

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:

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

3 TITLE 4

4 SORRY WORKS! DEMONSTRATION PROGRAM

5 SECTION 2999-G. SORRY WORKS! DEMONSTRATION PROGRAM.

6 2999-H. COMMISSIONER'S SORRY WORKS! DEMONSTRATION PROGRAM WORK-
7 GROUP.

8 2999-I. SORRY WORKS! DEMONSTRATION PROGRAM GRANTS.

9 2999-J. SORRY WORKS! DEMONSTRATION PROGRAM REPORT.

10 S 2999-G. SORRY WORKS! DEMONSTRATION PROGRAM. 1. THE COMMISSIONER, IN
11 CONSULTATION WITH THE SUPERINTENDENT OF INSURANCE, IS AUTHORIZED AND
12 DIRECTED TO CONDUCT A SORRY WORKS! DEMONSTRATION PROGRAM, WITHIN AMOUNTS
13 APPROPRIATED, AT A MINIMUM OF TWO SITES LOCATED WITHIN THE GEOGRAPHIC
14 CONFINES OF THE NORTHERN REGION AND THE CENTRAL REGION OF THE STATE, ONE
15 OF THE DEMONSTRATION SITES SHALL BE LOCATED IN A PRIMARILY RURAL AREA
16 AND ONE SHALL BE LOCATED IN A PRIMARILY URBAN AREA, AS DEFINED BY THE
17 COMMISSIONER, FOR THE PURPOSE OF DETERMINING WHETHER PARTICIPATING
18 HOSPITALS, PHYSICIANS, AND OTHER HEALTH CARE PROVIDERS WHO ARE MEMBERS
19 OF THE MEDICAL STAFF WHO, WHEN AN UNANTICIPATED OUTCOME HAS OCCURRED,
20 APOLOGIZE AND IN CASES WHERE THE STANDARD OF PATIENT CARE WAS VIOLATED,
21 PROMPTLY ACKNOWLEDGE THE MISTAKE AND OFFER A PROMPT SETTLEMENT, EXPERI-
22 ENCE A REDUCTION IN THEIR TOTAL COSTS FOR MEDICAL MALPRACTICE VERDICTS,
23 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.

LBD15118-01-9

1 VISION, THE TERM "NORTHERN REGION" SHALL CONSIST OF THE COUNTIES OF
2 ALBANY, CLINTON, COLUMBIA, ESSEX, FRANKLIN, FULTON, GREENE, HAMILTON,
3 MONTGOMERY, OTSEGO, RENSSELAER, SARATOGA, SCHENECTADY, SCHOHARIE, WARREN
4 AND WASHINGTON, AND THE TERM "CENTRAL REGION" SHALL CONSIST OF THE COUN-
5 TIES OF BROOME, CAYUGA, CHEMUNG, CHENANGO, CORTLAND, HERKIMER, JEFFER-
6 SON, LEWIS, LIVINGSTON, MADISON, MONROE, ONEIDA, ONONDAGA, ONTARIO,
7 OSWEGO, SCHUYLER, SENECA, ST. LAWRENCE, STEUBEN, TIOGA, TOMPKINS, WAYNE
8 AND YATES.

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

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

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

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

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

54 7. PARTICIPATION BY A HOSPITAL IN THE SORRY WORKS! DEMONSTRATION
55 PROGRAM SHALL BE ON A VOLUNTARY BASIS. A PROGRAM PARTICIPANT MAY WITH-
56 DRAW FROM THE PROGRAM BY NOTIFYING THE COMMISSIONER. ANY MISTAKES IN

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

5 8. A HOSPITAL APPLYING TO PARTICIPATE IN THE SORRY WORKS! DEMON-
6 STRATION PROGRAM SHALL:

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

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

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

26 9. THE COMMISSIONER SHALL APPROVE THE SORRY WORKS! DEMONSTRATION
27 PROGRAM SITES BASED ON AN ASSESSMENT OF THE REQUESTING HOSPITAL'S ABILI-
28 TY TO EFFECTUATE THE GOALS OF THE PROGRAM.

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

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

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

49 (A) ON THE APPROVAL OF DEMONSTRATION PROGRAM SITES;

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

52 (C) ON GUIDELINES FOR DETERMINING WHEN NEGOTIATIONS UNDER THE DEMON-
53 STRATION PROGRAM BEGIN AND END FOR THE PURPOSE OF TOLLING THE STATUTE;
54 AND

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

1 THE MERIT OF EXPANDING THE PROGRAM, AND STRATEGIES TO FACILITATE PARTIC-
2 IPATION IN THE PROGRAM.

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

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

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

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

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

42 S 4549. PROTECTIONS OF EXPRESSIONS OF APOLOGIES, CONDOLENCE AND SYMPA-
43 THY. 1. IN ANY CIVIL ACTION BROUGHT BY OR ON BEHALF OF A PATIENT WHO
44 EXPERIENCES AN UNANTICIPATED OUTCOME OF MEDICAL CARE, OR IN AN ARBI-
45 TRATION PROCEEDING RELATED TO, OR IN LIEU OF SUCH CIVIL ACTION WHEN SUCH
46 CARE IS PROVIDED IN A FACILITY PARTICIPATING IN THE SORRY WORKS! DEMON-
47 STRATION PROGRAM PURSUANT TO TITLE FOUR OF ARTICLE TWENTY-NINE-D OF THE
48 PUBLIC HEALTH LAW, ALL STATEMENTS AND AFFIRMATIONS, INCLUDING AN OFFER
49 OF SETTLEMENT, WHETHER IN WRITING OR ORAL, AND ALL GESTURES OR CONDUCT
50 EXPRESSING APOLOGY, SYMPATHY, COMMISERATION, CONDOLENCE, COMPASSION, OR
51 A GENERAL SENSE OF BENEVOLENCE, OR ACCEPTANCE OF RESPONSIBILITY, INCLUD-
52 ING ANY EXPLANATION MADE BY A HEALTH CARE PROVIDER OR AN EMPLOYEE OR AN
53 AGENT OF A HEALTH CARE PROVIDER PARTICIPATING IN THE PROGRAM TO A
54 PATIENT OR WHICH RELATE TO THE DISCOMFORT, PAIN, SUFFERING, INJURY, OR
55 DEATH OF THE PATIENT AS THE RESULT OF THE UNANTICIPATED OUTCOME OF
56 MEDICAL CARE SHALL BE INADMISSIBLE AS EVIDENCE FOR ANY REASON INCLUDING,

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

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

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

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

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

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

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