

# STATE OF NEW YORK

6795

2017-2018 Regular Sessions

## IN SENATE

June 18, 2017

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:

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

4 § 2999-g. Purpose of this title. Creation and expansion of the New  
5 York state medical indemnity fund. [~~There is hereby created the~~] 1. The  
6 New York state medical indemnity fund (the "fund") [~~The purpose of the~~  
7 ~~fund is~~] was created to provide a funding source for future health care  
8 costs associated with birth related neurological injuries, in order to  
9 reduce premium costs for medical malpractice insurance coverage.

10 2. To further the state's interest in reducing premium costs for  
11 medical malpractice insurance coverage, the fund's mission is expanded  
12 such that the fund will provide a funding source for future health care  
13 costs associated with all neurological injuries resulting from medical  
14 services provided or not provided and not just those that are birth  
15 related.

16 § 2. Section 2999-h of the public health law, as added by section 52  
17 of part H of chapter 59 of the laws of 2011, subdivision 1 as amended by  
18 chapter 517 of the laws of 2016 and subdivision 3 as amended by chapter  
19 4 of the laws of 2017, is amended to read as follows:

20 § 2999-h. Definitions. As used in this title, unless the context or  
21 subject matter requires otherwise:

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

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1 1. [~~"Birth-related neurological injury" means an injury to the brain~~  
2 ~~or spinal cord of a live infant caused by the deprivation of oxygen or~~  
3 ~~mechanical injury occurring in the course of labor, delivery or resusci-~~  
4 ~~tation, or by other medical services provided or not provided during~~  
5 ~~delivery admission, that rendered the infant with a permanent and~~  
6 ~~substantial motor impairment or with a developmental disability as that~~  
7 ~~term is defined by section 1.03 of the mental hygiene law, or both. This~~  
8 ~~definition shall apply to live births only.~~

9 ~~2-~~] "Fund" means the New York state medical indemnity fund.

10 2. "Neurological injury" means an injury to the brain or spinal cord  
11 of a person caused by medical services provided or not provided that  
12 rendered the person with a:

13 (a) permanent and substantial motor impairment, and/or

14 (b) disability that (i) is attributable to (A) developmental disabili-  
15 ties, cerebral palsy, epilepsy, neurological impairment, familial dysau-  
16 tonomia or autism; (B) any other condition of a person found to be  
17 closely related to developmental disabilities because such condition  
18 results in similar impairment of general intellectual functioning or  
19 adaptive behavior to that of developmentally disabled persons or  
20 requires treatment and services similar to those required for such  
21 person; or (C) dyslexia resulting from a disability described in subpar-  
22 agraph (A) or (B) of this paragraph; (ii) has continued or can be  
23 expected to continue indefinitely; and (iii) constitutes a substantial  
24 handicap to such person's ability to function normally in society.

25 3. "Qualifying health care costs" means the future medical, hospital,  
26 surgical, nursing, dental, rehabilitation, habilitation, respite, custo-  
27 dial, durable medical equipment, home modifications, assistive technolo-  
28 gy, vehicle modifications, transportation for purposes of health care  
29 related appointments, prescription and non-prescription medications, and  
30 other health care costs actually incurred for services rendered to and  
31 supplies utilized by qualified plaintiffs, which are necessary to meet  
32 their health care needs, as determined by their treating physicians,  
33 physician assistants, or nurse practitioners and as otherwise defined by  
34 the commissioner in regulation.

35 4. "Qualified plaintiff" means every plaintiff or claimant who (i) has  
36 been found by a jury or court to have sustained a [~~birth-related~~] neuro-  
37 logical injury as the result of medical malpractice, or (ii) has  
38 sustained a [~~birth-related~~] neurological injury as the result of alleged  
39 medical malpractice, and has settled his or her lawsuit or claim there-  
40 for.

