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

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I N S E N A T E

February 2, 2010

Introduced by Sens. HANNON, LARKIN, MORAHAN, VOLKER -- read twice and ordered printed, and when printed to be committed to the Committee on Health

AN ACT to amend the public health law, in relation to enacting the New York birth-related neurological injury compensation act

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

Section 1. The public health law is amended by adding a new article 20-B to read as follows:

ARTICLE 20-B
NEW YORK BIRTH-RELATED NEUROLOGICAL
INJURY COMPENSATION ACT

SECTION 2021. SHORT TITLE.
2022. DEFINITIONS.
2023. NEW YORK BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PROGRAM; EXCLUSIVE REMEDY; EXCEPTION.
2024. FILING OF CLAIMS; REVIEW BY STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT; FILING OF RESPONSES; DETERMINATION OF ESTABLISHED CLAIMS BY ADMINISTRATIVE LAW JUDGE.
2025. TOLLING OF STATUTE OF LIMITATIONS.
2026. HEARING; PARTIES.
2027. INTERROGATORIES AND DEPOSITIONS.
2028. DETERMINATION OF CLAIMS; PRESUMPTION; FINDINGS OF ADMINISTRATIVE LAW JUDGE BINDING ON PARTICIPANTS; MEDICAL ADVISORY PANEL.
2029. ADMINISTRATIVE LAW JUDGE AWARDS FOR BIRTH-RELATED NEUROLOGICAL INJURIES; NOTICE OF AWARD.
2030. LIMITATION ON CLAIMS.
2031. SCOPE.
2032. BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION FUND.
2033. BOARD OF DIRECTORS; APPOINTMENT; VACANCIES; TERM.
2034. PLAN OF OPERATION.
2035. FUNDS TO BE HELD IN RESTRICTED CASH ACCOUNT.
2036. ASSESSMENTS.

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

LBD15386-01-0

2037. ACTUARIAL INVESTIGATION, VALUATIONS, GAIN/LOSS ANALYSIS; NOTICE IF ASSESSMENTS PROVE INSUFFICIENT.

S 2021. SHORT TITLE. THE PROVISIONS OF THIS ARTICLE SHALL BE KNOWN AND MAY BE CITED AS THE "NEW YORK BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ACT".

S 2022. DEFINITIONS. AS USED IN THIS ARTICLE:

1. "BIRTH-RELATED NEUROLOGICAL INJURY" MEANS A NON-PROGRESSIVE IMPAIRMENT OF BRAIN OR SPINAL CORD WHICH OCCURRED OR WHICH COULD HAVE OCCURRED DURING PREGNANCY, DURING LABOR, DURING DELIVERY OR IN THE IMMEDIATE RESUSCITATION PERIOD AFTER DELIVERY WHICH RESULTS IN A SIGNIFICANT IMPAIRMENT IN CENTRAL NERVOUS SYSTEM FUNCTION RENDERING THE INFANT SUBSTANTIALLY HANDICAPPED. THE DETERMINATION OF WHETHER A SUBSTANTIAL HANDICAP EXISTS SHALL BE MADE BY THE STATE BOARD OF PROFESSIONAL MEDICAL CONDUCT. THIS TERM SHALL APPLY ONLY TO LIVE BIRTHS, AND SHALL NOT INCLUDE DISABILITIES CAUSED BY CONGENITAL ABNORMALITIES INCLUDING, BUT NOT LIMITED TO: GENETIC, DEVELOPMENTAL OR TERATOGENIC CAUSES.

2. "CLAIMANT" MEANS ANY PERSON WHO FILES A CLAIM PURSUANT TO SECTION TWO THOUSAND TWENTY-FOUR OF THIS ARTICLE FOR COMPENSATION FOR A BIRTH-RELATED NEUROLOGICAL INJURY TO AN INFANT. SUCH CLAIMS MAY BE FILED BY ANY LEGAL REPRESENTATIVE ON BEHALF OF AN INJURED INFANT; AND, IN THE CASE OF A DECEASED INFANT, THE CLAIM MAY BE FILED BY AN ADMINISTRATOR, EXECUTOR, OR OTHER LEGAL REPRESENTATIVE.

