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TITLE 4

NEW YORK STATE MEDICAL INDEMNITY FUND

Section 2999-g. Purpose of this title.

2999-h. Definitions.

2999-i. Custody and administration of the fund.

2999-j. Payments from the fund.

§ 2999-g. Purpose of this title. 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.

§ 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 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.

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

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1 medical malpractice, and has settled his or her lawsuit or claim there-
2 for.

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

7 § 2999-i. Custody and administration of the fund. 1. The commissioner
8 of taxation and finance shall be the custodian of the fund and the
9 special account established pursuant to section ninety-nine-t of the
10 state finance law. All payments from the fund shall be made by the
11 commissioner of taxation and finance upon certificates signed by the
12 superintendent of financial services, or his or her designee, as herein-
13 after provided. The fund shall be separate and apart from any other fund
14 and from all other state monies. No monies from the fund shall be trans-
15 ferred to any other fund, nor shall any such monies be applied to the
16 making of any payment for any purpose other than the purpose set forth
17 in this title.

18 2. (a) The fund shall be administered by the superintendent of finan-
19 cial services or his or her designee in accordance with the provisions

20 of this article.

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

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

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

33 3. The expense of administering the fund, including the expenses
34 incurred by the department, shall be paid from the fund.

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

36 5. For the state fiscal year beginning April first, two thousand elev-
37 en and ending March thirty-first, two thousand twelve, the state fiscal
38 year beginning April first, two thousand twelve and ending March thir-
39 ty-first, two thousand thirteen, and the state fiscal year beginning
40 April first, two thousand thirteen and ending March thirty-first, two
41 thousand fourteen, the superintendent of financial services shall cause
42 to be deposited into the fund for each such fiscal year the amount
43 appropriated for such purpose. Beginning April first, two thousand
44 fourteen and annually thereafter, the superintendent of financial
45 services shall cause to be deposited into the fund, subject to available
46 appropriations, an amount equal to the difference between the amount
47 appropriated to the fund in the preceding fiscal year, as increased by
48 the adjustment factor defined in subdivision seven of this section, and
49 the assets of the fund at the conclusion of that fiscal 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 administrator shall from time to time adjust such calculation.
55 If the total of all estimates of current liabilities equals or exceeds
56 eighty percent of the fund's assets, then the fund shall not accept any

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1 new enrollments until a new deposit has been made pursuant to subdivi-
2 sion five of this section. When, as a result of such new deposit, the
3 fund's liabilities no longer exceed eighty percent of the fund's assets,
4 the fund administrator shall enroll new qualified plaintiffs in the
5 order that an application for enrollment has been submitted in accord-
6 ance with subdivision seven of section twenty-nine hundred ninety-nine-j
7 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
11 the department's website and on the website of the department of finan-
12 cial services; (ii) the fund administrator shall deny each application
13 for enrollment that had been received but not accepted prior to the date
14 of suspension and each application for enrollment received after the
15 date of such suspension; and (iii) notification of each such denial
16 shall be made to the plaintiff or claimant or persons authorized to act
17 on behalf of such plaintiff or claimant and all defendants in regard to
18 such plaintiff or claimant, to the extent they are known to the fund

19 administrator. Judgments and settlements for plaintiffs or claimants for
20 whom applications are denied under this paragraph or who are not eligi-
21 ble for enrollment due to suspension pursuant to paragraph (a) of this
22 subdivision shall be satisfied as if this title had not been enacted.

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

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

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

34 § 2999-j. Payments from the fund. 1. The fund shall be used to pay
35 the qualifying health care costs of qualified plaintiffs.

36 2. The provision of qualifying health care costs to qualified plain-
37 tiffs shall not be subject to prior authorization, except as described
38 by the commissioner in regulation; provided, however, that such regu-
39 lation shall not prevent qualified plaintiffs from receiving care or
40 assistance that would, at a minimum, be authorized under the medicaid
41 program; and provided, further, that if any prior authorization is
42 required by such regulation, the regulation shall require that requests
43 for prior authorization be processed within a reasonably prompt period
44 of time and shall identify a process for prompt administrative review of
45 any denial of a request for prior authorization.

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

54 4. The amount of qualifying health care costs to be paid from the fund
55 shall be calculated: (a) with respect to services provided in private
56 physician practices on the basis of one hundred percent of the usual and

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1 customary rates, as defined by the commissioner in regulation; or (b)
2 with respect to all other services, on the basis of Medicaid rates of
3 reimbursement or, where no such rates are available, as defined by the
4 commissioner in regulation.