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

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

49 § 2999-i. Custody and administration of the fund. 1. (a) The commis-  
50 sioner of taxation and finance shall be the custodian of the fund and  
51 the special account established pursuant to section ninety-nine-t of the  
52 state finance law. All payments from the fund shall be made by the  
53 commissioner of taxation and finance upon certificates signed by the  
54 superintendent of financial services, or his or her designee, as herein-  
55 after provided. The fund shall be separate and apart from any other fund  
56 and from all other state monies; provided, however, that monies of the

1 fund may be invested as set forth in paragraph (b) of this subdivision.  
2 No monies from the fund shall be transferred to any other fund, nor  
3 shall any such monies be applied to the making of any payment for any  
4 purpose other than the purpose set forth in this title.

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

13 2. (a) The fund shall be administered by the superintendent of finan-  
14 cial services or his or her designee in accordance with the provisions  
15 of this article.

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

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

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

28 3. The expense of administering the fund, including the expenses  
29 incurred by the department of financial services and/or the department  
30 of health, shall be paid from the fund.

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

32 5. For the state fiscal year beginning April first, two thousand  
33 [~~eleven~~] eighteen and ending March thirty-first, two thousand [~~twelve,~~  
34 ~~the state fiscal year beginning April first, two thousand twelve and~~  
35 ~~ending March thirty first, two thousand thirteen, and the state fiscal~~  
36 ~~year beginning April first, two thousand thirteen and ending March thir-~~  
37 ~~ty-first, two thousand fourteen~~] nineteen, and annually thereafter, the  
38 superintendent of financial services shall cause to be deposited into  
39 the fund for each such fiscal year the amount appropriated for such  
40 purpose. [~~Beginning April first, two thousand fourteen and annually~~  
41 ~~thereafter, the superintendent of financial services shall cause to be~~  
42 ~~deposited into the fund, subject to available appropriations, an amount~~  
43 ~~equal to the difference between the amount appropriated to the fund in~~  
44 ~~the preceding fiscal year, as increased by the adjustment factor defined~~  
45 ~~in subdivision seven of this section, and the assets of the fund at the~~  
46 ~~conclusion of that fiscal year.~~] The total amount to be deposited into  
47 the fund shall be based upon an actuarial calculation, conducted quar-  
48 terly by the superintendent of financial services, of the estimated  
49 liabilities of the fund for the next succeeding year.

50 6. (a) Following the deposit referenced in subdivision five of this  
51 section, the superintendent of financial services shall conduct an actu-  
52 arial calculation of the estimated liabilities of the fund for the  
53 coming year resulting from the qualified plaintiffs enrolled in the  
54 fund. The fund administrator shall from time to time adjust such calcu-  
55 lation. If the total of all estimates of current liabilities equals or  
56 exceeds eighty percent of the fund's assets, then the fund shall not

1 accept any new enrollments until a new deposit has been made pursuant to  
2 subdivision five of this section. When, as a result of such new deposit,  
3 the fund's liabilities no longer exceed eighty percent of the fund's  
4 assets, the fund administrator shall enroll new qualified plaintiffs in  
5 the order that an application for enrollment has been submitted in  
6 accordance with subdivision seven of section twenty-nine hundred nine-  
7 ty-nine-j of this title.

8 (b) Whenever enrollment is suspended pursuant to paragraph (a) of this  
9 subdivision and until such time as enrollment resumes pursuant to such  
10 paragraph: (i) notice of such suspension shall be promptly posted on the  
11 [~~department's~~] website of the department of health and on the website of  
12 the department of financial services; (ii) the fund administrator shall  
13 deny each application for enrollment that had been received but not  
14 accepted prior to the date of suspension and each application for  
15 enrollment received on and after the date of such suspension; and (iii)  
16 notification of each such denial shall be made to the plaintiff or  
17 claimant or persons authorized to act on behalf of such plaintiff or  
18 claimant and all defendants in regard to such plaintiff or claimant, to  
19 the extent they are known to the fund administrator. Judgments and  
20 settlements for plaintiffs or claimants for whom applications are denied  
21 under this paragraph or who are not eligible for enrollment due to  
22 suspension pursuant to paragraph (a) of this subdivision shall be satis-  
23 fied as if this title had not been enacted.