3. "PARTICIPATING PHYSICIAN" MEANS A PHYSICIAN LICENSED IN THIS STATE TO PRACTICE MEDICINE, WHO PRACTICES OBSTETRICS OR PERFORMS OBSTETRICAL SERVICES EITHER FULL OR PART TIME AND WHO HAD IN FORCE AN AGREEMENT WITH THE STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT WHEREBY THE PHYSICIAN AGREED TO SUBMIT TO REVIEW BY THE STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT AS REQUIRED BY SUBDIVISION TWO OF SECTION TWO THOUSAND TWENTY-FOUR OF THIS ARTICLE.

4. "PARTICIPATING HOSPITAL" MEANS A HOSPITAL LICENSED IN NEW YORK WHICH AT THE TIME OF THE INJURY HAD IN FORCE AN AGREEMENT WHEREBY THE HOSPITAL AGREED TO SUBMIT TO REVIEW OF ITS OBSTETRICAL SERVICE, AS REQUIRED BY SUBDIVISION THREE OF SECTION TWO THOUSAND TWENTY-FOUR OF THIS ARTICLE.

5. "PROGRAM" MEANS THE NEW YORK BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PROGRAM ESTABLISHED BY THIS ARTICLE.

S 2023. NEW YORK BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PROGRAM; EXCLUSIVE REMEDY; EXCEPTION. 1. THERE IS HEREBY ESTABLISHED THE NEW YORK BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PROGRAM.

2. THE RIGHTS AND REMEDIES GRANTED IN THIS ARTICLE TO AN INFANT ON ACCOUNT OF A BIRTH-RELATED NEUROLOGICAL INJURY SHALL EXCLUDE ALL OTHER RIGHTS AND REMEDIES OF SUCH INFANT, HIS OR HER PERSONAL REPRESENTATIVE, PARENTS, DEPENDENTS OR NEXT OF KIN, AT COMMON LAW OR OTHERWISE ARISING OUT OF OR RELATED TO A MEDICAL MALPRACTICE CLAIM WITH RESPECT TO SUCH INJURY.

3. NOTWITHSTANDING ANYTHING TO THE CONTRARY IN THIS SECTION, A CIVIL ACTION SHALL NOT BE FORECLOSED AGAINST A PHYSICIAN OR A HOSPITAL WHERE THERE IS CLEAR AND CONVINCING EVIDENCE THAT SUCH PHYSICIAN OR HOSPITAL INTENTIONALLY OR WILLFULLY CAUSED OR INTENDED TO CAUSE A BIRTH-RELATED NEUROLOGICAL INJURY, PROVIDED THAT SUCH SUIT IS FILED PRIOR TO AND IN LIEU OF PAYMENT OF AN AWARD UNDER THIS ARTICLE. SUCH SUIT SHALL BE FILED BEFORE THE AWARD OF THE BOARD BECOMES CONCLUSIVE AND BINDING.

S 2024. FILING OF CLAIMS; REVIEW BY STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT; FILING OF RESPONSES; DETERMINATION OF ESTABLISHED CLAIMS BY ADMINISTRATIVE LAW JUDGE. 1. (A) IN ALL CLAIMS FILED UNDER

THIS ARTICLE, THE CLAIMANT SHALL FILE WITH THE ADMINISTRATIVE LAW JUDGE A PETITION, SETTING FORTH THE FOLLOWING INFORMATION:

(I) THE NAME AND ADDRESS OF THE LEGAL REPRESENTATIVE AND THE BASIS FOR HIS OR HER REPRESENTATION OF THE INJURED INFANT;

(II) THE NAME AND ADDRESS OF THE INJURED INFANT;

(III) THE NAME AND ADDRESS OF ANY PHYSICIAN PROVIDING OBSTETRICAL SERVICES WHO WAS PRESENT AT THE BIRTH AND THE NAME AND ADDRESS OF THE HOSPITAL AT WHICH THE BIRTH OCCURRED;

(IV) A DESCRIPTION OF THE DISABILITY FOR WHICH CLAIM IS MADE;

(V) THE TIME AND PLACE WHERE THE INJURY OCCURRED;

(VI) A BRIEF STATEMENT OF THE FACTS AND CIRCUMSTANCES SURROUNDING THE INJURY AND GIVING RISE TO THE CLAIM;

