S T A T E O F N E W Y O R K

6321

2009-2010 Regular Sessions

I N S E N A T E

November 30, 2009

Introduced by Sen. VALESKY -- read twice and ordered printed, and when printed to be committed to the Committee on Finance

AN ACT to amend the public health law, the civil practice law and rules and the education law, in relation to establishing the Sorry Works! demonstration program; making an appropriation therefor and providing for the repeal of such provisions upon expiration thereof

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Article 29-D of the public health law is amended by adding a new title 4 to read as follows:

TITLE 4

SORRY WORKS! DEMONSTRATION PROGRAM

SECTION 2999-G. SORRY WORKS! DEMONSTRATION PROGRAM.
2999-H. COMMISSIONER'S SORRY WORKS! DEMONSTRATION PROGRAM WORKGROUP.
2999-I. SORRY WORKS! DEMONSTRATION PROGRAM GRANTS.
2999-J. SORRY WORKS! DEMONSTRATION PROGRAM REPORT.

S 2999-G. SORRY WORKS! DEMONSTRATION PROGRAM. 1. THE COMMISSIONER, IN CONSULTATION WITH THE SUPERINTENDENT OF INSURANCE, IS AUTHORIZED AND DIRECTED TO CONDUCT A SORRY WORKS! DEMONSTRATION PROGRAM, WITHIN AMOUNTS APPROPRIATED, AT A MINIMUM OF TWO SITES LOCATED WITHIN THE GEOGRAPHIC CONFINES OF THE NORTHERN REGION AND THE CENTRAL REGION OF THE STATE, ONE OF THE DEMONSTRATION SITES SHALL BE LOCATED IN A PRIMARILY RURAL AREA AND ONE SHALL BE LOCATED IN A PRIMARILY URBAN AREA, AS DEFINED BY THE COMMISSIONER, FOR THE PURPOSE OF DETERMINING WHETHER PARTICIPATING HOSPITALS, PHYSICIANS, AND OTHER HEALTH CARE PROVIDERS WHO ARE MEMBERS OF THE MEDICAL STAFF WHO, WHEN AN UNANTICIPATED OUTCOME HAS OCCURRED, APOLOGIZE AND IN CASES WHERE THE STANDARD OF PATIENT CARE WAS VIOLATED, PROMPTLY ACKNOWLEDGE THE MISTAKE AND OFFER A PROMPT SETTLEMENT, EXPERIENCE A REDUCTION IN THEIR TOTAL COSTS FOR MEDICAL MALPRACTICE VERDICTS, SETTLEMENTS, AND DEFENSE LITIGATION COSTS. FOR PURPOSES OF THIS SUBDI-

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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VISION, THE TERM "NORTHERN REGION" SHALL CONSIST OF THE COUNTIES OF ALBANY, CLINTON, COLUMBIA, ESSEX, FRANKLIN, FULTON, GREENE, HAMILTON, MONTGOMERY, OTSEGO, RENSSELAER, SARATOGA, SCHENECTADY, SCHOHARIE, WARREN AND WASHINGTON, AND THE TERM "CENTRAL REGION" SHALL CONSIST OF THE COUNTIES OF BROOME, CAYUGA, CHEMUNG, CHENANGO, CORTLAND, HERKIMER, JEFFERSON, LEWIS, LIVINGSTON, MADISON, MONROE, ONEIDA, ONONDAGA, ONTARIO, OSWEGO, SCHUYLER, SENECA, ST. LAWRENCE, STEUBEN, TIOGA, TOMPKINS, WAYNE AND YATES.

