injuries are processed through the civil justice system can be resolved, and the system improved, by common sense reforms, some of which are conceptualized in S. 1784.

Thank you for taking time to understand our concerns. We look forward to working with you on legislation to improve patient safety in the health care system. Please do not hesitate to contact Dick Woodruff at the Alliance for Justice, 202-822-6070 if we may be of further assistance.