

109TH CONGRESS
1ST SESSION

S. _____

To restore fairness and reliability to the medical justice system and promote patient safety by fostering alternatives to current medical tort litigation, and for other purposes.

IN THE SENATE OF THE UNITED STATES

Mr. ENZI (for himself and Mr. BAUCUS) introduced the following bill; which was read twice and referred to the Committee on _____

A BILL

To restore fairness and reliability to the medical justice system and promote patient safety by fostering alternatives to current medical tort litigation, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Fair and Reliable Med-
5 ical Justice Act”.

6 **SEC. 2. PURPOSES.**

7 The purposes of this Act are—

- 8 (1) to restore fairness and reliability to the
9 medical justice system by fostering alternatives to

1 current medical tort litigation that promote early
2 disclosure of health care errors and provide prompt,
3 fair, and reasonable compensation to patients who
4 are injured by health care errors;

5 (2) to promote patient safety through early dis-
6 closure of health care errors; and

7 (3) to support and assist States in developing
8 such alternatives.

9 **SEC. 3. STATE DEMONSTRATION PROGRAMS TO EVALUATE**
10 **ALTERNATIVES TO CURRENT MEDICAL TORT**
11 **LITIGATION.**

12 Part P of title III of the Public Health Service Act
13 (42 U.S.C. 280g et seq.) is amended by adding at the end
14 the following:

15 **“SEC. 3990. STATE DEMONSTRATION PROGRAMS TO EVALU-**
16 **ATE ALTERNATIVES TO CURRENT MEDICAL**
17 **TORT LITIGATION.**

18 “(a) IN GENERAL.—The Secretary is authorized to
19 award demonstration grants to States for the develop-
20 ment, implementation, and evaluation of alternatives to
21 current tort litigation for resolving disputes over injuries
22 allegedly caused by health care providers or health care
23 organizations.

1 “(b) DURATION.—The Secretary may award up to 10
2 grants under subsection (a) and each grant awarded under
3 such subsection may not exceed a period of 5 years.

4 “(c) CONDITIONS FOR DEMONSTRATION GRANTS.—

5 “(1) REQUIREMENTS.—Each State desiring a
6 grant under subsection (a) shall—

7 “(A) develop an alternative to current tort
8 litigation for resolving disputes over injuries al-
9 legedly caused by health care providers or
10 health care organizations that may be 1 of the
11 models described in subsection (d); and

12 “(B) promote a reduction of health care
13 errors by allowing for patient safety data re-
14 lated to disputes resolved under subparagraph
15 (A) to be collected and analyzed by organiza-
16 tions that engage in voluntary efforts to im-
17 prove patient safety and the quality of health
18 care delivery.

19 “(2) ALTERNATIVE TO CURRENT TORT LITIGA-
20 TION.—Each State desiring a grant under sub-
21 section (a) shall demonstrate how the proposed al-
22 ternative described in paragraph (1)(A)—

23 “(A) makes the medical liability system
24 more reliable through prompt and fair resolu-
25 tion of disputes;

1 “(B) encourages the early disclosure of
2 health care errors;

3 “(C) enhances patient safety; and

4 “(D) maintains access to liability insur-
5 ance.

6 “(3) SOURCES OF COMPENSATION.—Each State
7 desiring a grant under subsection (a) shall identify
8 the sources from and methods by which compensa-
9 tion would be paid for claims resolved under the pro-
10 posed alternative to current tort litigation, which
11 may include public or private funding sources, or a
12 combination of such sources. Funding methods shall
13 to the extent practicable provide financial incentives
14 for activities that improve patient safety.

15 “(4) SCOPE.—

16 “(A) IN GENERAL.—Each State desiring a
17 grant under subsection (a) may establish a
18 scope of jurisdiction (such as a designated geo-
19 graphic region, a designated area of health care
20 practice, or a designated group of health care
21 providers or health care organizations) for the
22 proposed alternative to current tort litigation
23 that is sufficient to evaluate the effects of the
24 alternative.

1 “(B) NOTIFICATION OF PATIENTS.—A
2 State proposing a scope of jurisdiction under
3 subparagraph (A) shall demonstrate how pa-
4 tients would be notified that they are receiving
5 health care services that fall within such scope.

6 “(5) PREFERENCE IN AWARDING DEMONSTRATION
7 GRANTS.—In awarding grants under sub-
8 section (a), the Secretary shall give preference to
9 States—

10 “(A) that have developed the proposed al-
11 ternative through substantive consultation with
12 relevant stakeholders; and

13 “(B) in which State law at the time of the
14 application would not prohibit the adoption of
15 an alternative to current tort litigation.

