

§ 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:

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

(b) 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

(c) 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.

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 or Medicaid.

* 4. 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 cost. 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 superintendent of financial services. 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.

* NB Effective until June 1, 2027

* 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.

* NB Effective June 1, 2027

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 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 for the plaintiff or claimant, shall provide that 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 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 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, the future medical expenses of the plaintiff 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 that the relevant provisions of subdivision six of this section have been met; 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 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.

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. Such payments shall constitute payment in full for any services provided to a qualified plaintiff in accordance with this article.

12. 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 superintendent of financial services shall have the authority to enforce the provisions of this subdivision upon the referral of the commissioner.

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 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 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.