

2444

2011-2012 Regular Sessions

I N S E N A T E

January 21, 2011

Introduced by Sen. HANNON -- 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:

1 Section 1. The public health law is amended by adding a new article
2 20-B to read as follows:

3 ARTICLE 20-B

4 NEW YORK BIRTH-RELATED NEUROLOGICAL
5 INJURY COMPENSATION ACT

6 SECTION 2021. SHORT TITLE.

7 2022. DEFINITIONS.

8 2023. NEW YORK BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION
9 PROGRAM; EXCLUSIVE REMEDY; EXCEPTION.

10 2024. FILING OF CLAIMS; REVIEW BY STATE BOARD FOR PROFESSIONAL
11 MEDICAL CONDUCT; FILING OF RESPONSES; DETERMINATION OF
12 ESTABLISHED CLAIMS BY ADMINISTRATIVE LAW JUDGE.

13 2025. TOLLING OF STATUTE OF LIMITATIONS.

14 2026. HEARING; PARTIES.

15 2027. INTERROGATORIES AND DEPOSITIONS.

16 2028. DETERMINATION OF CLAIMS; PRESUMPTION; FINDINGS OF ADMINIS-
17 TRATIVE LAW JUDGE BINDING ON PARTICIPANTS; MEDICAL ADVI-
18 SORY PANEL.

19 2029. ADMINISTRATIVE LAW JUDGE AWARDS FOR BIRTH-RELATED NEURO-
20 LOGICAL INJURIES; NOTICE OF AWARD.

21 2030. LIMITATION ON CLAIMS.

22 2031. SCOPE.

23 2032. BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION FUND.

24 2033. BOARD OF DIRECTORS; APPOINTMENT; VACANCIES; TERM.

25 2034. PLAN OF OPERATION.

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

LBD07194-01-1

2035. FUNDS TO BE HELD IN RESTRICTED CASH ACCOUNT.

2036. ASSESSMENTS.

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 COMPEN-
SATION ACT".

S 2022. DEFINITIONS. AS USED IN THIS ARTICLE:

1. "BIRTH-RELATED NEUROLOGICAL INJURY" MEANS A NON-PROGRESSIVE IMPAIR-
MENT 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 ADMINIS-
TRATOR, 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

