

Secretary concerned shall take into consideration—

(A) the amount of space that would be so programed for the facility based upon projected inpatient and outpatient workloads at the facility for persons covered by sections 1074(b) and 1076(b) of this title; and

(B) the anticipated capability of the medical and dental staff of the facility, determined in accordance with regulations prescribed by the Secretary of Defense and based upon realistic projections of the number of physicians and other health-care providers that it can reasonably be expected will be assigned to or will otherwise be available to the facility.

(2) In addition, a determination made for the purpose of clause (2) of subsection (a) shall be made in accordance with an economic analysis (including a life-cycle cost analysis) of the facility and consideration of all reasonable and available medical care treatment alternatives (including treatment provided under a contract under section 1086 of this title or under part A of title XVIII of the Social Security Act (42 U.S.C. 1395c et seq.)).

(Added Pub. L. 89-614, §2(7), Sept. 30, 1966, 80 Stat. 866; amended Pub. L. 97-337, §1, Oct. 15, 1982, 96 Stat. 1631; Pub. L. 98-525, title XIV, §1405(24), Oct. 19, 1984, 98 Stat. 2623; Pub. L. 99-661, div. A, title XIII, §1343(a)(4), Nov. 14, 1986, 100 Stat. 3992.)

#### REFERENCES IN TEXT

The Social Security Act, referred to in subsec. (b)(2), is act Aug. 14, 1935, ch. 531, 49 Stat. 620, as amended, which is classified generally to chapter 7 (§301 et seq.) of Title 42, The Public Health and Welfare. Part A of title XVIII of the Social Security Act, is classified generally to Part A (§1395c et seq.) of subchapter XVIII of chapter 7 of Title 42. For complete classification of this Act to the Code, see section 1305 of Title 42 and Tables.

#### AMENDMENTS

1986—Subsec. (b)(2). Pub. L. 99-661 substituted “Act (42 U.S.C. 1395c et seq.)” for “Act. (42 U.S.C. 1395c et seq.)”.

1984—Subsec. (b)(2). Pub. L. 98-525 which directed that “(42 U.S.C. 1395c et seq.)” be inserted after “the Social Security Act.”, was executed by inserting parenthetical after “the Social Security Act” to reflect the probable intent of Congress. See 1986 Amendment note above.

1982—Subsec. (a). Pub. L. 97-337, §1(1), designated existing provisions as subsec. (a).

Pub. L. 97-337, §1(2), substituted provisions limiting the maximum amount of space to be programed as the greater of the amounts of space described in par. (1) or (2) for provisions limiting the amount of space to be programed to that amount needed to support teaching and training requirements, except that space may be programed in areas having large concentrations of retired members where there is a critical shortage of facilities.

Subsec. (b). Pub. L. 97-337, §1(2), added subsec. (b).

#### EFFECTIVE DATE OF 1982 AMENDMENT

Pub. L. 97-337, §2, Oct. 15, 1982, 96 Stat. 1632, provided that: “The amendment made by paragraph (2) of the first section of this Act [amending this section] shall apply only with respect to a facility for which funds for construction (or a major alteration) are first appropriated for a fiscal year after fiscal year 1983.”

#### EFFECTIVE DATE

For effective date of section, see section 3 of Pub. L. 89-614, set out as a note under section 1071 of this title.

#### § 1088. Air evacuation patients: furnished subsistence

Notwithstanding any other provision of law, and under regulations to be prescribed by the Secretary concerned, a person entitled to medical and dental care under this chapter may be furnished subsistence without charge while being evacuated as a patient by military aircraft of the United States.

(Added Pub. L. 91-481, §2(1), Oct. 21, 1970, 84 Stat. 1081.)

#### § 1089. Defense of certain suits arising out of medical malpractice

(a) The remedy against the United States provided by sections 1346(b) and 2672 of title 28 for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (including medical and dental technicians, nursing assistants, and therapists) of the armed forces, the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, the Department of Defense, the Armed Forces Retirement Home, or the Central Intelligence Agency in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of his duties or employment therein or therefor shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or the estate of such person) whose act or omission gave rise to such action or proceeding. This subsection shall also apply to such a physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or the estate of such person) serving under a personal services contract entered into under section 1091 of this title or a subcontract at any tier under such a contract that is authorized in accordance with the requirements of such section 1091.