(VII) ALL AVAILABLE RELEVANT MEDICAL RECORDS RELATING TO THE PERSON WHO ALLEGEDLY SUFFERED A BIRTH-RELATED NEUROLOGICAL INJURY AND AN IDENTIFICATION OF ANY UNAVAILABLE RECORDS KNOWN TO THE CLAIMANT AND THE REASONS FOR THEIR UNAVAILABILITY;

(VIII) APPROPRIATE ASSESSMENTS, EVALUATIONS, AND PROGNOSES AND SUCH OTHER RECORDS AND DOCUMENTS AS ARE REASONABLY NECESSARY FOR THE DETERMINATION OF THE AMOUNT OF COMPENSATION TO BE PAID TO, OR ON BEHALF OF, THE INJURED INFANT ON ACCOUNT OF A BIRTH-RELATED NEUROLOGICAL INJURY;

(IX) DOCUMENTATION OF EXPENSES AND SERVICES INCURRED TO DATE, WHICH INDICATES WHETHER SUCH EXPENSES AND SERVICES HAVE BEEN PAID FOR, AND IF SO, BY WHOM; AND

(X) DOCUMENTATION OF ANY APPLICABLE PRIVATE OR GOVERNMENTAL SOURCE OF SERVICES OR REIMBURSEMENT RELATIVE TO THE ALLEGED IMPAIRMENTS.

(B) THE CLAIMANT SHALL FURNISH THE ADMINISTRATIVE LAW JUDGE WITH AS MANY COPIES OF THE PETITION AS REQUIRED FOR SERVICE UPON THE PROGRAM, ANY PHYSICIAN AND HOSPITAL NAMED IN THE PETITION, AND THE STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT, ALONG WITH A FIFTEEN DOLLAR FILING FEE. UPON RECEIPT OF THE PETITION, THE ADMINISTRATIVE LAW JUDGE SHALL IMMEDIATELY SERVE THE PROGRAM BY SERVICE UPON THE AGENT DESIGNATED TO ACCEPT SERVICE ON BEHALF OF THE PROGRAM IN THE PLAN OF OPERATION BY REGISTERED OR CERTIFIED MAIL, AND SHALL MAIL COPIES OF THE PETITION TO ANY PHYSICIAN AND HOSPITAL NAMED IN THE PETITION, THE STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT AND THE DEPARTMENT.

2. UPON RECEIPT OF THE PETITION, THE STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT SHALL EVALUATE THE CLAIM, AND IF IT DETERMINES THAT THERE IS REASON TO BELIEVE THAT THE ALLEGED INJURY RESULTED FROM, OR WAS AGGRAVATED BY, SUBSTANDARD CARE ON THE PART OF THE PHYSICIANS, IT SHALL TAKE ANY APPROPRIATE ACTION.

3. UPON RECEIPT OF THE PETITION, THE DEPARTMENT SHALL EVALUATE THE CLAIM, AND IF IT DETERMINES THAT THERE IS REASON TO BELIEVE THAT THE ALLEGED INJURY RESULTED FROM, OR WAS AGGRAVATED BY, SUBSTANDARD CARE ON THE PART OF THE HOSPITAL AT WHICH THE BIRTH OCCURRED, IT SHALL TAKE ANY APPROPRIATE ACTION.

4. THE PROGRAM SHALL HAVE THIRTY DAYS FROM THE DATE OF SERVICE IN WHICH TO FILE A RESPONSE TO THE PETITION, AND TO SUBMIT RELEVANT WRITTEN INFORMATION RELATING TO THE ISSUE OF WHETHER THE INJURY ALLEGED IS A BIRTH-RELATED NEUROLOGICAL INJURY, WITHIN THE MEANING OF THIS ARTICLE.

5. UPON THE ESTABLISHMENT OF A CLAIM BY THE STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT, SUCH CLAIM SHALL BE ADVANCED TO AN ADMINISTRATIVE LAW JUDGE, AUTHORIZED TO HEAR AND PASS UPON ALL CLAIMS FILED PURSUANT TO THIS ARTICLE.

S 2025. TOLLING OF STATUTE OF LIMITATIONS. THE STATUTE OF LIMITATIONS WITH RESPECT TO ANY CIVIL ACTION THAT MAY BE BROUGHT BY OR ON BEHALF OF AN INJURED INFANT ALLEGEDLY ARISING OUT OF OR RELATED TO A BIRTH-RELATED

INJURY SHALL BE TOLLED BY THE FILING OF A CLAIM IN ACCORDANCE WITH THIS SECTION, AND THE TIME SUCH CLAIM IS PENDING SHALL NOT BE COMPUTED AS PART OF THE PERIOD WITHIN WHICH SUCH CIVIL ACTION MAY BE BROUGHT.

