STATE OF NEW YORK

10222

IN ASSEMBLY

March 26, 2018

Introduced by M. of A. GOTTFRIED -- (at request of the Department of Health) -- read once and referred to the Committee on Health

AN ACT to amend the mental hygiene law and the state finance law, in relation to the New York state medical indemnity fund; to amend section 1 of a chapter of the laws of 2018, enacting Aid to Localities, as proposed in legislative bill numbers S.7503 and A.9503, in relation to suballocation of certain funds; and to repeal title 4 of article 29-D of the public health law, relating to the New York state medical indemnity fund

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Title 4 of article 29-D of the public health law is REPEALED.

§ 2. The mental hygiene law is amended by adding a new article 17 to read as follows:

ARTICLE 17

NEW YORK STATE MEDICAL INDEMNITY FUND

Section 17.01 Purpose of article; creation of the New York state medical indemnity fund.
17.03 Definitions.
17.05 Custody and administration of the fund.
17.07 Payments from the fund.

§ 17.01 Purpose of article; creation of the New York state medical indemnity fund.

There is hereby created the New York state medical indemnity fund (the "fund"). The purpose of the fund is 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.

§ 17.03 Definitions.

As used in this article, unless the context or subject matter requires otherwise:

(a) "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 in section 1.03 of this chapter, or both. This definition shall apply to live births only.

(b) "Fund" means the New York state medical indemnity fund.

(c) "Qualifying health care costs" means the future medical, hospital, surgical, nursing, dental, rehabilitation, habilitation, respite, custodial, durable medical equipment, home modifications, assistive technology, vehicle modifications, transportation for purposes of health care related appointments, 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.

(d) "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.

(e) Any reference to the "office" and the "commissioner" in this article shall mean, respectively, the "office for people with developmental disabilities" and "the commissioner of the office for people with developmental disabilities".

§ 17.05 Custody and administration of the fund.

(a)(1) 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 commissioner, 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 two 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 article.

(2) Any monies of the fund not required for immediate use may, at the discretion of the commissioner in consultation with 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.

(b) (1) The fund shall be administered by the commissioner or his or her designee in accordance with the provisions of this article.

(2) The commissioner shall have all powers necessary and proper to carry out the purposes of the fund.

(3) 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 assign and the commissioner is authorized to receive assignment of any and all contracts entered into by the super-

intendent of financial services to administer the fund for periods prior to August first, two thousand eighteen.

(4) The office shall post on its website information about the fund, eligibility for enrollment in the fund, and the process for enrollment in the fund.

(c) The expense of administering the fund shall be paid from the fund.

(d) Monies for the fund will be provided pursuant to this chapter.

(e) Beginning April first, two thousand eighteen and annually thereafter, the superintendent of financial services or the commissioner, whichever is applicable, 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 (g) of this section, and the assets of the fund at the conclusion of that fiscal year.

(f) (1) Following the deposit referenced in subdivision (e) of this section, the commissioner, in consultation with 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 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 (e) 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 (g) of section 17.07 of this article.

(2) Whenever enrollment is suspended pursuant to paragraph one 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 office's website; (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 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 one of this subdivision shall be satisfied as if this article had not been enacted.

(3) Following a suspension, whenever enrollment resumes pursuant to paragraph one of this subdivision, notice that enrollment has resumed shall be promptly posted on the office's website.

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

(g) 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.

§ 17.07 Payments from the fund.

(a) The fund shall be used to pay the qualifying health care costs of qualified plaintiffs.

(b) 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:

(1) such regulation shall not prevent qualified plaintiffs from receiving care or assistance that would, at a minimum, be authorized under the Medicaid program;

(2) 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; and

(3) such regulations shall not prohibit qualifying health care costs on the grounds that the qualifying health care cost may incidentally benefit other members of the household, provided that whether the qualifying health care cost primarily benefits the patient may be considered.

(c) 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 article, "collateral source" shall not include Medicare or Medicaid.

(d) (1) Effective until December thirty-first, two thousand nineteen, the amount of qualifying health care costs to be paid from the fund shall be calculated on the basis of one hundred percent of the usual and customary costs. For the purposes of this section, "usual and customary costs" shall mean the eightieth percentile of all charges for the particular health care service performed by a provider in the same or similar specialty and provided in the same geographical area as reported in a benchmarking database maintained by a nonprofit organization specified by the commissioner. If no such rates are available, qualifying health care costs shall be calculated on the basis of no less than one hundred thirty percent of Medicaid or Medicare rates of reimbursement, whichever is higher. If no such rate exists, costs shall be reimbursed as defined by the commissioner in regulation.

(2) Effective December thirty-first, two thousand nineteen, the amount of qualifying health care costs to be paid from the fund shall be calculated: (i) 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 (ii) 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.

(e) 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 conjunction with regulations establishing a mechanism for submission of claims by health care providers directly to the fund, where practicable.