1 CLAIMS BY ADMINISTRATIVE LAW JUDGE. 1. (A) IN ALL CLAIMS FILED UNDER
2 THIS ARTICLE, THE CLAIMANT SHALL FILE WITH THE ADMINISTRATIVE LAW JUDGE
3 A PETITION, SETTING FORTH THE FOLLOWING INFORMATION:
4 (I) THE NAME AND ADDRESS OF THE LEGAL REPRESENTATIVE AND THE BASIS FOR
5 HIS OR HER REPRESENTATION OF THE INJURED INFANT;
6 (II) THE NAME AND ADDRESS OF THE INJURED INFANT;
7 (III) THE NAME AND ADDRESS OF ANY PHYSICIAN PROVIDING OBSTETRICAL
8 SERVICES WHO WAS PRESENT AT THE BIRTH AND THE NAME AND ADDRESS OF THE
9 HOSPITAL AT WHICH THE BIRTH OCCURRED;
10 (IV) A DESCRIPTION OF THE DISABILITY FOR WHICH CLAIM IS MADE;
11 (V) THE TIME AND PLACE WHERE THE INJURY OCCURRED;
12 (VI) A BRIEF STATEMENT OF THE FACTS AND CIRCUMSTANCES SURROUNDING THE
13 INJURY AND GIVING RISE TO THE CLAIM;
14 (VII) ALL AVAILABLE RELEVANT MEDICAL RECORDS RELATING TO THE PERSON
15 WHO ALLEGEDLY SUFFERED A BIRTH-RELATED NEUROLOGICAL INJURY AND AN IDEN-
16 TIFICATION OF ANY UNAVAILABLE RECORDS KNOWN TO THE CLAIMANT AND THE
17 REASONS FOR THEIR UNAVAILABILITY;
18 (VIII) APPROPRIATE ASSESSMENTS, EVALUATIONS, AND PROGNoses AND SUCH
19 OTHER RECORDS AND DOCUMENTS AS ARE REASONABLY NECESSARY FOR THE DETERMI-
20 NATION OF THE AMOUNT OF COMPENSATION TO BE PAID TO, OR ON BEHALF OF, THE
21 INJURED INFANT ON ACCOUNT OF A BIRTH-RELATED NEUROLOGICAL INJURY;
22 (IX) DOCUMENTATION OF EXPENSES AND SERVICES INCURRED TO DATE, WHICH
23 INDICATES WHETHER SUCH EXPENSES AND SERVICES HAVE BEEN PAID FOR, AND IF
24 SO, BY WHOM; AND
25 (X) DOCUMENTATION OF ANY APPLICABLE PRIVATE OR GOVERNMENTAL SOURCE OF
26 SERVICES OR REIMBURSEMENT RELATIVE TO THE ALLEGED IMPAIRMENTS.
27 (B) THE CLAIMANT SHALL FURNISH THE ADMINISTRATIVE LAW JUDGE WITH AS
28 MANY COPIES OF THE PETITION AS REQUIRED FOR SERVICE UPON THE PROGRAM,
29 ANY PHYSICIAN AND HOSPITAL NAMED IN THE PETITION, AND THE STATE BOARD
30 FOR PROFESSIONAL MEDICAL CONDUCT, ALONG WITH A FIFTEEN DOLLAR FILING
31 FEE. UPON RECEIPT OF THE PETITION, THE ADMINISTRATIVE LAW JUDGE SHALL
32 IMMEDIATELY SERVE THE PROGRAM BY SERVICE UPON THE AGENT DESIGNATED TO
33 ACCEPT SERVICE ON BEHALF OF THE PROGRAM IN THE PLAN OF OPERATION BY
34 REGISTERED OR CERTIFIED MAIL, AND SHALL MAIL COPIES OF THE PETITION TO
35 ANY PHYSICIAN AND HOSPITAL NAMED IN THE PETITION, THE STATE BOARD FOR
36 PROFESSIONAL MEDICAL CONDUCT AND THE DEPARTMENT.
37 2. UPON RECEIPT OF THE PETITION, THE STATE BOARD FOR PROFESSIONAL
38 MEDICAL CONDUCT SHALL EVALUATE THE CLAIM, AND IF IT DETERMINES THAT
39 THERE IS REASON TO BELIEVE THAT THE ALLEGED INJURY RESULTED FROM, OR WAS
40 AGGRAVATED BY, SUBSTANDARD CARE ON THE PART OF THE PHYSICIANS, IT SHALL
41 TAKE ANY APPROPRIATE ACTION.
42 3. UPON RECEIPT OF THE PETITION, THE DEPARTMENT SHALL EVALUATE THE
43 CLAIM, AND IF IT DETERMINES THAT THERE IS REASON TO BELIEVE THAT THE
44 ALLEGED INJURY RESULTED FROM, OR WAS AGGRAVATED BY, SUBSTANDARD CARE ON
45 THE PART OF THE HOSPITAL AT WHICH THE BIRTH OCCURRED, IT SHALL TAKE ANY
46 APPROPRIATE ACTION.
47 4. THE PROGRAM SHALL HAVE THIRTY DAYS FROM THE DATE OF SERVICE IN
48 WHICH TO FILE A RESPONSE TO THE PETITION, AND TO SUBMIT RELEVANT WRITTEN
49 INFORMATION RELATING TO THE ISSUE OF WHETHER THE INJURY ALLEGED IS A
50 BIRTH-RELATED NEUROLOGICAL INJURY, WITHIN THE MEANING OF THIS ARTICLE.
51 5. UPON THE ESTABLISHMENT OF A CLAIM BY THE STATE BOARD FOR PROFES-
52 SIONAL MEDICAL CONDUCT, SUCH CLAIM SHALL BE ADVANCED TO AN ADMINISTRA-
53 TIVE LAW JUDGE, AUTHORIZED TO HEAR AND PASS UPON ALL CLAIMS FILED PURSU-
54 ANT TO THIS ARTICLE.
55 S 2025. TOLLING OF STATUTE OF LIMITATIONS. THE STATUTE OF LIMITATIONS
56 WITH RESPECT TO ANY CIVIL ACTION THAT MAY BE BROUGHT BY OR ON BEHALF OF

1 AN INJURED INFANT ALLEGEDLY ARISING OUT OF OR RELATED TO A BIRTH-RELATED
2 INJURY SHALL BE TOLLED BY THE FILING OF A CLAIM IN ACCORDANCE WITH THIS
3 SECTION, AND THE TIME SUCH CLAIM IS PENDING SHALL NOT BE COMPUTED AS
4 PART OF THE PERIOD WITHIN WHICH SUCH CIVIL ACTION MAY BE BROUGHT.

