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

5976

2015-2016 Regular Sessions

I N S E N A T E

June 15, 2015

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

AN ACT to amend the public health law, in relation to expanding the function of the New York state medical indemnity fund such that it will serve as a funding source for future health care costs associated with neurological injuries resulting from medical services provided or not provided

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

Section 1. Section 2999-g of the public health law, as added by section 52 of part H of chapter 59 of the laws of 2011, is amended to read as follows:

S 2999-g. Purpose of this title. Creation AND EXPANSION of the New York state medical indemnity fund. [There is hereby created the] 1. THE New York state medical indemnity fund (the "fund")[. The purpose of the fund is] WAS CREATED to provide a funding source for future health care costs associated with birth related neurological injuries, in order to reduce premium costs for medical malpractice insurance coverage.

2. TO FURTHER THE STATE'S INTEREST IN REDUCING PREMIUM COSTS FOR MEDICAL MALPRACTICE INSURANCE COVERAGE, THE FUND'S MISSION IS EXPANDED SUCH THAT THE FUND WILL PROVIDE A FUNDING SOURCE FOR FUTURE HEALTH CARE COSTS ASSOCIATED WITH ALL NEUROLOGICAL INJURIES RESULTING FROM MEDICAL SERVICES PROVIDED OR NOT PROVIDED AND NOT JUST THOSE THAT ARE BIRTH RELATED.

S 2. Section 2999-h of the public health law, as added by section 52 of part H of chapter 59 of the laws of 2011, is amended to read as follows:

S 2999-h. Definitions. As used in this title, unless the context or subject matter requires otherwise:

1. ["Birth-related neurological injury" means an injury to the brain or spinal cord of a live infant caused by the deprivation of oxygen or

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

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mechanical injury occurring in the course of labor, delivery or resuscitation or by other medical services provided or not provided during delivery admission that rendered the infant with a permanent and substantial motor impairment or with a developmental disability as that term is defined by section 1.03 of the mental hygiene law, or both. This definition shall apply to live births only.

2.] "Fund" means the New York state medical indemnity fund.

2. "NEUROLOGICAL INJURY" MEANS AN INJURY TO THE BRAIN OR SPINAL CORD OF A PERSON CAUSED BY MEDICAL SERVICES PROVIDED OR NOT PROVIDED THAT RENDERED THE PERSON WITH A:

(A) PERMANENT AND SUBSTANTIAL MOTOR IMPAIRMENT, AND/OR

(B) DISABILITY THAT (I) IS ATTRIBUTABLE TO (A) DEVELOPMENTAL DISABILITIES, CEREBRAL PALSY, EPILEPSY, NEUROLOGICAL IMPAIRMENT, FAMILIAL DYSAUTONOMIA OR AUTISM; (B) ANY OTHER CONDITION OF A PERSON FOUND TO BE CLOSELY RELATED TO DEVELOPMENTAL DISABILITIES BECAUSE SUCH CONDITION RESULTS IN SIMILAR IMPAIRMENT OF GENERAL INTELLECTUAL FUNCTIONING OR ADAPTIVE BEHAVIOR TO THAT OF DEVELOPMENTALLY DISABLED PERSONS OR REQUIRES TREATMENT AND SERVICES SIMILAR TO THOSE REQUIRED FOR SUCH PERSON; OR (C) DYSLEXIA RESULTING FROM A DISABILITY DESCRIBED IN SUBPARAGRAPH (A) OR (B) OF THIS PARAGRAPH; (II) HAS CONTINUED OR CAN BE EXPECTED TO CONTINUE INDEFINITELY; AND (III) CONSTITUTES A SUBSTANTIAL HANDICAP TO SUCH PERSON'S ABILITY TO FUNCTION NORMALLY IN SOCIETY.

3. "Qualifying health care costs" means the future medical, hospital, surgical, nursing, dental, rehabilitation, custodial, durable medical equipment, home modifications, assistive technology, vehicle modifications, prescription and non-prescription medications, and other health care costs actually incurred for services rendered to and supplies utilized by qualified plaintiffs, which are necessary to meet their health care needs as determined by their treating physicians, physician assistants, or nurse practitioners and as otherwise defined by the commissioner in regulation.

4. "Qualified plaintiff" means every plaintiff or claimant who (i) has been found by a jury or court to have sustained a [birth-related] neurological injury as the result of medical malpractice, or (ii) has sustained a [birth-related] neurological injury as the result of alleged medical malpractice, and has settled his or her lawsuit or claim therefor.

5. Any reference to the "department of financial services" and the "superintendent of financial services" in this title shall mean, prior to October third, two thousand eleven, respectively, the "department of insurance" and "superintendent of insurance."