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

10 6. (a) Every settlement agreement for claims arising out of a
11 plaintiff's or claimant's birth related neurological injury subject to
12 this title, and that provides for the payment of future medical expenses
13 for the plaintiff or claimant, shall provide that in the event the
14 administrator of the fund determines that the plaintiff or claimant is a
15 qualified plaintiff, all payments for future medical expenses shall be
16 paid in accordance with this title, in lieu of that portion of the
17 settlement agreement that provides for payment of such expenses. The

18 plaintiff's or claimant's future medical expenses shall be paid in
19 accordance with this title. When such a settlement agreement does not so
20 provide, the court shall direct the modification of the agreement to
21 include such term as a condition of court approval.

22 (b) In any case where the jury or court has made an award for future
23 medical expenses arising out of a birth related neurological injury, any
24 party to such action or person authorized to act on behalf of such party
25 may make application to the court that the judgment reflect that, in
26 lieu of that portion of the award that provides for payment of such
27 expenses, and upon a determination by the fund administrator that the
28 plaintiff is a qualified plaintiff, the future medical expenses of the
29 plaintiff shall be paid out of the fund in accordance with this title.
30 Upon a finding by the court that the applicant has made a prima facie
31 showing that the plaintiff is a qualified plaintiff, the court shall
32 ensure that the judgment so provides.

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

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

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

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

52 9. Payments from the fund shall be made by the commissioner of taxa-
53 tion and finance on the said certificate of the superintendent of finan-
54 cial services. No payment shall be made by the commissioner of taxation
55 and finance in excess of the amount certified. Promptly upon receipt of
56 the said certificate of the superintendent of financial services, the

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1 commissioner of taxation and finance shall pay the qualified plaintiff's
2 health care provider or reimburse the qualified plaintiff the amount so
3 certified for payment.

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

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

11 12. Health insurers (other than medicare and Medicaid) shall be the
12 primary payers of qualifying health care costs of qualified plaintiffs.
13 Such costs shall be paid from the fund only to the extent that health
14 insurers or other collateral sources or other persons are not otherwise
15 obligated to make payments therefor. Health insurers that make payments
16 for qualifying health care costs to or on behalf of qualified plaintiffs

17 shall have no right of recovery against and shall have no lien upon the
18 fund or any person or entity nor shall the fund constitute an additional
19 payment source to offset the payments otherwise contractually required
20 to be made by such health insurers. The superintendent of financial
21 services shall have the authority to enforce the provisions of this
22 subdivision.

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

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

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

44 16. The commissioner shall convene a consumer advisory committee for
45 the purpose of providing information, as requested by the commissioner,
46 in the development of the regulations authorized by subdivision fifteen
47 of this section.

48 § 52-a. Article 29-D of the public health law is amended by adding a
49 new title 5 to read as follows:

50 TITLE 5

51 NEW YORK STATE HOSPITAL QUALITY INITIATIVE

52 Section 2999-m. New York state hospital quality initiative.

53 § 2999-m. New York state hospital quality initiative. The New York
54 state hospital quality initiative, including the New York state obstet-
55 rical patient safety workgroup, will be created in the department of

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1 health to be comprised of medical, hospital and academic experts and
2 other stakeholders chosen by the commissioner.

3 The New York state quality initiative will oversee the general dissem-
4 ination of initiatives, guidance, and best practices to general hospi-
5 tals. Activities will include but not be limited to: building cultures
6 of patient safety and implementing evidence based care in target areas.
7 The workgroup will undertake collaborative work to improve obstetrical
8 care outcomes and quality of care, based on identifying and implementing
9 evidence based practices, and clinical protocols that can be standard-
10 ized and adopted by hospitals including but not limited to:

11 (a) Surveying, reviewing and analyzing current "best" practices
12 employed in obstetrical cases, including exploring the use of "virtual
13 grand rounds";

14 (b) Undertaking a review of claims in an effort to develop a set of
15 "standard best practices" for deliveries in New York state;

16 (c) Formulating and recommending to the commissioner best practice

17 standards and designing new programs for implementation and improved
18 outcomes, including but not limited to, clinical bundles for high prior-
19 ity conditions, electronic fetal monitoring training and certification,
20 and team training; and

21 (d) Engaging the existing regional perinatal center network in
22 dialogues regarding the above topics and making recommendations to
23 improve and/or upgrade assistance and communication to smaller hospi-
24 tals.

25 § 52-b. Subdivision 1 of section 2807-v of the public health law is
26 amended by adding a new paragraph (iii) to read as follows:

27 (iii) Funds shall be reserved and set aside and accumulated from year
28 to year and shall be made available, including income from investment
29 funds, for the purpose of supporting the New York state medical indem-
30 nity fund as authorized pursuant to title four of article twenty-nine-D
31 of this chapter, for the following periods and in the following amounts,
32 provided, however, that the commissioner is authorized to seek waiver
33 authority from the federal centers for medicare and Medicaid for the
34 purpose of securing Medicaid federal financial participation for such
35 program, in which case the funding authorized pursuant to this paragraph
36 shall be utilized as the non-federal share for such payments:

37 Thirty million dollars for the period April first, two thousand eleven
38 through March thirty-first, two thousand twelve.