(b) The Attorney General shall defend any civil action or proceeding brought in any court against any person referred to in subsection (a) of this section (or the estate of such person) for any such injury. Any such person against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon such person or an attested true copy thereof to such person's immediate superior or to whomever was designated by the head of the agency concerned to receive such papers and such person shall promptly furnish copies of the pleading and process therein to the United States attorney for the district embracing the place wherein the action or proceeding is brought, to the Attorney General and to the head of the agency concerned.

(c) Upon a certification by the Attorney General that any person described in subsection (a) was acting in the scope of such person's duties or employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be

removed without bond at any time before trial by the Attorney General to the district court of the United States of the district and division embracing the place wherein it is pending and the proceeding deemed a tort action brought against the United States under the provisions of title 28 and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (a) of this section is not available against the United States, the case shall be remanded to the State court.

(d) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677 of title 28, and with the same effect.

(e) For purposes of this section, the provisions of section 2680(h) of title 28 shall not apply to any cause of action arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations).

(f)(1) The head of the agency concerned may, to the extent that the head of the agency concerned considers appropriate, hold harmless or provide liability insurance for any person described in subsection (a) for damages for personal injury, including death, caused by such person's negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of such person's duties if such person is assigned to a foreign country or detailed for service with other than a Federal department, agency, or instrumentality or if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 1346(b) of title 28, for such damage or injury.

(2) With respect to the Secretary of Defense and the Armed Forces Retirement Home Board, the authority provided by paragraph (1) also includes the authority to provide for reasonable attorney's fees for persons described in subsection (a), as determined necessary pursuant to regulations prescribed by the head of the agency concerned.

(g) In this section, the term "head of the agency concerned" means—

(1) the Director of the Central Intelligence Agency, in the case of an employee of the Central Intelligence Agency;

(2) the Secretary of Homeland Security, in the case of a member or employee of the Coast Guard when it is not operating as a service in the Navy;

(3) the Chief Operating Officer of the Armed Forces Retirement Home, in the case of an employee of the Armed Forces Retirement Home; and

(4) the Secretary of Defense, in all other cases.

(Added Pub. L. 94-464, §1(a), Oct. 8, 1976, 90 Stat. 1985; amended Pub. L. 97-124, §2, Dec. 29, 1981, 95 Stat. 1666; Pub. L. 98-94, title IX, §934(a)-(c), Sept. 24, 1983, 97 Stat. 651, 652; Pub. L. 100-180, div. A, title XII, §1231(18)(A), Dec. 4, 1987, 101 Stat. 1161; Pub. L. 101-510, div. A, title XV,

§1533(a)(1), Nov. 5, 1990, 104 Stat. 1733; Pub. L. 105-85, div. A, title VII, §736(b), Nov. 18, 1997, 111 Stat. 1814; Pub. L. 107-296, title XVII, §1704(b)(1), Nov. 25, 2002, 116 Stat. 2314; Pub. L. 110-181, div. A, title IX, §931(b)(3), Jan. 28, 2008, 122 Stat. 285; Pub. L. 112-81, div. A, title V, §567(b)(2)(A), Dec. 31, 2011, 125 Stat. 1425; Pub. L. 112-239, div. A, title VII, §713(a), Jan. 2, 2013, 126 Stat. 1803.)

#### AMENDMENTS

2013—Subsec. (a). Pub. L. 112-239 substituted "to such a physician, dentist, nurse, pharmacist, or paramedical" for "if the physician, dentist, nurse, pharmacist, or paramedical", struck out "involved is" before "serving under", and inserted "or a subcontract at any tier under such a contract that is authorized in accordance with the requirements of such section 1091" after "section 1091 of this title".

2011—Subsec. (g)(3). Pub. L. 112-81 substituted "Chief Operating Officer of the Armed Forces Retirement Home" for "Armed Forces Retirement Home Board".