S 2026. HEARING; PARTIES. 1. IMMEDIATELY AFTER SUCH PETITION HAS BEEN RECEIVED, THE ADMINISTRATIVE LAW JUDGE SHALL SET THE DATE FOR A HEARING, WHICH SHALL BE HELD NO SOONER THAN FORTY-FIVE DAYS AND NO LATER THAN ONE HUNDRED TWENTY DAYS AFTER THE FILING OF A PETITION, AND SHALL NOTIFY THE PARTIES THERETO OF THE TIME AND PLACE OF SUCH HEARING. THE HEARING SHALL BE HELD IN THE CITY OR COUNTY WHERE THE INJURY OCCURRED, OR IN A CONTIGUOUS CITY OR COUNTY, UNLESS OTHERWISE AGREED TO BY THE PARTIES AND AUTHORIZED BY THE ADMINISTRATIVE LAW JUDGE.

2. THE PARTIES TO THE HEARING REQUIRED UNDER THIS SECTION SHALL INCLUDE THE CLAIMANT AND THE PROGRAM.

S 2027. INTERROGATORIES AND DEPOSITIONS. ANY PARTY TO A PROCEEDING UNDER THIS ARTICLE MAY, UPON APPLICATION TO THE ADMINISTRATIVE LAW JUDGE SETTING FORTH THE MATERIALITY OF THE EVIDENCE TO BE GIVEN, SERVE INTERROGATORIES OR CAUSE THE DEPOSITIONS OF WITNESSES RESIDING WITHIN OR WITHOUT THE STATE TO BE TAKEN, THE COSTS TO BE TAXED AS EXPENSES INCURRED IN CONNECTION WITH THE FILING OF A CLAIM, IN ACCORDANCE WITH SUBDIVISION TWO OF SECTION TWO THOUSAND TWENTY-NINE OF THIS ARTICLE. SUCH DEPOSITIONS SHALL BE TAKEN AFTER GIVING NOTICE AND IN THE MANNER PRESCRIBED BY LAW, FOR DEPOSITIONS IN ACTIONS AT LAW, EXCEPT THAT THEY SHALL BE FILED WITH THE ADMINISTRATIVE LAW JUDGE.

S 2028. DETERMINATION OF CLAIMS; PRESUMPTION; FINDINGS OF ADMINISTRATIVE LAW JUDGE BINDING ON PARTICIPANTS; MEDICAL ADVISORY PANEL. 1. THE ADMINISTRATIVE LAW JUDGE SHALL DETERMINE, ON THE BASIS OF THE EVIDENCE PRESENTED TO IT, THE FOLLOWING ISSUES:

(A) WHETHER THE INJURIES CLAIMED ARE BIRTH-RELATED NEUROLOGICAL INJURIES AS DEFINED IN SECTION TWO THOUSAND TWENTY-TWO OF THIS ARTICLE. A REBUTTABLE PRESUMPTION SHALL ARISE THAT THE INJURY ALLEGED IS A BIRTH-RELATED NEUROLOGICAL INJURY WHERE IT HAS BEEN DEMONSTRATED, TO THE SATISFACTION OF THE ADMINISTRATIVE LAW JUDGE, THAT THE INFANT HAS SUSTAINED A BRAIN OR SPINAL CORD INJURY CAUSED BY OXYGEN DEPRIVATION OR MECHANICAL INJURY, AND THAT THE INFANT WAS THEREBY RENDERED PERMANENTLY NONAMBULATORY, APHASIC AND INCONTINENT.

IF EITHER PARTY DISAGREES WITH SUCH PRESUMPTION, THAT PARTY SHALL HAVE THE BURDEN OF PROVING THAT THE INJURIES ALLEGED ARE NOT BIRTH-RELATED NEUROLOGICAL INJURIES WITHIN THE MEANING OF THIS ARTICLE.

(B) WHETHER OBSTETRICAL SERVICES WERE DELIVERED BY A PARTICIPATING PHYSICIAN AT THE BIRTH.

(C) WHETHER THE BIRTH OCCURRED IN A PARTICIPATING HOSPITAL.