39 § 52-c. The public health law is amended by adding a new section
40 2807-d-1 to read as follows:

41 § 2807-d-1. Hospital quality contributions. 1. Notwithstanding any
42 contrary provision of law and subject to the receipt of all necessary
43 federal approvals or waivers, for periods on and after July first, two
44 thousand eleven, a quality contribution shall be imposed on the inpa-
45 tient revenue of each general hospital that is received for the
46 provision of inpatient obstetrical patient care services in an amount
47 equal to one and six-tenths percent of such revenue, as defined in
48 accordance with paragraph (a) of subdivision three of section twenty-
49 eight hundred seven-d of this article, provided, however, that in the
50 event the commissioner, in consultation with the director of the budget,
51 determines that such quality contribution shall raise less than or more
52 than the total quality collection amount set forth in subdivision two of
53 this section, the commissioner, in consultation with the director of the
54 budget, may promulgate regulations, and may promulgate emergency regu-
55 lations, increasing or decreasing such quality contributions by amounts

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1 sufficient to ensure the collection of such annual quality contribution
2 amount.

3 2. The annual quality contribution amount referenced in subdivision
4 one of this section shall be thirty million dollars for the state fiscal
5 year beginning April first, two thousand eleven, and for each subsequent
6 state fiscal year thereafter it shall be the amount of the preceding
7 year as increased by the ten year rolling average of the medical compo-
8 nent of the consumer price index as published by the United States
9 department of labor, bureau of labor statistics, for the preceding ten
10 years.

11 3. The quality contributions described in this section shall be admin-
12 istered in accordance with and subject to the provisions of subdivisions
13 four, five, six, seven, eight and twelve of section twenty-eight hundred
14 seven-d of this article, provided, however, that such quality contrib-
15 utions shall be deposited in the HCRA resources fund as established
16 pursuant to section ninety-two-dd of the state finance law; and provided

17 further, however, that such contributions shall not be an allowable cost
18 in the determination of reimbursement rates of payment computed pursuant
19 to this article.

20 § 52-d. The civil practice law and rules is amended by adding a new
21 rule 3409 to read as follows:

22 Rule 3409. Settlement conference in dental, podiatric and medical
23 malpractice actions. In every dental, podiatric or medical malpractice
24 action, the court shall hold a mandatory settlement conference within
25 forty-five days after the filing of the note of issue and certificate of
26 readiness or, if a party moves to vacate the note of issue and certifi-
27 cate of readiness, within forty-five days after the denial of such
28 motion. Where parties are represented by counsel, only attorneys fully
29 familiar with the action and authorized to dispose of the case, or
30 accompanied by a person empowered to act on behalf of the party repres-
31 ented, will be permitted to appear at the conference. Where appropriate,
32 the court may order parties, representatives of parties, representatives
33 of insurance carriers or persons having an interest in any settlement to
34 also attend in person or telephonically at the settlement conference.
35 The chief administrative judge shall by rule adopt procedures to imple-
36 ment such settlement conference.

37 § 52-e. The state finance law is amended by adding a new section 99-t
38 to read as follows:

39 § 99-t. New York state medical indemnity fund account. 1. There is
40 hereby established in the custody of the commissioner of taxation and
41 finance a special account to be known as the "New York state medical
42 indemnity fund account".

43 2. All moneys received by the New York state medical indemnity fund
44 pursuant to title four of article twenty-nine-D of the public health law
45 from whatever source derived shall be deposited to the exclusive credit
46 of such fund account. Said moneys shall be kept separate and shall not
47 be commingled with any other moneys in the custody of the commissioner
48 of taxation and finance.

49 3. The moneys in said account shall be retained by the fund and shall
50 be released by the commissioner of taxation and finance only upon
51 certificates signed by the superintendent of financial services or the
52 head of any successor agency to the department of insurance or his or
53 her designee and only for the purposes set forth in title four of arti-
54 cle twenty-nine-D of the public health law.

55 § 52-f. Part C of chapter 58 of the laws of 2005, amending the public
56 health law and other laws relating to authorizing reimbursements for
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1 expenditures made by social services districts for medical assistance,
2 is amended by adding a new section 5-a to read as follows:

3 § 5-a. Notwithstanding any provision of law to the contrary, the
4 commissioner of health is authorized to approve social services district
5 demonstration programs for the purpose of maximizing Medicaid recov-
6 eries. The commissioner shall evaluate the results of any such programs,
7 including any savings resulting therefrom. Ten percent of any such
8 savings, after certification by the director of the division of the
9 budget, shall be shared with the applicable social services district in
10 a manner to be determined jointly by the commissioner of health and the
11 director of the division of the budget.