S 3. Section 2999-i of the public health law, as added by section 52 of part H of chapter 59 of the laws of 2011, subdivision 1 as amended by section 29 of part D of chapter 56 of the laws of 2012, is amended to read as follows:

S 2999-i. Custody and administration of the fund. 1. (a) The commissioner of taxation and finance shall be the custodian of the fund and the special account established pursuant to section ninety-nine-t of the state finance law. All payments from the fund shall be made by the commissioner of taxation and finance upon certificates signed by the superintendent of financial services, or his or her designee, as hereinafter provided. The fund shall be separate and apart from any other fund and from all other state monies; provided, however, that monies of the fund may be invested as set forth in paragraph (b) of this subdivision. No monies from the fund shall be transferred to any other fund, nor

shall any such monies be applied to the making of any payment for any purpose other than the purpose set forth in this title.

(b) Any monies of the fund not required for immediate use may, at the discretion of the [commissioner] SUPERINTENDENT of financial services in consultation with the commissioner of health and the director of the budget, be invested by the commissioner of taxation and finance in obligations of the United States or the state or obligations the principal and interest of which are guaranteed by the United States or the state. The proceeds of any such investment shall be retained by the fund as assets to be used for the purposes of the fund.

2. (a) The fund shall be administered by the superintendent of financial services or his or her designee in accordance with the provisions of this article.

(b) The superintendent of financial services shall have all powers necessary and proper to carry out the purposes of the fund.

(c) Notwithstanding any contrary provision of this section, sections one hundred twelve and one hundred sixty-three of the state finance law or any other contrary provision of law, the superintendent of financial services is authorized to enter into a contract or contracts without a competitive bid or request for proposal process for purposes of administering the fund for the first year of its operation and in preparation therefor.

(d) The department of financial services and the department OF HEALTH shall post on their websites information about the fund, eligibility for enrollment in the fund, and the process for enrollment in the fund.

3. The expense of administering the fund, including the expenses incurred by the department OF FINANCIAL SERVICES AND/OR THE DEPARTMENT OF HEALTH, shall be paid from the fund.

4. Monies for the fund will be provided pursuant to this chapter.

5. For the state fiscal year beginning April first, two thousand [eleven] FOURTEEN and ending March thirty-first, two thousand [twelve, the state fiscal year beginning April first, two thousand twelve and ending March thirty-first, two thousand thirteen, and the state fiscal year beginning April first, two thousand thirteen and ending March thirty-first, two thousand fourteen] FIFTEEN, AND ANNUALLY THEREAFTER, the superintendent of financial services shall cause to be deposited into the fund for each such fiscal year the amount appropriated for such purpose. [Beginning April first, two thousand fourteen and annually thereafter, the superintendent of financial services shall cause to be deposited into the fund, subject to available appropriations, an amount equal to the difference between the amount appropriated to the fund in the preceding fiscal year, as increased by the adjustment factor defined in subdivision seven of this section, and the assets of the fund at the conclusion of that fiscal year.] THE TOTAL AMOUNT TO BE DEPOSITED INTO THE FUND SHALL BE BASED UPON AN ACTUARIAL CALCULATION, CONDUCTED QUARTERLY BY THE SUPERINTENDENT OF FINANCIAL SERVICES, OF THE ESTIMATED LIABILITIES OF THE FUND FOR THE NEXT SUCCEEDING YEAR.

6. (a) Following the deposit referenced in subdivision five of this section, the superintendent of financial services shall conduct an actuarial calculation of the estimated liabilities of the fund for the coming year resulting from the qualified plaintiffs enrolled in the fund. The FUND administrator shall from time to time adjust such calculation. If the total of all estimates of current liabilities equals or exceeds eighty percent of the fund's assets, then the fund shall not accept any new enrollments until a new deposit has been made pursuant to subdivision five of this section. When, as a result of such new deposit,

the fund's liabilities no longer exceed eighty percent of the fund's assets, the fund administrator shall enroll new qualified plaintiffs in the order that an application for enrollment has been submitted in accordance with subdivision seven of section twenty-nine hundred ninety-nine-j of this title.

(b) Whenever enrollment is suspended pursuant to paragraph (a) of this subdivision and until such time as enrollment resumes pursuant to such paragraph: (i) notice of such suspension shall be promptly posted on the [department's] website OF THE DEPARTMENT OF HEALTH and on the website of the department of financial services; (ii) the fund administrator shall deny each application for enrollment that had been received but not accepted prior to the date of suspension and each application for enrollment received ON AND after the date of such suspension; and (iii) notification of each such denial shall be made to the plaintiff or claimant or persons authorized to act on behalf of such plaintiff or claimant and all defendants in regard to such plaintiff or claimant, to the extent they are known to the fund administrator. Judgments and settlements for plaintiffs or claimants for whom applications are denied under this paragraph or who are not eligible for enrollment due to suspension pursuant to paragraph (a) of this subdivision shall be satisfied as if this title had not been enacted.