2. UNDER THE DEMONSTRATION PROGRAM, PARTICIPATING HOSPITALS, WITHIN FORTY-FIVE DAYS OF THE UNANTICIPATED OUTCOME OF THE PROVISION OF HEALTH CARE SERVICES, AFTER CONDUCTING A ROOT CAUSE ANALYSIS OF THE UNANTICIPATED OUTCOME, SHALL IN CASES WHERE THE STANDARD OF CARE IS FOUND TO HAVE BEEN VIOLATED, ACKNOWLEDGE AND EXPLAIN THE NATURE OF THE FAILURE IN CARE, APOLOGIZE FOR THE MISTAKE, EXPLAIN THE EFFORTS THE HOSPITAL WILL TAKE TO ASSURE THAT SUCH A FAILURE DOES NOT REOCCUR AND PROMPTLY OFFER A FAIR SETTLEMENT. IF A SETTLEMENT IS ACCEPTED, ALL FURTHER LITIGATION WITH RESPECT TO THE MISTAKE SHALL BE PROHIBITED. PARTICIPATING HOSPITALS SHALL PROVIDE TO THE PATIENT WRITTEN NOTIFICATION OF THE RIGHT TO COUNSEL AND SHALL ENCOURAGE PATIENTS AND THEIR FAMILIES TO EXERCISE THIS RIGHT. THE NOTIFICATION SHALL FURTHER INCLUDE AN AFFIRMATIVE DECLARATION THAT NO ACTION WAS TAKEN TO DISSUADE A PATIENT FROM UTILIZING COUNSEL DURING THE NEGOTIATIONS, PROVIDED, HOWEVER, THAT ANY CASE FOR WHICH A CLAIM OF MEDICAL MALPRACTICE OR NOTICE OF CLAIM TO COMMENCE A MEDICAL MALPRACTICE ACTION IS FILED SHALL NOT BE ELIGIBLE FOR ADJUDICATION UNDER THIS TITLE.

3. NOTWITHSTANDING ANY LAW TO THE CONTRARY, ANY COLLATERAL SOURCE PAYER WHO HAS MADE PAYMENT FOR THE COST OF MEDICAL CARE, DENTAL CARE, PODIATRIC CARE, CUSTODIAL CARE, REHABILITATION SERVICES, LOSS OF EARNINGS OR OTHER ECONOMIC LOSS TO OR ON BEHALF OF A PATIENT WHO HAS RECEIVED A SETTLEMENT FROM A HOSPITAL PARTICIPATING IN THE SORRY WORKS! DEMONSTRATION PROGRAM ESTABLISHED PURSUANT TO THIS TITLE MAY NOT SEEK REIMBURSEMENT FROM THE INDIVIDUAL BASED ON THEIR RECEIPT OF SUCH A SETTLEMENT.

4. NOTWITHSTANDING SECTION THREE HUNDRED FIFTEEN OF THE INSURANCE LAW OR ANY OTHER LAW TO THE CONTRARY, ANY SETTLEMENT OFFER MADE TO A PATIENT AND ACCEPTED BY THE PATIENT AS A RESULT OF AN UNANTICIPATED OUTCOME BY A HOSPITAL PARTICIPATING IN THE SORRY WORKS! DEMONSTRATION PROGRAM ESTABLISHED PURSUANT TO THIS TITLE SHALL NOT CONSTITUTE A REPORTABLE CLAIM.

5. PURSUANT TO SECTION FORTY-FIVE HUNDRED FORTY-NINE OF THE CIVIL PRACTICE LAW AND RULES, ANY STATEMENT OR AFFIRMATION RELATING TO AN EXPLANATION, APOLOGY AND OFFER OF SETTLEMENT MADE WITHIN THE TIME PERIOD PROVIDED FOR IN SUBDIVISION ONE OF THIS SECTION SHALL NOT BE DISCOVERABLE OR ADMISSIBLE IN ANY CIVIL OR ADMINISTRATIVE PROCEEDING. EVIDENCE OR INFORMATION THAT IS OTHERWISE ADMISSIBLE OR SUBJECT TO DISCOVERY DOES NOT BECOME INADMISSIBLE OR PROTECTED FROM DISCOVERY SOLELY BY REASON OF ITS DISCLOSURE OR USE IN NEGOTIATIONS PURSUANT TO THIS PROGRAM.