16 “(d) MODELS.—

17 “(1) IN GENERAL.—Any State desiring a grant
18 under subsection (a) that proposes an alternative de-
19 scribed in paragraph (2), (3), or (4) shall be deemed
20 to meet the criteria under subsection (c)(2).

21 “(2) EARLY DISCLOSURE AND COMPENSATION
22 MODEL.—In the early disclosure and compensation
23 model, the State shall—

24 “(A) require that health care providers and
25 health care organizations notify a patient (or an

1 immediate family member or designee of the
2 patient) of an adverse event that results in seri-
3 ous injury to the patient, and that such notifi-
4 cation shall not constitute an acknowledgment
5 of the admission of liability;

6 “(B) provide immunity from tort liability
7 to any health care provider or health care orga-
8 nization that offers in good faith to pay com-
9 pensation in accordance with this section to a
10 patient for an injury incurred in the provision
11 of health care services (limited to claims arising
12 out of the same nucleus of operative facts as
13 the injury, and except in cases of fraud related
14 to the provision of health care services, or in
15 cases of criminal or intentional harm);

16 “(C) set a limited time period during
17 which a health care provider or health care or-
18 ganization may make an offer of compensation
19 benefits under subparagraph (B), with consider-
20 ation for instances where prompt recognition of
21 an injury is unlikely or impossible;

22 “(D) require that the compensation pro-
23 vided under subparagraph (B) include—

24 “(i) payment for the net economic loss
25 of the patient, on a periodic basis, reduced

1 by any payments received by the patient
2 under—

3 “(I) any health or accident insur-
4 ance;

5 “(II) any wage or salary continu-
6 ation plan; or

7 “(III) any disability income in-
8 surance;

9 “(ii) payment for the non-economic
10 damages of the patient, if appropriate for
11 the injury, based on a defined payment
12 schedule developed by the State in con-
13 sultation with relevant experts and with
14 the Secretary in accordance with sub-
15 section (g); and

16 “(iii) reasonable attorney’s fees;

17 “(E) not abridge the right of an injured
18 patient to seek redress through the State tort
19 system if a health care provider does not enter
20 into a compensation agreement with the patient
21 in accordance with subparagraph (B) or if the
22 compensation offered does not meet the require-
23 ments of subparagraph (D) or is not offered in
24 good faith;

1 “(F) permit a health care provider or
2 health care organization that offers in good
3 faith to pay compensation benefits to an indi-
4 vidual under subparagraph (B) to join in the
5 payment of the compensation benefits any
6 health care provider or health care organization
7 that is potentially liable, in whole or in part, for
8 the injury; and

9 “(G) permit any health care provider or
10 health care organization to contribute volun-
11 tarily in the payment of compensation benefits
12 to an individual under subparagraph (B).

13 “(3) ADMINISTRATIVE DETERMINATION OF
14 COMPENSATION MODEL.—

15 “(A) IN GENERAL.—In the administrative
16 determination of compensation model—

17 “(i) the State shall—

18 “(I) designate an administrative
19 entity (in this paragraph referred to
20 as the ‘Board’) that shall include rep-
21 resentatives of—

22 “(aa) relevant State licens-
23 ing boards;

24 “(bb) patient advocacy
25 groups;

1 “(cc) health care providers
2 and health care organizations;
3 and

4 “(dd) attorneys in relevant
5 practice areas;

6 “(II) set up classes of avoidable
7 injuries, in consultation with relevant
8 experts and with the Secretary in ac-
9 cordance with subsection (g), that will
10 be used by the Board to determine
11 compensation under clause (ii)(II);

12 “(III) modify tort liability,
13 through statute or contract, to bar
14 negligence claims in court against
15 health care providers and health care
16 organizations for the classes of inju-
17 ries established under subclause (II),
18 except in cases of fraud related to an
19 injury, or in cases of criminal or in-
20 tentional harm;

21 “(IV) outline a procedure for in-
22 forming patients about the modified
23 liability system described in this para-
24 graph and, in systems where partici-
25 pation by the health care provider,

1 health care organization, or patient is
2 voluntary, allow for the decision by
3 the provider, organization, or patient
4 of whether to participate to be made
5 prior to the provision of, use of, or
6 payment for the health care service;

7 “(V) provide for an appeals proce-
8 ss to allow for a review of decisions;
9 and

10 “(VI) establish procedures to co-
11 ordinate settlement payments with
12 other sources of payment;

13 “(ii) the Board shall—

14 “(I) resolve health care liability
15 claims for certain classes of avoidable
16 injuries as determined by the State
17 and determine compensation for such
18 claims;

19 “(II) develop a schedule of com-
20 pensation to be used in making such
21 determinations that includes—

22 “(aa) payment for the net
23 economic loss of the patient, on a
24 periodic basis, reduced by any
25 payments received by the patient

1 under any health or accident in-
2 surance, any wage or salary con-
3 tinuation plan, or any disability
4 income insurance;

5 “(bb) payment for the non-
6 economic damages of the patient,
7 if appropriate for the injury,
8 based on a defined payment
9 schedule developed by the State
10 in consultation with relevant ex-
11 perts and with the Secretary in
12 accordance with subsection (g);
13 and

14 “(cc) reasonable attorney’s
15 fees; and

16 “(III) update the schedule under
17 subclause (II) on a regular basis.