(c) Following a suspension, whenever enrollment resumes pursuant to paragraph (a) of this subdivision, notice that enrollment has resumed shall be promptly posted on the [department's] website OF THE DEPARTMENT OF HEALTH and on the website of the department of financial services.

(d) The suspension of enrollment pursuant to paragraph (a) of this subdivision shall not impact payment under the fund for any qualified plaintiffs already enrolled in the fund.

[7. For purposes of this section, the adjustment factor referenced in this section shall be the ten year rolling average medical component of the consumer price index as published by the United States department of labor, bureau of labor statistics, for the preceding ten years.]

S 4. Section 2999-j of the public health law, as added by section 52 of part H of chapter 59 of the laws of 2011, is amended to read as follows:

S 2999-j. Payments from the fund. 1. The fund shall be used to pay the qualifying health care costs of qualified plaintiffs.

2. The provision of qualifying health care costs to qualified plaintiffs shall not be subject to prior authorization, except as described by the commissioner in regulation; provided, however, that such regulation shall not prevent qualified plaintiffs from receiving care or assistance that would, at a minimum, be authorized under the [medicaid] MEDICAID program; and provided, further, that if any prior authorization is required by such regulation, the regulation shall require that requests for prior authorization be processed within a reasonably prompt period of time and shall identify a process for prompt administrative review of any denial of a request for prior authorization.

3. In determining the amount of qualifying health care costs to be paid from the fund, any such cost or expense that was or will, with reasonable certainty, be paid, replaced or indemnified from any collateral source as provided by subdivision (a) of section forty-five hundred forty-five of the civil practice law and rules shall not constitute a qualifying health care cost and shall not be paid from the fund. For purposes of this title, "collateral source" shall not include [medicare] MEDICARE or Medicaid.

4. The amount of qualifying health care costs to be paid from the fund shall be calculated: (a) with respect to services provided in private physician practices on the basis of one hundred percent of the usual and customary rates, as defined by the commissioner in regulation; or (b) with respect to all other services, on the basis of Medicaid rates of reimbursement or, where no such rates are available, as defined by the commissioner in regulation.

5. Claims for the payment or reimbursement from the fund of qualifying health care costs shall be made upon forms prescribed and furnished by the fund administrator in consultation with the commissioner and in conjunction with regulations establishing a mechanism for submission of claims by health care providers directly to the fund, where practicable.

6. (a) Every settlement agreement for claims arising out of a plaintiff's or claimant's [birth related] neurological injury subject to this title, and that provides for the payment of future [medical expenses] HEALTH CARE COSTS for the plaintiff or claimant, SHALL BE SUBMITTED FOR COURT REVIEW AND APPROVAL AND shall provide that, in the event the [administrator of the fund determines that the plaintiff or claimant is a qualified plaintiff] COURT FINDS THAT THERE HAS BEEN A PRIMA FACIE SHOWING THAT THE PLAINTIFF OR CLAIMANT IS A QUALIFIED PLAINTIFF, all payments for future [medical expenses] HEALTH CARE COSTS shall be paid in accordance with this title, in lieu of that portion of the settlement agreement that provides for payment of such [expenses] FUTURE HEALTH CARE COSTS. The plaintiff's or claimant's future medical expenses shall be paid in accordance with this title. When such a settlement agreement does not so provide, the court shall direct the modification of the agreement to include such term as a condition of court approval.

(b) In any case where the jury or court has made an award for future [medical expenses] HEALTH CARE COSTS arising out of a [birth related] neurological injury, [any party to such action or person authorized to act on behalf of such party may make application to the court that] SUBJECT TO THIS TITLE, THE COURT SHALL DETERMINE IF THERE HAS BEEN A PRIMA FACIE SHOWING THAT THE PLAINTIFF OR CLAIMANT IS A QUALIFIED PLAINTIFF, AND, IF THE COURT SHALL SO DETERMINE, the judgment SHALL reflect that, in lieu of that portion of the award that provides for payment of such [expenses, and upon a determination by the fund administrator that the plaintiff is a qualified plaintiff] FUTURE HEALTH CARE COSTS, the future [medical expenses] HEALTH CARE COSTS of the plaintiff OR CLAIMANT shall be paid out of the fund in accordance with this title. [Upon a finding by the court that the applicant has made a prima facie showing that the plaintiff is a qualified plaintiff, the court shall ensure that the judgment so provides.]