6. PARTICIPATION IN THE SORRY WORKS! DEMONSTRATION PROGRAM SHALL TOLL THE APPLICABLE STATUTE OF LIMITATIONS IN CASES WHERE SUCH NEGOTIATIONS ARE UNSUCCESSFUL. THE COMMISSIONER WITH THE ADVICE AND THE RECOMMENDATION OF THE WORKGROUP CREATED PURSUANT TO SECTION TWENTY-NINE HUNDRED NINETY-NINE-H OF THIS TITLE SHALL ESTABLISH GUIDELINES FOR DETERMINING WHEN NEGOTIATIONS UNDER THE SORRY WORKS! DEMONSTRATION PROGRAM BEGIN AND END FOR THE PURPOSE OF TOLLING THE STATUTE.

7. PARTICIPATION BY A HOSPITAL IN THE SORRY WORKS! DEMONSTRATION PROGRAM SHALL BE ON A VOLUNTARY BASIS. A PROGRAM PARTICIPANT MAY WITHDRAW FROM THE PROGRAM BY NOTIFYING THE COMMISSIONER. ANY MISTAKES IN

PATIENT CARE THAT RESULT IN HARM THAT OCCURRED PRIOR TO THE PROGRAM PARTICIPANT NOTIFYING THE COMMISSIONER OF THE PARTICIPANT'S WITHDRAWAL FROM THE PROGRAM SHALL CONTINUE TO BE SUBJECT TO THE TERMS OF THE PROGRAM.

8. A HOSPITAL APPLYING TO PARTICIPATE IN THE SORRY WORKS! DEMONSTRATION PROGRAM SHALL:

(A) NOTIFY THE COMMISSIONER IN WRITING OF ITS REQUEST TO PARTICIPATE; SUCH NOTIFICATION SHALL INCLUDE DOCUMENTATION OF AN AFFIRMATIVE VOTE BY THE MEDICAL STAFF OF ITS CONCURRENCE WITH THE ELECTION OF THE HOSPITAL ADMINISTRATION TO PARTICIPATE;

(B) INDEPENDENTLY OR IN CONJUNCTION WITH OTHER PROGRAM PARTICIPANTS ADOPT A FORMAL TRAINING PROGRAM, ACCEPTABLE TO THE COMMISSIONER, TO TRAIN ITS STAFF ON THE PROGRAM PARAMETERS AND PROTOCOLS, AND ON SUCCESSFUL COMMUNICATION STRATEGIES IN AN EFFORT TO IMPROVE THE LIKELIHOOD OF A SUCCESSFUL PROGRAM; AND

(C) PROVIDE THE COMMISSIONER WITH DATA REGARDING ITS TOTAL COSTS FOR MEDICAL MALPRACTICE VERDICTS, SETTLEMENTS, AND DEFENSE LITIGATION COSTS FOR THE FIRST YEAR OF THE PARTICIPATION IN THE PROGRAM, FOR THE ENTIRE PERIOD OF TIME OF PARTICIPATION IN THE PROGRAM, AND FOR A PERIOD OF FIVE YEARS PRIOR TO PARTICIPATION IN THE PROGRAM TO ENABLE THE COMMISSIONER TO DETERMINE AVERAGE COSTS FOR THE HOSPITAL DURING THAT FIVE-YEAR PERIOD. PROGRAM PARTICIPANTS SHALL ALSO PROVIDE TO THE COMMISSIONER ANY ADDITIONAL NON-PATIENT SPECIFIC INFORMATION REQUIRED BY THE COMMISSIONER IN ORDER TO EVALUATE THE EFFECTIVENESS OF THE SORRY WORKS! DEMONSTRATION PROGRAM.

9. THE COMMISSIONER SHALL APPROVE THE SORRY WORKS! DEMONSTRATION PROGRAM SITES BASED ON AN ASSESSMENT OF THE REQUESTING HOSPITAL'S ABILITY TO EFFECTUATE THE GOALS OF THE PROGRAM.