(f) (1) Every settlement agreement for claims arising out of a plaintiff's or claimant's birth related neurological injury subject to this article, and that provides for the payment of future medical expenses for the plaintiff or claimant, shall provide that in the event the administrator of the fund determines that the plaintiff or claimant is a qualified plaintiff, all payments for future medical expenses shall be paid in accordance with this title, in lieu of that portion of the

settlement agreement that provides for payment of such expenses. The plaintiff's or claimant's future medical expenses shall be paid in accordance with this article. 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.

(2) In any case where the jury or court has made an award for future medical expenses 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 the judgment 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, the future medical expenses of the plaintiff shall be paid out of the fund in accordance with this article. 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.

(g) A qualified plaintiff shall be enrolled when: (1) 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 (2) 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 (f) 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 (f) of section 17.05 of this article.

(h) As to all claims, the fund administrator shall:

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

(2) 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.

(i) Payments from the fund shall be made by the commissioner of taxation and finance on the said certificate of the commissioner. 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 commissioner, 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.

(j) 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.

(k) All health care providers shall accept from qualified plaintiffs or persons authorized to act on behalf of such plaintiffs assignments of the right to receive payments from the fund for qualifying health care costs. Such payments shall constitute payment in full for any service provided to a qualified plaintiff in accordance with this article.

(l) Health insurers (other than 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 commissioner shall have the authority to enforce the provisions of this subdivision.

(m) Except as provided for by this article, 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.

(n) 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'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.

(o) The commissioner 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 article.

(p) The commissioner shall convene a consumer advisory committee for the purpose of providing information, as requested by the commissioner, in the development of the regulations authorized by subdivision (o) of this section.

§ 3. Subdivisions 2 and 3 of section 99-t of the state finance law, as added by section 52-e of part H of chapter 59 of the laws of 2011, are amended to read as follows:

2. All moneys received by the New York state medical indemnity fund pursuant to title four of article twenty-nine-D of the public health law, and on and after August first, two thousand eighteen, article seventeen of the mental hygiene law, from whatever source derived shall be deposited to the exclusive credit of such fund account. Said moneys shall be kept separate and shall not be commingled with any other moneys in the custody of the commissioner of taxation and finance.

3. The moneys in said account shall be retained by the fund and shall be released by the commissioner of taxation and finance only upon certificates signed by: (a) the superintendent of financial services or the head of any successor agency to the department of insurance or his or her designee and only for the purposes set forth in title four of article twenty-nine-D of the public health law; or (b) on and after August first, two thousand eighteen, the commissioner of the office for people with developmental disabilities or his or her designee and only for the purposes set forth in article seventeen of the mental hygiene law.

§ 4. That part entitled "DEPARTMENT OF HEALTH", of section 1 of a chapter of the laws of 2018, enacting the aid to localities budget, as proposed in legislative bill numbers S.7503 and A.9503, is amended by repealing the items hereinbelow set forth in brackets and by adding to such section the items hereinbelow set forth in italics as follows:

HEALTH CARE REFORM ACT PROGRAM

Special Revenue Funds - Other
HCRA Resources Fund
HCRA Program Account - 20807

For [~~suballocation to the department of financial services, for~~] the purpose of supporting the New York state medical indemnity fund established pursuant to chapter 59 of the laws of 2011**, a portion of which may be suballocated to the department of financial services or the office for people with developmental disabilities** (29736) 52,000,000

§ 5. Notwithstanding any inconsistent provision of article 2 of the state administrative procedure act, regulations set forth in subpart 69-10 of title 10 of the codes, rules and regulations of the state of New York governing administration of the NYS Medical Indemnity Fund shall continue in full force and effect until the date the commissioner of the office for people with developmental disabilities promulgates regulations on a final basis pursuant to this act; provided, however, the following revised meanings shall apply on and after August 1, 2018:

1. References to the "department of financial services" shall be null and void and have no force and effect.

2. References to the "commissioner of health" or "commissioner" and "superintendent of financial services" shall each mean the "commissioner of the office for people with developmental disabilities".

3. References to the "fund administrator" shall mean the "commissioner of the office for people with developmental disabilities".

4. References to the "department of health's chief administrative law judge" for purposes of providing an administrative review process pursuant to sections 69-10.16, 69-10.17 and 69-10.18 of title 10 of the codes, rules and regulations of the state of New York shall mean a chief administrative law judge designated by the commissioner of the office for people with developmental disabilities who may be employed by either the department of health or the office of temporary and disability assistance, or may be an independent administrative law judge used for other programs administered by the office for people with developmental disabilities.

5. References to a section of title 4 of article 29-D of the public health law shall mean the correlating section of article 17 of the mental hygiene law.

§ 6. This act shall take effect August 1, 2018. Effective immediately, the commissioner of the office for people with developmental disabilities is authorized to take any steps necessary to implement this act prior to its effective date; and, notwithstanding any inconsistent provision of the state administrative procedure act or any other provision of law, rule or regulation, the commissioner of the office for people with developmental disabilities is authorized to adopt or amend or promulgate on an emergency basis any regulation he or she determines necessary to implement any provision of this act on its effective date; provided that, upon such promulgation, the provisions of subpart 69-10 of title 10 of the codes, rules and regulations of the state of New York shall be null and void and have no force and effect.