7. A qualified plaintiff shall be enrolled when [(a)] such plaintiff or person authorized to act on behalf of such person, upon notice to all defendants, or any of the defendants in regard to the plaintiff's claim, upon notice to such plaintiff, makes an application for enrollment by providing the fund administrator with a certified copy of the judgment or of the court approved settlement agreement; [and (b) the fund administrator determines upon the basis of such judgment or settlement agreement and any additional information the fund administrator shall request that the relevant provisions of subdivision six of this section have been met and that the plaintiff is a qualified plaintiff;] provided that no enrollment shall occur when the fund is closed to enrollment pursuant to subdivision six of section twenty-nine hundred ninety-nine-i of this title.

8. As to all claims, the fund administrator shall:

(a) determine which of such costs are qualifying health care costs to be paid from the fund; and

(b) thereupon certify to the commissioner of taxation and finance those costs that have been determined to be qualifying health care costs to be paid from the fund.

9. Payments from the fund shall be made by the commissioner of taxation and finance on the said certificate of the superintendent of financial services. No payment shall be made by the commissioner of taxation and finance in excess of the amount certified. Promptly upon receipt of the said certificate of the superintendent of financial services, the commissioner of taxation and finance shall pay the qualified plaintiff's health care provider or reimburse the qualified plaintiff the amount so certified for payment.

10. Payment from the fund shall not give the fund any right of recovery against any qualified plaintiff or such qualified plaintiff's attorney except in the case of fraud or mistake.

11. All health care providers shall accept from qualified plaintiff's or persons authorized to act on behalf of such plaintiff's assignments of the right to receive payments from the fund for qualifying health care costs.

12. Health insurers (other than [medicare] MEDICARE and Medicaid) shall be the primary payers of qualifying health care costs of qualified plaintiffs. Such costs shall be paid from the fund only to the extent that health insurers or other collateral sources or other persons are not otherwise obligated to make payments therefor. Health insurers that make payments for qualifying health care costs to or on behalf of qualified plaintiffs shall have no right of recovery against and shall have no lien upon the fund or any person or entity nor shall the fund constitute an additional payment source to offset the payments otherwise contractually required to be made by such health insurers. The superintendent of financial services shall have the authority to enforce the provisions of this subdivision.

13. Except as provided for by this title, with respect to a qualified plaintiff, no payment shall be required to be made by any defendant or such defendant's insurer for qualifying health care costs and no judgment shall be made or entered requiring that any such payment be made by any defendant or such defendant's insurer for such health care costs.

14. The determination of the qualified plaintiff's attorney's fee shall be based upon the entire sum awarded by the jury or the court or the full sum of the settlement, as the case may be. The qualified plaintiff's attorney's fee shall be paid in a lump sum by the defendants and their insurers pursuant to section four hundred seventy-four-a of the judiciary law; provided however that the portion of the [attorney] ATTORNEY'S fee that is allocated to the non-fund elements of damages shall be deducted from the non-fund portion of the award in a proportional manner.

15. The commissioner, in consultation with the superintendent of financial services, shall promulgate, amend and enforce all rules and regulations necessary for the proper administration of the fund in accordance with the provisions of this section, including, but not limited to, those concerning the payment of claims and concerning the actuarial calculations necessary to determine, annually, the total amount to be paid into the fund as provided herein, and as otherwise needed to implement this title.

16. The commissioner shall convene a consumer advisory committee for the purpose of REVIEWING THE RULES AND REGULATIONS PROMULGATED BY SUBDI-

VISION FIFTEEN OF THIS SECTION AND providing information, as requested by the commissioner, in the development of [the regulations authorized by subdivision fifteen of this section] ANY REVISIONS TO SUCH RULES AND REGULATIONS AND/OR ANY ADDITIONAL RULES AND REGULATIONS REQUIRED TO IMPLEMENT THIS TITLE.

S 5. This act shall take effect immediately and shall be deemed to have been in full force and effect on and after July 1, 2015, provided, however, that:

(a) with respect to lawsuits involving birth related neurological injury subject to this title (i.e., an injury to the brain or spinal cord of a live infant caused by the deprivation of oxygen or mechanical injury occurring in the course of labor, delivery or resuscitation or by other medical services provided or not provided during delivery admission that rendered the infant with a permanent and substantial motor impairment or with a developmental disability as that term is defined by section 1.03 of the mental hygiene law, or both), the provisions of this act shall apply if no judgment has been entered or no settlement agreement has been entered into by the parties before April 1, 2011, and, with respect to all other lawsuits involving neurological injury subject to this title, the provisions of this act shall apply if no judgment has been entered or no settlement has been entered into by the parties before the effective date of this act;

(b) this act shall not be construed to alter, change, affect, impair or defeat any rights, obligations, duties or interests accrued, incurred or conferred prior to the effective date of this act; and

(c) the provisions of this act shall become effective notwithstanding the failure of the commissioner of health or the superintendent of financial services to adopt or amend or promulgate rules and regulations implementing this act.