(D) HOW MUCH COMPENSATION, IF ANY, IS AWARDABLE PURSUANT TO SECTION TWO THOUSAND TWENTY-NINE OF THIS ARTICLE.

(E) IF THE ADMINISTRATIVE LAW JUDGE DETERMINES THAT THE INJURY ALLEGED IS NOT A BIRTH-RELATED NEUROLOGICAL INJURY WITHIN THE MEANING OF THIS ARTICLE, THAT OBSTETRICAL SERVICES WERE NOT DELIVERED BY A PARTICIPATING PHYSICIAN AT THE BIRTH, OR THAT THE BIRTH DID NOT OCCUR IN A PARTICIPATING HOSPITAL, IT SHALL CAUSE A COPY OF SUCH DETERMINATION TO BE SENT IMMEDIATELY TO THE PARTIES BY REGISTERED OR CERTIFIED MAIL.

(F) BY BECOMING A PARTICIPATING PHYSICIAN OR HOSPITAL EACH PARTICIPANT IS BOUND FOR ALL PURPOSES INCLUDING ANY SUIT AT LAW AGAINST A PARTICIPATING PHYSICIAN OR PARTICIPATING HOSPITAL, BY THE FINDING OF THE ADMINISTRATIVE LAW JUDGE (OR ANY APPEAL THEREFROM) WITH RESPECT TO WHETHER SUCH INJURY IS BIRTH-RELATED.

2. THE DEANS OF THE MEDICAL SCHOOLS OF THE STATE SHALL DEVELOP A PLAN WHEREBY EACH CLAIM FILED WITH THE ADMINISTRATIVE LAW JUDGE IS REVIEWED

BY A PANEL OF THREE QUALIFIED AND IMPARTIAL PHYSICIANS. THIS PANEL SHALL FILE ITS REPORT AND RECOMMENDATIONS AS TO WHETHER THE INJURY ALLEGED IS A BIRTH-RELATED NEUROLOGICAL INJURY WITHIN THE MEANING OF THIS ARTICLE WITH THE ADMINISTRATIVE LAW JUDGE AT LEAST TEN DAYS PRIOR TO THE DATE SET FOR HEARING PURSUANT TO SECTION TWO THOUSAND TWENTY-SIX OF THIS ARTICLE. AT THE REQUEST OF THE ADMINISTRATIVE LAW JUDGE, AT LEAST ONE MEMBER OF THE PANEL SHALL BE AVAILABLE TO TESTIFY AT THE HEARING. THE ADMINISTRATIVE LAW JUDGE MUST CONSIDER, BUT SHALL NOT BE BOUND BY, THE RECOMMENDATION OF THE PANEL.

S 2029. ADMINISTRATIVE LAW JUDGE AWARDS FOR BIRTH-RELATED NEUROLOGICAL INJURIES; NOTICE OF AWARD. UPON DETERMINING THAT AN INFANT HAS SUSTAINED A BIRTH-RELATED NEUROLOGICAL INJURY, THAT OBSTETRICAL SERVICES WERE DELIVERED BY A PARTICIPATING PHYSICIAN AT THE BIRTH, AND THAT THE BIRTH OCCURRED IN A PARTICIPATING HOSPITAL, THE ADMINISTRATIVE LAW JUDGE SHALL MAKE AN AWARD PROVIDING COMPENSATION FOR THE FOLLOWING ITEMS RELATIVE TO SUCH INJURY:

1. ACTUAL MEDICALLY NECESSARY AND REASONABLE EXPENSES OF MEDICAL AND HOSPITAL, REHABILITATIVE, RESIDENTIAL AND CUSTODIAL CARE AND SERVICE, SPECIAL EQUIPMENT OR FACILITIES, AND RELATED TRAVEL. HOWEVER, SUCH EXPENSES SHALL NOT INCLUDE:

(A) EXPENSES FOR ITEMS OR SERVICES THAT THE INFANT HAS RECEIVED, OR IS ENTITLED TO RECEIVE, UNDER THE LAWS OF ANY STATE OR THE FEDERAL GOVERNMENT EXCEPT TO THE EXTENT PROHIBITED BY FEDERAL LAW;

