

1 VIRGINIA ACTS OF ASSEMBLY — CHAPTER

2 *An Act to amend and reenact §§ 38.2-5002, 38.2-5002.1, 38.2-5004, 38.2-5005, 38.2-5006, 38.2-5007,*
 3 *38.2-5009, 38.2-5009.1, 38.2-5015, 38.2-5016, 38.2-5017, and 38.2-5020 of the Code of Virginia, relating*
 4 *to Virginia Birth-Related Neurological Injury Compensation Program and Fund; board of directors; plan*
 5 *of operation; filing of claims; awards and coverage for expenses or services.*

6 [S 398]

7 Approved

8 **Be it enacted by the General Assembly of Virginia:**

9 **1. That §§ 38.2-5002, 38.2-5002.1, 38.2-5004, 38.2-5005, 38.2-5006, 38.2-5007, 38.2-5009, 38.2-5009.1,**
 10 **38.2-5015, 38.2-5016, 38.2-5017, and 38.2-5020 of the Code of Virginia are amended and reenacted as**
 11 **follows:**

12 **§ 38.2-5002. Virginia Birth-Related Neurological Injury Compensation Program; exclusive remedy;**
 13 **exception.**

14 A. There is hereby established the Virginia Birth-Related Neurological Injury Compensation Program.

15 B. Except as provided in subsection D, the rights and remedies herein granted to an infant on account of a
 16 birth-related neurological injury shall exclude all other rights and remedies of such infant; *or* his personal
 17 representative, parents, dependents or next of kin, at common law or otherwise arising out of or related to a
 18 medical malpractice claim with respect to such injury to the infant, including any claims by the infant's
 19 personal representative, parents, dependents or next of kin that, by substantive law, are derivative of the
 20 medical malpractice claim with respect to the infant's injury, including but not limited to claims of emotional
 21 distress proximately related to the infant's injury. This subsection shall not be construed to exclude other
 22 rights and remedies available to the infant's mother arising out of or related to a physical injury, separate and
 23 distinct from an injury to the infant, that is suffered by the infant's mother during the course of the infant's
 24 delivery.

25 C. Notwithstanding anything to the contrary in this section, a civil action shall not be foreclosed against a
 26 physician or a hospital where there is clear and convincing evidence that such physician or hospital
 27 intentionally or willfully caused or intended to cause a birth-related neurological injury, provided that such
 28 suit is filed prior to and in lieu of payment of an award under this chapter. Such suit shall be filed before the
 29 award of the Commission becomes conclusive and binding as provided for in § 38.2-5011.

30 D. Notwithstanding anything to the contrary in this section, a civil action arising out of or related to a
 31 birth-related neurological injury under this chapter; brought by an infant; *or* his personal representative,
 32 parents, dependents, or next of kin; ~~shall not against a participating hospital or physician shall be referred to~~
 33 ~~the Virginia Workers' Compensation Commission for the purposes of determining whether the cause of action~~
 34 ~~satisfies the requirements of this chapter, pursuant to § 8.01-273.1. No civil action arising out of or related to~~
 35 ~~a birth-related neurological injury brought by an infant or his personal representative, parents, dependents,~~
 36 ~~or next of kin shall be foreclosed against a nonparticipating physician or hospital, provided that (i) no~~
 37 ~~participating physician or hospital shall be made a party to any such action or related action; and (ii) the~~
 38 ~~commencement of any such action, regardless of its outcome, shall constitute an election of remedies; to the~~
 39 ~~exclusion of any claim under this chapter; provided that if a claim is made and accepted and benefits are~~
 40 ~~provided by the Fund established under this Program, the Fund shall have the right, and be subrogated, to all~~
 41 ~~of the common law rights, based on negligence or malpractice, that the said infant; or his personal~~
 42 ~~representative, parents, dependents, or next of kin may have or may have had against the non-participating~~
 43 ~~physician or hospital, as the case may be.~~

44 **§ 38.2-5002.1. Representation by Office of Attorney General; applicability of Public Procurement**
 45 **Act, Freedom of Information Act, and Administrative Process Act.**

46 A. The Office of the Attorney General shall provide requested legal services to the Program as provided in
 47 this subsection. The Program shall compensate the Office of the Attorney General for its provision of such
 48 legal services based on a reasonable hourly rate as shall be agreed upon periodically by the ~~Board~~ *board of*
 49 *directors of the Program* and the Attorney General. If the Office of the Attorney General is unable to provide
 50 such legal services as the result of a conflict of interest or other disqualifying circumstances, the ~~Board~~ *board*
 51 *of directors of the Program* may employ such other counsel as it deems necessary.