18 “(B) APPEALS.—The State, in establishing
19 the appeals process described in subparagraph
20 (A)(i)(V), may choose whether to allow for de
21 novo review, review with deference, or some op-
22 portunity for parties to reject determinations by
23 the Board and elect to file a civil action after
24 such rejection. Any State desiring to adopt the
25 model described in this paragraph shall indicate

1 how such review method meets the criteria
2 under subsection (c)(2).

3 “(C) TIMELINESS.—The State shall estab-
4 lish timeframes to ensure that claims handled
5 under the system described in this paragraph
6 provide for adjudication that is more timely and
7 expedited than adjudication in a traditional tort
8 system.

9 “(4) SPECIAL HEALTH CARE COURT MODEL.—
10 In the special health care court model, the State
11 shall—

12 “(A) establish a special court for the time-
13 ly adjudication of disputes over injuries alleg-
14 edly caused by health care providers or health
15 care organizations in the provision of health
16 care services;

17 “(B) ensure that such court is presided
18 over by judges with health care expertise who
19 meet applicable State standards for judges and
20 who agree to preside over such court volun-
21 tarily;

22 “(C) provide authority to such judges to
23 make binding rulings on causation, compensa-
24 tion, standards of care, and related issues with

1 reliance on independent expert witnesses com-
2 missioned by the court;

3 “(D) provide for an appeals process to
4 allow for a review of decisions; and

5 “(E) at its option, establish an administra-
6 tive entity similar to the entity described in
7 paragraph (3)(a)(i)(I) to provide advice and
8 guidance to the special court.

9 “(e) APPLICATION.—

10 “(1) IN GENERAL.—Each State desiring a
11 grant under subsection (a) shall submit to the Sec-
12 retary an application, at such time, in such manner,
13 and containing such information as the Secretary
14 may require.

15 “(2) REVIEW PANEL.—

16 “(A) IN GENERAL.—In reviewing applica-
17 tions under paragraph (1), the Secretary shall
18 consult with a review panel composed of rel-
19 evant experts appointed by the Comptroller
20 General.

21 “(B) COMPOSITION.—

22 “(i) NOMINATIONS.—The Comptroller
23 General shall solicit nominations from the
24 public for individuals to serve on the re-
25 view panel.

1 “(ii) APPOINTMENT.—The Comp-
2 troller General shall appoint, at least 11
3 but not more than 15, highly qualified and
4 knowledgeable individuals to serve on the
5 review panel and shall ensure that the fol-
6 lowing entities receive fair representation
7 on such panel:

8 “(I) Patient advocates.

9 “(II) Health care providers and
10 health care organizations.

11 “(III) Attorneys with expertise in
12 representing patients and health care
13 providers.

14 “(IV) Insurers.

15 “(V) State officials.

16 “(C) CHAIRPERSON.—The Comptroller
17 General, or an individual within the Govern-
18 ment Accountability Office designated by the
19 Comptroller General, shall be the chairperson of
20 the review panel.

21 “(D) AVAILABILITY OF INFORMATION.—
22 The Comptroller General shall make available
23 to the review panel such information, personnel,
24 and administrative services and assistance as

1 the review panel may reasonably require to
2 carry out its duties.

3 “(E) INFORMATION FROM AGENCIES.—The
4 review panel may request directly from any de-
5 partment or agency of the United States any
6 information that such panel considers necessary
7 to carry out its duties. To the extent consistent
8 with applicable laws and regulations, the head
9 of such department or agency shall furnish the
10 requested information to the review panel.

11 “(f) REPORT.—Each State receiving a grant under
12 subsection (a) shall submit to the Secretary a report evalu-
13 ating the effectiveness of activities funded with grants
14 awarded under such subsection at such time and in such
15 manner as the Secretary may require.

16 “(g) TECHNICAL ASSISTANCE.—

17 “(1) IN GENERAL.—The Secretary shall provide
18 technical assistance to the States awarded grants
19 under subsection (a).

20 “(2) REQUIREMENTS.—Technical assistance
21 under paragraph (1) shall include—

22 “(A) the development of a defined payment
23 schedule for non-economic damages (including
24 guidance on the consideration of individual
25 facts and circumstances in determining appro-

1 pripate payment), the development of classes of
2 avoidable injuries, and guidance on early disclo-
3 sure to patients of adverse events; and

4 “(B) the development, in consultation with
5 States, of common definitions, formats, and
6 data collection infrastructure for States receiv-
7 ing grants under this section to use in reporting
8 to facilitate aggregation and analysis of data
9 both within and between States.