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

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

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

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

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

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

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

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

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

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

51 (F) BY BECOMING A PARTICIPATING PHYSICIAN OR HOSPITAL EACH PARTICIPANT
52 IS BOUND FOR ALL PURPOSES INCLUDING ANY SUIT AT LAW AGAINST A PARTIC-
53 IPATING PHYSICIAN OR PARTICIPATING HOSPITAL, BY THE FINDING OF THE
54 ADMINISTRATIVE LAW JUDGE (OR ANY APPEAL THEREFROM) WITH RESPECT TO
55 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.

1 S 2031. SCOPE. THIS ARTICLE APPLIES TO ALL CLAIMS FOR BIRTH-RELATED
2 NEUROLOGICAL INJURIES OCCURRING IN THIS STATE ON OR AFTER JANUARY FIRST,
3 TWO THOUSAND ELEVEN. THIS ARTICLE SHALL NOT APPLY TO DISABILITY OR DEATH
4 CAUSED BY GENETIC OR CONGENITAL ABNORMALITIES, OR DISABILITY OR DEATH
5 CAUSED BY BIRTH AT HOME UNATTENDED BY A PHYSICIAN.

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

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

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

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

16 (I) ONE CITIZEN REPRESENTATIVE;

17 (II) ONE REPRESENTATIVE OF PARTICIPATING PHYSICIANS;

18 (III) ONE REPRESENTATIVE OF PARTICIPATING HOSPITALS;

19 (IV) ONE REPRESENTATIVE OF LIABILITY INSURERS; AND

20 (V) ONE REPRESENTATIVE OF PHYSICIANS OTHER THAN PARTICIPATING PHYSI-
21 CIANS.

22 (B) THE GOVERNOR MAY SELECT THE REPRESENTATIVE OF THE PARTICIPATING
23 PHYSICIANS FROM A LIST OF AT LEAST THREE NAMES TO BE RECOMMENDED BY THE
24 AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS; THE REPRESENTATIVE
25 OF PARTICIPATING HOSPITALS FROM A LIST OF AT LEAST THREE NAMES TO BE
26 RECOMMENDED BY THE HEALTH CARE ASSOCIATION OF NEW YORK STATE; THE REPRE-
27 SENTATIVE OF LIABILITY INSURERS FROM A LIST OF AT LEAST THREE NAMES, ONE
28 OF WHICH IS RECOMMENDED BY THE AMERICAN INSURANCE ASSOCIATION, ONE BY
29 THE ALLIANCE OF AMERICAN INSURERS, AND ONE BY THE NATIONAL ASSOCIATION
30 OF INDEPENDENT INSURERS; AND THE REPRESENTATIVE OF PHYSICIANS OTHER THAN
31 PARTICIPATING PHYSICIANS FROM A LIST OF AT LEAST THREE NAMES TO BE
32 RECOMMENDED BY THE MEDICAL SOCIETY OF NEW YORK. IN NO CASE SHALL THE
33 GOVERNOR BE BOUND TO MAKE ANY APPOINTMENT FROM AMONG THE NOMINEES OF THE
34 RESPECTIVE ASSOCIATIONS.

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

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

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

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

1 2. THE PLAN OF OPERATION SHALL PROVIDE FOR THE EFFICIENT ADMINIS-
2 TRATION OF THE PROGRAM AND FOR THE PROMPT PROCESSING OF CLAIMS MADE
3 AGAINST THE FUND PURSUANT TO AN AWARD UNDER THIS ARTICLE. THE PLAN SHALL
4 CONTAIN OTHER PROVISIONS INCLUDING:

5 (A) ESTABLISHMENT OF NECESSARY FACILITIES;
6 (B) MANAGEMENT OF THE FUND;
7 (C) APPOINTMENT OF SERVICING CARRIERS OR OTHER SERVICING ARRANGEMENTS
8 TO ADMINISTER THE PROCESSING OF CLAIMS AGAINST THE FUND; AND
9 (D) ANY OTHER MATTERS NECESSARY FOR THE EFFICIENT OPERATION OF THE
10 PROGRAM.

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

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

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

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

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

41 FOLLOWING THE INITIAL VALUATION, THE SUPERINTENDENT OF INSURANCE SHALL
42 CAUSE AN ACTUARIAL VALUATION TO BE MADE OF THE ASSETS AND LIABILITIES OF
43 THE FUND NO LESS FREQUENTLY THAN BIENNIALY. PURSUANT TO THE RESULTS OF
44 SUCH VALUATIONS, THE SUPERINTENDENT OF INSURANCE SHALL PREPARE A STATE-
45 MENT AS TO THE APPLICABLE CONTRIBUTION FROM THE HOSPITAL EXCESS LIABIL-
46 ITY POOL.

47 S 2. This act shall take effect immediately.