24 (c) Following a suspension, whenever enrollment resumes pursuant to  
25 paragraph (a) of this subdivision, notice that enrollment has resumed  
26 shall be promptly posted on the [~~department's~~] website of the department  
27 of health and on the website of the department of financial services.

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

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

35 § 4. Section 2999-j of the public health law, as added by section 52  
36 of part H of chapter 59 of the laws of 2011, subdivisions 2 and 4 as  
37 amended by chapter 517 of the laws of 2016, and paragraph (c) of subdi-  
38 vision 2 as amended by chapter 4 of laws of 2017, is amended to read as  
39 follows:

40 § 2999-j. Payments from the fund. 1. The fund shall be used to pay the  
41 qualifying health care costs of qualified plaintiffs.

42 2. The provision of qualifying health care costs to qualified plain-  
43 tiffs shall not be subject to prior authorization, except as described  
44 by the commissioner in regulation; provided, however:

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

48 (b) if any prior authorization is required by such regulation, the  
49 regulation shall require that requests for prior authorization be proc-  
50 essed within a reasonably prompt period of time and [~~, subject to the~~  
51 ~~provisions of subdivision two-a of this section,~~] shall identify a proc-  
52 ess for prompt administrative review of any denial of a request for  
53 prior authorization; and

54 (c) such regulations shall not prohibit qualifying health care costs  
55 on the grounds that the qualifying health care cost may incidentally

1 benefit other members of the household, provided that whether the quali-  
2 fying health care cost primarily benefits the patient may be considered.

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

11 4. The amount of qualifying health care costs to be paid from the fund  
12 shall be calculated on the basis of one hundred percent of the usual and  
13 customary cost. For the purposes of this section, "usual and customary  
14 costs" shall mean the eightieth percentile of all charges for the  
15 particular health care service performed by a provider in the same or  
16 similar specialty and provided in the same geographical area as reported  
17 in a benchmarking database maintained by a nonprofit organization speci-  
18 fied by the superintendent of financial services. If no such rates are  
19 available qualifying health care costs shall be calculated on the basis  
20 of no less than one hundred thirty percent of Medicaid or Medicare rates  
21 of reimbursement, whichever is higher. If no such rate exists, costs  
22 shall be reimbursed as defined by the commissioner in regulation.

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

28 6. (a) Every settlement agreement for claims arising out of a  
29 plaintiff's or claimant's [~~birth-related~~] neurological injury subject to  
30 this title, and that provides for the payment of future [~~medical~~  
31 ~~expenses~~] health care costs for the plaintiff or claimant, shall be  
32 submitted for court review and approval and shall provide that, in the  
33 event the [~~administrator of the fund determines that the plaintiff or~~  
34 ~~claimant is a qualified plaintiff~~] court finds that there has been a  
35 prima facie showing that the plaintiff or claimant is a qualified plain-  
36 tiff, all payments for future [~~medical expenses~~] health care costs shall  
37 be paid in accordance with this title, in lieu of that portion of the  
38 settlement agreement that provides for payment of such [~~expenses~~] future  
39 health care costs. The plaintiff's or claimant's future medical expenses  
40 shall be paid in accordance with this title. When such a settlement  
41 agreement does not so provide, the court shall direct the modification  
42 of the agreement to include such term as a condition of court approval.

43 (b) In any case where the jury or court has made an award for future  
44 [~~medical expenses~~] health care costs arising out of a [~~birth-related~~]  
45 neurological injury, [~~any party to such action or person authorized to~~  
46 ~~act on behalf of such party may make application to the court that~~]  
47 subject to this title, the court shall determine if there has been a  
48 prima facie showing that the plaintiff or claimant is a qualified plain-  
49 tiff, and, if the court shall so determine, the judgment shall reflect  
50 that, in lieu of that portion of the award that provides for payment of  
51 such [~~expenses, and upon a determination by the fund administrator that~~  
52 ~~the plaintiff is a qualified plaintiff~~] future health care costs, the  
53 future [~~medical expenses~~] health care costs of the plaintiff or claimant  
54 shall be paid out of the fund in accordance with this title. [~~Upon a~~  
55 ~~finding by the court that the applicant has made a prima facie showing~~