10 “(3) USE OF COMMON DEFINITIONS, FORMATS,
11 AND DATA COLLECTION INFRASTRUCTURE.—States
12 not receiving grants under this section may also use
13 the common definitions, formats, and data collection
14 infrastructure developed under paragraph (2)(B).

15 “(h) EVALUATION.—

16 “(1) IN GENERAL.—The Secretary, in consulta-
17 tion with the review panel established under sub-
18 section (e)(2), shall enter into a contract with an ap-
19 propriate research organization to conduct an overall
20 evaluation of the effectiveness of grants awarded
21 under subsection (a) and to annually prepare and
22 submit a report to the appropriate committees of
23 Congress. Such an evaluation shall begin not later
24 than 18 months following the date of implementa-

1 tion of the first program funded by a grant under
2 subsection (a).

3 “(2) CONTENTS.—The evaluation under para-
4 graph (1) shall include—

5 “(A) an analysis of the effect of the grants
6 awarded under subsection (a) on the number,
7 nature, and costs of health care liability claims;

8 “(B) a comparison of the claim and cost
9 information of each State receiving a grant
10 under subsection (a); and

11 “(C) a comparison between States receiv-
12 ing a grant under this section and States that
13 did not receive such a grant, matched to ensure
14 similar legal and health care environments, and
15 to determine the effects of the grants and sub-
16 sequent reforms on—

17 “(i) the liability environment;

18 “(ii) health care quality;

19 “(iii) patient safety; and

20 “(iv) patient and health care provider
21 and organization satisfaction with the re-
22 forms.

23 “(i) OPTION TO PROVIDE FOR INITIAL PLANNING
24 GRANTS.—Of the funds appropriated pursuant to sub-
25 section (k), the Secretary may use a portion not to exceed

1 \$500,000 per State to provide planning grants to such
2 States for the development of demonstration project appli-
3 cations meeting the criteria described in subsection (c).
4 In selecting States to receive such planning grants, the
5 Secretary shall give preference to those States in which
6 State law at the time of the application would not prohibit
7 the adoption of an alternative to current tort litigation.

8 “(j) DEFINITIONS.—In this section:

9 “(1) HEALTH CARE SERVICES.—The term
10 ‘health care services’ means any services provided by
11 a health care provider, or by any individual working
12 under the supervision of a health care provider, that
13 relate to—

14 “(A) the diagnosis, prevention, or treat-
15 ment of any human disease or impairment; or

16 “(B) the assessment of the health of
17 human beings.

18 “(2) HEALTH CARE ORGANIZATION.—The term
19 ‘health care organization’ means any individual or
20 entity which is obligated to provide, pay for, or ad-
21 minister health benefits under any health plan.

22 “(3) HEALTH CARE PROVIDER.—The term
23 ‘health care provider’ means any individual or enti-
24 ty—

1 “(A) licensed, registered, or certified under
2 Federal or State laws or regulations to provide
3 health care services; or

4 “(B) required to be so licensed, registered,
5 or certified but that is exempted by other stat-
6 ute or regulation.

7 “(4) NET ECONOMIC LOSS.—The term ‘net eco-
8 nomic loss’ means—

9 “(A) reasonable expenses incurred for
10 products, services, and accommodations needed
11 for health care, training, and other remedial
12 treatment and care of an injured individual;

13 “(B) reasonable and appropriate expenses
14 for rehabilitation treatment and occupational
15 training;

16 “(C) 100 percent of the loss of income
17 from work that an injured individual would
18 have performed if not injured, reduced by any
19 income from substitute work actually per-
20 formed; and

21 “(D) reasonable expenses incurred in ob-
22 taining ordinary and necessary services to re-
23 place services an injured individual would have
24 performed for the benefit of the individual or

1 the family of such individual if the individual
2 had not been injured.

3 “(5) NON-ECONOMIC DAMAGES.—The term
4 ‘non-economic damages’ means losses for physical
5 and emotional pain, suffering, inconvenience, phys-
6 ical impairment, mental anguish, disfigurement, loss
7 of enjoyment of life, loss of society and companion-
8 ship, loss of consortium (other than loss of domestic
9 service), injury to reputation, and all other non-pe-
10 cuniary losses of any kind or nature, to the extent
11 permitted under State law.

12 “(k) AUTHORIZATION OF APPROPRIATIONS.—There
13 are authorized to be appropriated to carry out this section
14 such sums as may be necessary. Amounts appropriated
15 pursuant to this subsection shall remain available until ex-
16 pended.”.