2008—Subsec. (g)(1). Pub. L. 110-181 substituted "Director of the Central Intelligence Agency" for "Director of Central Intelligence".

2002—Subsec. (g)(2). Pub. L. 107-296 substituted "of Homeland Security" for "of Transportation".

1997—Subsec. (a). Pub. L. 105-85, §736(b)(1), inserted at end "This subsection shall also apply if the physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or the estate of such person) involved is serving under a personal services contract entered into under section 1091 of this title."

Subsec. (f). Pub. L. 105-85, §736(b)(2), designated existing provisions as par. (1) and added par. (2).

1990—Subsec. (a). Pub. L. 101-510, §1533(a)(1)(A), substituted "Armed Forces Retirement Home" for "United States Soldiers' and Airmen's Home".

Subsec. (g)(3). Pub. L. 101-510, §1533(a)(1)(B), added par. (3) and struck out former par. (3) which read as follows: "the Board of Commissioners of the United States Soldiers' and Airmen's home, in the case of an employee of the United States Soldiers' and Airmen's Home; and".

1987—Subsec. (g). Pub. L. 100-180 inserted "the term" after "In this section,".

1983—Subsec. (a). Pub. L. 98-94, §934(a), inserted "the United States Soldiers' and Airmen's Home,".

Subsec. (f). Pub. L. 98-94, §934(b), substituted "may, to the extent that the head of the agency concerned considers" for "or his designee may, to the extent that he or his designee deems".

Subsec. (g)(3), (4). Pub. L. 98-94, §934(c)(3), added par. (3) and redesignated former par. (3) as (4).

1981—Subsec. (a). Pub. L. 97-124 inserted "the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32," after "armed forces,".

#### EFFECTIVE DATE OF 2002 AMENDMENT

Amendment by Pub. L. 107-296 effective on the date of transfer of the Coast Guard to the Department of Homeland Security, see section 1704(g) of Pub. L. 107-296, set out as a note under section 101 of this title.

#### EFFECTIVE DATE OF 1990 AMENDMENT

Amendment by Pub. L. 101-510 effective one year after Nov. 5, 1990, see section 1541 of Pub. L. 101-510, formerly set out as an Effective Date note under section 401 of Title 24, Hospitals and Asylums.

#### EFFECTIVE DATE OF 1983 AMENDMENT

Pub. L. 98-94, title IX, §934(d), Sept. 24, 1983, 97 Stat. 652, provided that: "The amendments made by this section [amending this section] shall apply only to claims accruing on or after the date of the enactment of this Act [Sept. 24, 1983]."

#### EFFECTIVE DATE OF 1981 AMENDMENT

Pub. L. 97-124, §4, Dec. 29, 1981, 95 Stat. 1666, provided that: "The amendments made by this Act [amending

this section and section 2671 of Title 28, Judiciary and Judicial Procedure] and the repeal made by section 334 of this Act [repealing section 334 of Title 32, National Guard] shall apply only with respect to claims arising on or after the date of enactment of this Act [Dec. 29, 1981].”

#### EFFECTIVE DATE

Pub. L. 94-464, §4, Oct. 8, 1976, 90 Stat. 1989, provided that: “This Act [enacting this section, section 334 of Title 32, National Guard, section 2458a of Title 42, The Public Health and Welfare, and provisions set out as notes under this section and section 334 of Title 32] shall become effective on the date of its enactment [Oct. 8, 1976] and shall apply only to those claims accruing on or after such date of enactment.”

#### CONGRESSIONAL FINDINGS

Pub. L. 94-464, §2(a), Oct. 8, 1976, 90 Stat. 1986, provided that: “The Congress finds—

“(1) that the Army National Guard and the Air National Guard are critical components of the defense posture of the United States;

“(2) that a medical capability is essential to the performance of the mission of the National Guard when in Federal service;

“(3) that the current medical malpractice crisis poses a serious threat to the availability of sufficient medical personnel for the National Guard; and

“(4) that in order to insure that such medical personnel will continue to be available to the National Guard, it is necessary for the Federal Government to assume responsibility for the payment of malpractice claims made against such personnel arising out of actions or omissions on the part of such personnel while they are performing certain training exercises.”