(B) EXPENSES FOR ITEMS OR SERVICES THAT THE INFANT HAS RECEIVED, OR IS CONTRACTUALLY ENTITLED TO RECEIVE, FROM ANY PREPAID HEALTH PLAN, HEALTH MAINTENANCE ORGANIZATION, OR OTHER PRIVATE INSURING ENTITY;

(C) EXPENSES FOR WHICH THE INFANT HAS RECEIVED REIMBURSEMENT, OR FOR WHICH THE INFANT IS ENTITLED TO RECEIVE REIMBURSEMENT, UNDER THE LAWS OF ANY STATE OR FEDERAL GOVERNMENT EXCEPT TO THE EXTENT PROHIBITED BY FEDERAL LAW; AND

(D) EXPENSES FOR WHICH THE INFANT HAS RECEIVED REIMBURSEMENT, OR FOR WHICH THE INFANT IS CONTRACTUALLY ENTITLED TO RECEIVE REIMBURSEMENT, PURSUANT TO THE PROVISIONS OF ANY HEALTH OR SICKNESS INSURANCE POLICY OR OTHER PRIVATE INSURANCE PROGRAM.

2. EXPENSES OF MEDICAL AND HOSPITAL SERVICES UNDER SUBDIVISION ONE OF THIS SECTION SHALL BE LIMITED TO SUCH CHARGES AS PREVAIL IN THE SAME COMMUNITY FOR SIMILAR TREATMENT OF INJURED PERSONS OF A LIKE STANDARD OF LIVING WHEN SUCH TREATMENT IS PAID FOR BY THE INJURED PERSON.

3. LOSS OF EARNINGS FROM THE AGE OF EIGHTEEN. AN INFANT FOUND TO HAVE SUSTAINED A BIRTH-RELATED NEUROLOGICAL INJURY SHALL BE CONCLUSIVELY PRESUMED TO HAVE BEEN ABLE TO EARN INCOME FROM WORK FROM THE AGE OF EIGHTEEN THROUGH THE AGE OF SIXTY-FIVE, IF HE OR SHE HAD NOT BEEN INJURED, IN THE AMOUNT OF FIFTY PERCENT OF THE AVERAGE WEEKLY WAGE IN THE STATE OF WORKERS IN THE PRIVATE, NONFARM SECTOR.

4. REASONABLE EXPENSES INCURRED IN CONNECTION WITH THE FILING OF A CLAIM UNDER THIS ARTICLE, INCLUDING REASONABLE ATTORNEYS' FEES, WHICH SHALL BE SUBJECT TO THE APPROVAL AND AWARD OF THE ADMINISTRATIVE LAW JUDGE.

5. A COPY OF THE AWARD SHALL BE SENT IMMEDIATELY BY REGISTERED OR CERTIFIED MAIL TO THE PARTIES.

S 2030. LIMITATION ON CLAIMS. ANY CLAIM UNDER THIS ARTICLE THAT IS FILED MORE THAN TEN YEARS AFTER THE BIRTH OF AN INFANT ALLEGED TO HAVE A BIRTH-RELATED NEUROLOGICAL INJURY IS BARRED.

S 2031. SCOPE. THIS ARTICLE APPLIES TO ALL CLAIMS FOR BIRTH-RELATED NEUROLOGICAL INJURIES OCCURRING IN THIS STATE ON OR AFTER JANUARY FIRST, TWO THOUSAND TEN. THIS ARTICLE SHALL NOT APPLY TO DISABILITY OR DEATH

CAUSED BY GENETIC OR CONGENITAL ABNORMALITIES, OR DISABILITY OR DEATH CAUSED BY BIRTH AT HOME UNATTENDED BY A PHYSICIAN.

S 2032. BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION FUND. THERE IS ESTABLISHED THE BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION FUND TO FINANCE THE NEW YORK BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PROGRAM CREATED BY THIS ARTICLE.

S 2033. BOARD OF DIRECTORS; APPOINTMENT; VACANCIES; TERM. 1. THE BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PROGRAM SHALL BE GOVERNED BY A BOARD OF FIVE DIRECTORS.