52 B. The board of directors of the Program shall adopt and implement rules consistent with the provisions of
 53 the Virginia Public Procurement Act (§ 2.2-4300 et seq.) that specify policies and procedures regarding the
 54 contracting for services not related to the health care provided for claimants, which rules shall be based on
 55 competitive principles generally applicable to the procurement of services by state agencies. *The procedure*
 56 *for adoption of rules by the board of directors of the Program shall be consistent with the provisions of*

57 *Article 2 (§ 2.2-4006 et seq.) of the Administrative Process Act.*

58 C. The Program and its board of directors shall be public bodies for purposes of the Virginia Freedom of
59 Information Act (§ 2.2-3700 et seq.).

60 D. ~~The procedure for adoption of rules and regulations by the board of directors of the Program shall be~~
61 ~~consistent with the provisions of Article 2 (§ 2.2-4006 et seq.) of the Administrative Process Act.~~
62 *Notwithstanding anything to the contrary in this chapter, the board of directors of the Program shall not hold*
63 *regulatory power or publish, implement, or enforce any policy, rule, or guideline that extinguishes, limits,*
64 *caps, or unreasonably delays payment of benefits to admitted claimants under this chapter.*

65 E. *Notwithstanding anything to the contrary in § 2.2-514, no compromise or settlement approved by the*
66 *board of directors of the Program or its designee shall require approval of the Attorney General or the*
67 *Governor.*

68 **§ 38.2-5004. Filing of claims; review by Board of Medicine; review by Department of Health; filing**
69 **of responses; medical records.**

70 A. 1. In all claims filed under this chapter, the claimant shall *electronically* file with the Commission a
71 petition; ~~setting forth~~ *including* the following information:

72 a. The name and address of the legal representative and the basis for his representation of the injured
73 infant;

74 b. The name and address of the injured infant;

75 c. The name and address of any physician providing obstetrical services who was present at the birth and
76 the name and address of the hospital at which the birth occurred;

77 d. A description of the disability for which claim is made;

78 e. The time and place where the birth-related neurological injury occurred;

79 f. A brief statement of the facts and circumstances surrounding the birth-related neurological injury and
80 giving rise to the claim;

81 g. All available relevant medical records relating to the person who allegedly suffered a birth-related
82 neurological injury and an identification of any unavailable records known to the claimant and the reasons for
83 their unavailability;

84 h. Appropriate assessments, evaluations, and prognoses and such other records and documents as are
85 reasonably necessary for the determination of the amount of compensation to be paid to, or on behalf of, the
86 injured infant on account of a birth-related neurological injury;

87 i. Documentation of expenses and services incurred to date, which indicates whether such expenses and
88 services have been paid for, and if so, by whom; and

89 j. Documentation of any applicable private or governmental source of services or reimbursement relative
90 to the alleged impairments.

91 2. ~~The~~ *In addition to filing the petition, the claimant shall furnish pay to the Commission with as many*
92 *copies of the petition as required for service upon the Program, any physician and hospital named in the*
93 *petition, the Board of Medicine and the Department of Health, along with a \$15 filing fee. Upon receipt of*
94 *the petition and filing fee, the Commission shall immediately serve the Program by service upon send copies*
95 *of the petition by registered or certified mail or by electronic mail to the agent designated to accept service on*
96 *behalf of the Program in the plan of operation by registered or certified mail, and shall mail copies of the*
97 *petition to, any physician and hospital named in the petition, the Board of Medicine, and the Department of*
98 *Health.*

99 3. *If a claimant is unable to file an electronic petition, he may file a petition in paper format upon the*
100 *Commission's approval. Such petition shall include all information required by subdivision 1.*

101 B. Upon receipt of the petition or the filing of a claim relating to the conduct of a participating physician,
102 the Department of Health Professions shall investigate the petition or claim, utilizing the same process as it
103 does in investigating complaints filed under any provision contained in Title 54.1. Conduct of health care
104 providers giving rise to disciplinary action shall be referred to the Board of Medicine for action consistent
105 with the authority granted to the Board in Article 2 (§ 54.1-2911 et seq.) of Chapter 29 of Title 54.1. If a
106 notice or order is issued by the Board of Medicine, a copy shall be mailed to the petitioner or claimant.