10. WITHIN ONE HUNDRED TWENTY DAYS OF THE COMPLETION OF THE FIRST YEAR OF THE SORRY WORKS! DEMONSTRATION PROGRAM, THE COMMISSIONER SHALL COMPLETE AN ANALYSIS, ON A FACILITY SPECIFIC BASIS, OF THE PARTICIPATING HOSPITALS' TOTAL COSTS FOR MEDICAL MALPRACTICE VERDICTS, SETTLEMENTS, AND DEFENSE LITIGATION COSTS FOR THE FIRST YEAR OF THE PROGRAM, AS COMPARED TO THEIR AVERAGE COSTS OVER THE FIVE YEAR PERIOD PRECEDING THE FIRST YEAR OF THE PROGRAM.

S 2999-H. COMMISSIONER'S SORRY WORKS! DEMONSTRATION PROGRAM WORKGROUP.

1. THE COMMISSIONER SHALL, WITHIN FORTY-FIVE DAYS OF THE EFFECTIVE DATE OF THIS TITLE, CONVENE AND CHAIR DIRECTLY OR INDIRECTLY, A WORKGROUP, INCLUDING, BUT NOT LIMITED TO, STAFF OF THE DEPARTMENT OF INSURANCE WITH EXPERTISE IN MEDICAL MALPRACTICE LIABILITY INSURANCE DESIGNATED BY THE SUPERINTENDENT OF INSURANCE, AND REPRESENTATIVES OF: STATEWIDE AND REGIONAL ASSOCIATIONS REPRESENTING HOSPITALS, PHYSICIANS AND OTHER HEALTH CARE PROVIDERS THAT ARE HOSPITAL MEDICAL STAFF MEMBERS; THE PLAINTIFFS AND DEFENSE BAR WITH EXPERTISE IN MEDICAL MALPRACTICE; NEW YORK STATE ADMITTED MEDICAL MALPRACTICE LIABILITY INSURANCE CARRIERS; AND CONSUMER AND PATIENT ADVOCACY GROUPS WITH EXPERTISE IN MEDICAL MALPRACTICE INSURANCE AND PATIENT SAFETY. THE WORKGROUP SHALL OFFER ADVICE AND RECOMMENDATIONS TO THE COMMISSIONER IN THE FOLLOWING AREAS:

(A) ON THE APPROVAL OF DEMONSTRATION PROGRAM SITES;

(B) ON THE ACCEPTABILITY OF TRAINING PROGRAMS THAT HOSPITALS WISHING TO PARTICIPATE IN THE DEMONSTRATION PROGRAM SUBMIT TO THE COMMISSIONER;

(C) ON GUIDELINES FOR DETERMINING WHEN NEGOTIATIONS UNDER THE DEMONSTRATION PROGRAM BEGIN AND END FOR THE PURPOSE OF TOLLING THE STATUTE; AND

(D) ON THE IMPLEMENTATION AND ADMINISTRATION OF THE DEMONSTRATION PROGRAM, PROGRAM GUIDELINES AND PARAMETERS, THE PROGRAM'S EVALUATION,

THE MERIT OF EXPANDING THE PROGRAM, AND STRATEGIES TO FACILITATE PARTICIPATION IN THE PROGRAM.

2. THE WORKGROUP SHALL OFFER ITS INITIAL ADVICE AND RECOMMENDATION TO THE COMMISSIONER AT LEAST SIXTY DAYS BEFORE THE COMMENCEMENT OF THE SORRY WORKS! DEMONSTRATION PROGRAM. THE COMMISSIONER SHALL CONSIDER THE ADVICE AND RECOMMENDATIONS OF THE WORKGROUP IN MAKING DECISIONS UNDER THIS TITLE PROVIDED HOWEVER, THAT THE PROGRAM SHALL NOT BE DELAYED DUE TO THE FAILURE OF THE WORKGROUP TO SUBMIT TIMELY ADVICE AND RECOMMENDATIONS.