2. DIRECTORS SHALL BE APPOINTED FOR A TERM OF THREE YEARS OR UNTIL THEIR SUCCESSORS ARE APPOINTED AND HAVE QUALIFIED.

3. (A) THE DIRECTORS SHALL BE APPOINTED BY THE GOVERNOR AS FOLLOWS:

(I) ONE CITIZEN REPRESENTATIVE;

(II) ONE REPRESENTATIVE OF PARTICIPATING PHYSICIANS;

(III) ONE REPRESENTATIVE OF PARTICIPATING HOSPITALS;

(IV) ONE REPRESENTATIVE OF LIABILITY INSURERS; AND

(V) ONE REPRESENTATIVE OF PHYSICIANS OTHER THAN PARTICIPATING PHYSICIANS.

(B) THE GOVERNOR MAY SELECT THE REPRESENTATIVE OF THE PARTICIPATING PHYSICIANS FROM A LIST OF AT LEAST THREE NAMES TO BE RECOMMENDED BY THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS; THE REPRESENTATIVE OF PARTICIPATING HOSPITALS FROM A LIST OF AT LEAST THREE NAMES TO BE RECOMMENDED BY THE HEALTH CARE ASSOCIATION OF NEW YORK STATE; THE REPRESENTATIVE OF LIABILITY INSURERS FROM A LIST OF AT LEAST THREE NAMES, ONE OF WHICH IS RECOMMENDED BY THE AMERICAN INSURANCE ASSOCIATION, ONE BY THE ALLIANCE OF AMERICAN INSURERS, AND ONE BY THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS; AND THE REPRESENTATIVE OF PHYSICIANS OTHER THAN PARTICIPATING PHYSICIANS FROM A LIST OF AT LEAST THREE NAMES TO BE RECOMMENDED BY THE MEDICAL SOCIETY OF NEW YORK. IN NO CASE SHALL THE GOVERNOR BE BOUND TO MAKE ANY APPOINTMENT FROM AMONG THE NOMINEES OF THE RESPECTIVE ASSOCIATIONS.

4. THE GOVERNOR SHALL PROMPTLY NOTIFY THE ASSOCIATION, WHICH MAY MAKE NOMINATIONS, OF ANY VACANCY OTHER THAN BY EXPIRATION AMONG THE MEMBERS OF THE BOARD REPRESENTING A PARTICULAR INTEREST AND LIKE NOMINATIONS MAY BE MADE FOR THE FILLING OF THE VACANCY.

5. THE DIRECTORS SHALL ACT BY MAJORITY VOTE WITH FIVE DIRECTORS CONSTITUTING A QUORUM FOR THE TRANSACTION OF ANY BUSINESS OR THE EXERCISE OF ANY POWER OF THE PROGRAM. THE DIRECTORS SHALL SERVE WITHOUT SALARY, BUT EACH DIRECTOR SHALL BE REIMBURSED FOR ACTUAL AND NECESSARY EXPENSES INCURRED IN THE PERFORMANCE OF HIS OR HER OFFICIAL DUTIES AS A DIRECTOR OF THE PROGRAM. THE DIRECTORS SHALL NOT BE SUBJECT TO ANY PERSONAL LIABILITY WITH RESPECT TO THE ADMINISTRATION OF THE PROGRAM.

6. THE BOARD ESTABLISHED BY THIS SECTION SHALL HAVE THE POWER TO ADMINISTER THE PROGRAM, ADMINISTER THE BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION FUND, APPOINT A SERVICE COMPANY OR COMPANIES TO ADMINISTER THE PAYMENT OF CLAIMS ON BEHALF OF THE PROGRAM, DIRECT THE INVESTMENT AND REINVESTMENT OF ANY SURPLUS IN THE FUND OVER LOSSES AND EXPENSES, PROVIDED ANY INVESTMENT INCOME GENERATED THEREBY REMAINS IN THE FUND, AND REINSURE THE RISKS OF THE FUND IN WHOLE OR IN PART.

S 2034. PLAN OF OPERATION. 1. ON OR BEFORE SEPTEMBER THIRTIETH, TWO THOUSAND TEN, THE DIRECTORS OF THE PROGRAM SHALL SUBMIT TO THE COMMISSIONER FOR REVIEW A PROPOSED PLAN OF OPERATIONS CONSISTENT WITH THIS ARTICLE.