### § 1090. Identifying and treating drug and alcohol dependence

The Secretary of Defense, and the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy, shall prescribe regulations, implement procedures using each practical and available method, and provide necessary facilities to identify, treat, and rehabilitate members of the armed forces who are dependent on drugs or alcohol.

(Added Pub. L. 97-295, §1(15)(A), Oct. 12, 1982, 96 Stat. 1290; amended Pub. L. 98-94, title XII, §1268(7), Sept. 24, 1983, 97 Stat. 706; Pub. L. 101-510, div. A, title V, §553, Nov. 5, 1990, 104 Stat. 1567; Pub. L. 107-296, title XVII, §1704(b)(1), Nov. 25, 2002, 116 Stat. 2314.)

#### HISTORICAL AND REVISION NOTES

Revised section	Source (U.S. Code)	Source (Statutes at Large)
1090 .....	10:1071 (note).	Sept. 28, 1971, Pub. L. 92-129, §501(a)(1), 85 Stat. 361.

The word “regulations” is added for consistency. The word “persons” is omitted as surplus.

#### AMENDMENTS

2002—Pub. L. 107-296 substituted “of Homeland Security” for “of Transportation”.

1990—Pub. L. 101-510 inserted “, and the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy,” after “Secretary of Defense”.

1983—Pub. L. 98-94 struck out “(a)” before “The Secretary of Defense”.

#### EFFECTIVE DATE OF 2002 AMENDMENT

Amendment by Pub. L. 107-296 effective on the date of transfer of the Coast Guard to the Department of

Homeland Security, see section 1704(g) of Pub. L. 107-296, set out as a note under section 101 of this title.

### § 1090a. Commanding officer and supervisor referrals of members for mental health evaluations

(a) REGULATIONS.—The Secretary of Defense shall prescribe and maintain regulations relating to commanding officer and supervisor referrals of members of the armed forces for mental health evaluations. The regulations shall incorporate the requirements set forth in subsections (b), (c), and (d) and such other matters as the Secretary considers appropriate.

(b) REDUCTION OF PERCEIVED STIGMA.—The regulations required by subsection (a) shall, to the greatest extent possible—

(1) seek to eliminate perceived stigma associated with seeking and receiving mental health services, promoting the use of mental health services on a basis comparable to the use of other medical and health services; and

(2) clarify the appropriate action to be taken by commanders or supervisory personnel who, in good faith, believe that a subordinate may require a mental health evaluation.

(c) PROCEDURES FOR INPATIENT EVALUATIONS.—The regulations required by subsection (a) shall provide that, when a commander or supervisor determines that it is necessary to refer a member of the armed forces for a mental health evaluation—

(1) the health evaluation shall only be conducted in the most appropriate clinical setting, in accordance with the least restrictive alternative principle; and

(2) only a psychiatrist, or, in cases in which a psychiatrist is not available, another mental health professional or a physician, may admit the member pursuant to the referral for a mental health evaluation to be conducted on an inpatient basis.

(d) PROHIBITION ON USE OF REFERRALS FOR MENTAL HEALTH EVALUATIONS TO RETALIATE AGAINST WHISTLEBLOWERS.—The regulations required by subsection (a) shall provide that no person may refer a member of the armed forces for a mental health evaluation as a reprisal for making or preparing a lawful communication of the type described in section 1034(c)(2) of this title, and applicable regulations. For purposes of this subsection, such communication shall also include a communication to any appropriate authority in the chain of command of the member.

(e) DEFINITIONS.—In this section:

(1) The term “mental health professional” means a psychiatrist or clinical psychologist, a person with a doctorate in clinical social work, or a psychiatric clinical nurse specialist.

(2) The term “mental health evaluation” means a psychiatric examination or evaluation, a psychological examination or evaluation, an examination for psychiatric or psychological fitness for duty, or any other means of assessing the state of mental health of a member of the armed forces.

(3) The term “least restrictive alternative principle” means a principle under which a member of the armed forces committed for