S 2999-I. SORRY WORKS! DEMONSTRATION PROGRAM GRANTS. 1. TO THE EXTENT THAT FUNDS ARE MADE AVAILABLE THEREFOR, THE COMMISSIONER IS AUTHORIZED TO ISSUE GRANTS TO SORRY WORKS! DEMONSTRATION PROGRAM PARTICIPANTS INDIVIDUALLY OR COLLECTIVELY TO THEIR DESIGNATED REPRESENTATIVE, FOR THE PURPOSES OF SUPPORTING TRAINING FOR THE DEMONSTRATION PROGRAMS AND TO DEFRAY ANY INCREASED COSTS RELATED TO MEDICAL MALPRACTICE VERDICTS, SETTLEMENTS, AND DEFENSE LITIGATION COSTS THAT A HOSPITAL INCURS AS A RESULT OF PARTICIPATION IN THE PROGRAM. THE COMMISSIONER IS FURTHER AUTHORIZED TO APPLY FOR GRANTS AND ACCEPT DONATIONS FROM PRIVATE AND PUBLIC SOURCES FOR THE PURPOSES OF FUNDING GRANTS PURSUANT TO THIS SECTION.

2. ANY HOSPITAL THAT IS FOUND BY THE COMMISSIONER TO HAVE EXPERIENCED INCREASED COSTS FOR MEDICAL MALPRACTICE VERDICTS, SETTLEMENTS, AND DEFENSE LITIGATION COSTS DURING THE FIRST YEAR OF THE DEMONSTRATION PROGRAM PERIOD AS A RESULT OF PARTICIPATION IN THE DEMONSTRATION PROGRAM, PURSUANT TO SUBDIVISION EIGHT OF SECTION TWENTY-NINE HUNDRED NINETY-NINE-G OF THIS TITLE MAY APPLY TO THE COMMISSIONER FOR GRANT FUNDING TO DEFRAY SUCH COSTS, PROVIDED, HOWEVER, THAT GRANT AWARDS UNDER THIS SUBDIVISION MAY NOT EXCEED THE TOTAL AMOUNT OF FUNDS REMAINING AVAILABLE. SHOULD TOTAL GRANT FUNDING REQUESTS EXCEED AVAILABLE FUNDS, GRANTS MADE PURSUANT TO THIS SUBDIVISION SHALL BE MADE ON A PRO RATA BASIS.

S 2999-J. SORRY WORKS! DEMONSTRATION PROGRAM REPORT. WITHIN ONE HUNDRED EIGHTY DAYS OF THE COMPLETION OF THE FIRST YEAR OF THE SORRY WORKS! DEMONSTRATION PROGRAM, THE COMMISSIONER SHALL SUBMIT A REPORT ON THE PROGRAM TO THE GOVERNOR, THE SPEAKER OF THE ASSEMBLY AND THE TEMPORARY PRESIDENT OF THE SENATE. SUCH REPORT SHALL INCLUDE, BUT NOT BE LIMITED TO: THE EXPERIENCE OF THE PROGRAM; THE EFFECTIVENESS OF THE PROGRAM; THE VALUE IN EXPANDING THE PROGRAM; AND SUGGESTED STATUTORY CHANGES TO THE PROGRAM.

S 2. The civil practice law and rules is amended by adding a new section 4549 to read as follows:

S 4549. PROTECTIONS OF EXPRESSIONS OF APOLOGIES, CONDOLENCE AND SYMPATHY. 1. IN ANY CIVIL ACTION BROUGHT BY OR ON BEHALF OF A PATIENT WHO EXPERIENCES AN UNANTICIPATED OUTCOME OF MEDICAL CARE, OR IN AN ARBITRATION PROCEEDING RELATED TO, OR IN LIEU OF SUCH CIVIL ACTION WHEN SUCH CARE IS PROVIDED IN A FACILITY PARTICIPATING IN THE SORRY WORKS! DEMONSTRATION PROGRAM PURSUANT TO TITLE FOUR OF ARTICLE TWENTY-NINE-D OF THE PUBLIC HEALTH LAW, ALL STATEMENTS AND AFFIRMATIONS, INCLUDING AN OFFER OF SETTLEMENT, WHETHER IN WRITING OR ORAL, AND ALL GESTURES OR CONDUCT EXPRESSING APOLOGY, SYMPATHY, COMMISERATION, CONDOLENCE, COMPASSION, OR A GENERAL SENSE OF BENEVOLENCE, OR ACCEPTANCE OF RESPONSIBILITY, INCLUDING ANY EXPLANATION MADE BY A HEALTH CARE PROVIDER OR AN EMPLOYEE OR AN AGENT OF A HEALTH CARE PROVIDER PARTICIPATING IN THE PROGRAM TO A PATIENT OR WHICH RELATE TO THE DISCOMFORT, PAIN, SUFFERING, INJURY, OR DEATH OF THE PATIENT AS THE RESULT OF THE UNANTICIPATED OUTCOME OF MEDICAL CARE SHALL BE INADMISSIBLE AS EVIDENCE FOR ANY REASON INCLUDING,

BUT NOT LIMITED TO, AS AN ADMISSION OF LIABILITY OR AS EVIDENCE OF AN ADMISSION AGAINST INTEREST.

2. THE PROVISIONS OF THIS SECTION SHALL NOT REQUIRE THE EXCLUSION OF ANY EVIDENCE WHICH IS OTHERWISE ADMISSIBLE SOLELY BECAUSE SUCH EVIDENCE WAS PRESENTED DURING THE COURSE OF COMPROMISE NEGOTIATIONS.

3. FOR THE PURPOSES OF THIS SECTION, UNLESS THE CONTEXT OTHERWISE REQUIRES, THE TERM "UNANTICIPATED OUTCOME" MEANS THE OUTCOME OF A MEDICAL DIAGNOSIS, TREATMENT OR PROCEDURE THAT DIFFERS FROM AN EXPECTED, HOPED FOR OR DESIRED RESULT.

S 3. Section 6530 of the education law is amended by adding a new subdivision 50 to read as follows:

50. FAILURE TO COOPERATE AND PARTICIPATE REASONABLY AND IN GOOD FAITH, IN THE QUALITY ASSURANCE, INCIDENT REPORTING AND PEER REVIEW PROGRAMS, ACTIVITIES AND REQUIREMENTS AND PROCEDURES COVERED BY THE CONFIDENTIALITY PROVISIONS OF SECTION TWENTY-EIGHT HUNDRED FIVE-M OF THE PUBLIC HEALTH LAW OR CLAUSE (A), (B), (D) OR (E) OF SUBDIVISION THREE OF SECTION SIXTY-FIVE HUNDRED TWENTY-SEVEN OF THIS ARTICLE IN THE CASE OF HEALTH CARE PROVIDERS WHO ARE PARTICIPATING IN THE SORRY WORKS! DEMONSTRATION PROGRAM ESTABLISHED PURSUANT TO SECTION TWENTY-NINE HUNDRED NINETY-NINE-G OF THE PUBLIC HEALTH LAW AND WHEREBY A SETTLEMENT HAS BEEN REACHED PURSUANT TO SUBDIVISION TWO OF SUCH SECTION PROHIBITING FURTHER LITIGATION.

S 4. The sum of one million dollars ($1,000,000), is hereby appropriated to the department of health out of moneys in the state treasury in the general fund, not otherwise appropriated, and made immediately available for the purposes of carrying out the provisions of this act, specifically for grants to effectuate the Sorry Works! demonstration program.

S 5. This act shall take effect immediately, provided however, that the demonstration program established pursuant to section 2999-g of the public health law as added by section one of this act shall begin 180 days after such effective date and provided further that this act shall expire and be deemed repealed 2 years and 180 days after such effective date.