2. THE PLAN OF OPERATION SHALL PROVIDE FOR THE EFFICIENT ADMINISTRATION OF THE PROGRAM AND FOR THE PROMPT PROCESSING OF CLAIMS MADE

AGAINST THE FUND PURSUANT TO AN AWARD UNDER THIS ARTICLE. THE PLAN SHALL CONTAIN OTHER PROVISIONS INCLUDING:

(A) ESTABLISHMENT OF NECESSARY FACILITIES;

(B) MANAGEMENT OF THE FUND;

(C) APPOINTMENT OF SERVICING CARRIERS OR OTHER SERVICING ARRANGEMENTS TO ADMINISTER THE PROCESSING OF CLAIMS AGAINST THE FUND; AND

(D) ANY OTHER MATTERS NECESSARY FOR THE EFFICIENT OPERATION OF THE PROGRAM.

3. THE PLAN OF OPERATION SHALL BE SUBJECT TO APPROVAL BY THE COMMISSIONER AFTER CONSULTATION WITH REPRESENTATIVES OF INTERESTED INDIVIDUALS AND ORGANIZATIONS. IF THE COMMISSIONER DISAPPROVES ALL OR ANY PART OF THE PROPOSED PLAN OF OPERATION, THE DIRECTORS SHALL WITHIN THIRTY DAYS SUBMIT FOR REVIEW AN APPROPRIATE REVISED PLAN OF OPERATION. IF THE DIRECTORS FAIL TO DO SO, THE COMMISSIONER SHALL PROMULGATE A PLAN OF OPERATION. THE PLAN OF OPERATION APPROVED OR PROMULGATED BY THE COMMISSIONER SHALL BECOME EFFECTIVE AND OPERATIONAL UPON ORDER OF THE COMMISSIONER.

4. AMENDMENTS TO THE PLAN OF OPERATION MAY BE MADE BY THE DIRECTORS OF THE PROGRAM, SUBJECT TO THE APPROVAL OF THE COMMISSIONER.

S 2035. FUNDS TO BE HELD IN RESTRICTED CASH ACCOUNT. ALL FUNDS, SHALL BE HELD IN A SEPARATE RESTRICTED CASH ACCOUNT UNDER THE SOLE CONTROL OF AN INDEPENDENT FUND MANAGER TO BE SELECTED BY THE DIRECTORS. THE FUND, AND ANY INCOME FROM IT, SHALL BE DISBURSED FOR THE PAYMENT OF AWARDS AS PROVIDED IN THIS ARTICLE AND FOR THE PAYMENT OF THE EXPENSES OF ADMINISTRATION OF THE FUND.

S 2036. ASSESSMENTS. FUNDS FOR THIS PROGRAM SHALL BE DERIVED FROM THE HOSPITAL EXCESS LIABILITY POOL, ENACTED BY SECTION EIGHTEEN OF CHAPTER TWO HUNDRED SIXTY-SIX OF THE LAWS OF NINETEEN HUNDRED EIGHTY-SIX, AS AMENDED, IN AN AMOUNT DETERMINED BY THE DIRECTORS OF THE FUND AND CERTIFIED BY THE SUPERINTENDENT OF INSURANCE TO BE ACTUARIALLY SOUND.

S 2037. ACTUARIAL INVESTIGATION, VALUATIONS, GAIN/LOSS ANALYSIS; NOTICE IF ASSESSMENTS PROVE INSUFFICIENT. THE SUPERINTENDENT OF INSURANCE SHALL UNDERTAKE AN ACTUARIAL INVESTIGATION OF THE REQUIREMENTS OF THE FUND BASED ON THE FUND'S EXPERIENCE IN THE FIRST YEAR OF OPERATION, INCLUDING WITHOUT LIMITATION THE ASSETS AND LIABILITIES OF THE FUND. PURSUANT TO SUCH INVESTIGATION, THE SUPERINTENDENT OF INSURANCE SHALL ESTABLISH THE RATE OF CONTRIBUTION FROM THE HOSPITAL EXCESS LIABILITY POOL.

FOLLOWING THE INITIAL VALUATION, THE SUPERINTENDENT OF INSURANCE SHALL CAUSE AN ACTUARIAL VALUATION TO BE MADE OF THE ASSETS AND LIABILITIES OF THE FUND NO LESS FREQUENTLY THAN BIENNIALLY. PURSUANT TO THE RESULTS OF SUCH VALUATIONS, THE SUPERINTENDENT OF INSURANCE SHALL PREPARE A STATEMENT AS TO THE APPLICABLE CONTRIBUTION FROM THE HOSPITAL EXCESS LIABILITY POOL.

S 2. This act shall take effect immediately.