1 ~~that the plaintiff is a qualified plaintiff, the court shall ensure that~~  
2 ~~the judgment so provides.]~~

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

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

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

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

22 9. Payments from the fund shall be made by the commissioner of taxa-  
23 tion and finance on the said certificate of the superintendent of finan-  
24 cial services. No payment shall be made by the commissioner of taxation  
25 and finance in excess of the amount certified. Promptly upon receipt of  
26 the said certificate of the superintendent of financial services, the  
27 commissioner of taxation and finance shall pay the qualified plaintiff's  
28 health care provider or reimburse the qualified plaintiff the amount so  
29 certified for payment.

30 10. Payment from the fund shall not give the fund any right of recov-  
31 ery against any qualified plaintiff or such qualified plaintiff's attor-  
32 ney except in the case of fraud or mistake.

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

37 12. Health insurers (other than [~~medicare~~] Medicare and Medicaid)  
38 shall be the primary payers of qualifying health care costs of qualified  
39 plaintiffs. Such costs shall be paid from the fund only to the extent  
40 that health insurers or other collateral sources or other persons are  
41 not otherwise obligated to make payments therefor. Health insurers that  
42 make payments for qualifying health care costs to or on behalf of quali-  
43 fied plaintiffs shall have no right of recovery against and shall have  
44 no lien upon the fund or any person or entity nor shall the fund consti-  
45 tute an additional payment source to offset the payments otherwise  
46 contractually required to be made by such health insurers. The super-  
47 intendent of financial services shall have the authority to enforce the  
48 provisions of this subdivision.

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

54 14. The determination of the qualified plaintiff's attorney's fee  
55 shall be based upon the entire sum awarded by the jury or the court or  
56 the full sum of the settlement, as the case may be. The qualified

1 plaintiff's attorney's fee shall be paid in a lump sum by the defendants  
2 and their insurers pursuant to section four hundred seventy-four-a of  
3 the judiciary law; provided however that the portion of the [~~attorney~~  
4 attorney's fee that is allocated to the non-fund elements of damages  
5 shall be deducted from the non-fund portion of the award in a propor-  
6 tional manner.

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

15 16. The commissioner shall convene a consumer advisory committee for  
16 the purpose of reviewing the rules and regulations promulgated by subdivi-  
17 sion fifteen of this section and providing information, as requested  
18 by the commissioner, in the development of [~~the regulations authorized~~  
19 ~~by subdivision fifteen of this section~~] any revisions to such rules and  
20 regulations and/or any additional rules and regulations required to  
21 implement this title.

22 § 5. This act shall take effect immediately and shall be deemed to  
23 have been in full force and effect on and after July 1, 2017, provided,  
24 however, that:

25 (a) if section 5 of chapter 517 of the laws of 2016 shall not have  
26 taken effect on or before such date, then subdivision 4 of section  
27 2999-j of the public health law, as amended by section four of this act,  
28 shall take effect on the same date and in the same manner as such chap-  
29 ter of the laws of 2016 takes effect; provided, further, that the amend-  
30 ments to subdivision 4 of section 2999-j of the public health law made  
31 by section four of this act shall not affect the expiration of such  
32 subdivision and shall be deemed to expire therewith;

33 (b) with respect to lawsuits involving birth related neurological  
34 injury subject to this title (i.e., an injury to the brain or spinal  
35 cord of a live infant caused by the deprivation of oxygen or mechanical  
36 injury occurring in the course of labor, delivery or resuscitation or by  
37 other medical services provided or not provided during delivery admis-  
38 sion that rendered the infant with a permanent and substantial motor  
39 impairment or with a developmental disability as that term is defined by  
40 section 1.03 of the mental hygiene law, or both), the provisions of this  
41 act shall apply if no judgment has been entered or no settlement agree-  
42 ment has been entered into by the parties before April 1, 2011, and,  
43 with respect to all other lawsuits involving neurological injury subject  
44 to this title, the provisions of this act shall apply if no judgment has  
45 been entered or no settlement has been entered into by the parties  
46 before the effective date of this act;

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

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