107 C. Upon receipt of the petition or the filing of a claim relating to the conduct of a participating hospital,
108 the Department of Health shall investigate the petition or claim, utilizing the same process as it does in
109 investigating complaints filed under any provision of Title 32.1. If it determines that there is reason to believe
110 that the alleged injury resulted from, or was aggravated by, substandard care on the part of the hospital at
111 which the birth occurred, it shall take any appropriate action consistent with the authority granted to the
112 Department of Health in Title 32.1.

113 D. The Program shall file a response to the petition and submit relevant written information relating to the
114 issue of whether the injury alleged is a birth-related neurological injury within the meaning of this chapter
115 within 10 days after the date the panel report prepared pursuant to subsection C of § 38.2-5008 is filed with
116 the Commission. *The Program shall file a response to any supplemental petition addressing attorney fees or*
117 *benefits disputes no later than 21 days after the filing of such petition.*

118 E. Any hospital at which a birth occurred, upon receipt of written notice from the legal representative of

119 an injured infant that he intends to file a petition under this chapter, shall promptly deliver to such person all
120 available medical records relating to the infant who allegedly suffered a birth-related neurological injury.

121 F. As used in this chapter, fetal monitoring strips, whether printed or in electronic format, shall be deemed
122 to constitute part of the medical records relating to an infant who allegedly suffered a birth-related
123 neurological injury.

124 G. *All costs incurred by the Virginia Workers' Compensation Commission to develop, implement, and*
125 *maintain the electronic filing system under this section shall be reimbursed by the Program and paid from the*
126 *Birth-Related Neurological Injury Compensation Fund.*

127 **§ 38.2-5005. Tolling of statute of limitations.**

128 The statute of limitations with respect to any civil action that may be brought by or on behalf of an injured
129 infant *or his personal representative, parents, dependents, or next of kin arising out of or related to a medical*
130 *malpractice claim with respect to such injury to the infant, including any claims by the infant's personal*
131 *representative, parents, dependents, or next of kin that, by substantive law, are derivative of the medical*
132 *malpractice claim with respect to the infant's injury, including claims of emotional distress proximately*
133 *related to the infant's injury* allegedly arising out of or related to a birth-related neurological injury, shall be
134 tolled by the filing of a claim in accordance with this chapter, and the time such claim is pending shall not be
135 computed as part of the period within which such civil action may be brought.

136 **§ 38.2-5006. Hearing; parties.**

137 A. Immediately after the Program's response is filed pursuant to subsection D of § 38.2-5004, the
138 Commission shall set the date for a hearing, which shall be held no sooner than 15 days and no later than 90
139 days after the filing of the Program's response, and shall notify the parties to the hearing of the time and place
140 of such hearing. The hearing shall be held in the city or county where the birth-related neurological injury
141 occurred, or in a contiguous city or county, unless otherwise agreed to by the parties and authorized by the
142 Commission.

143 B. ~~The~~ *Except as provided in subsection B of § 8.01-273.1, the* parties to the hearing required under this
144 section shall include the claimant and the Program.

145 **§ 38.2-5007. Discovery.**

146 Any party to a proceeding under this chapter may, ~~upon application to the Commission setting forth the~~
147 ~~materiality of the information requested,~~ serve interrogatories, *requests for document production, or requests*
148 *for admissions* or cause the depositions of witnesses residing within or ~~without~~ *outside of* the Commonwealth
149 to be taken, the costs to be taxed as expenses incurred in connection with the filing of a claim, in accordance
150 with § 38.2-5009. Such depositions shall be taken after notice and in the manner prescribed by law, for
151 depositions in actions at law, except that they shall be directed to the Commission, the Commissioner, or the
152 Deputy Commissioner before whom the proceedings may be pending.

153 **§ 38.2-5009. Commission awards for birth-related neurological injuries; notice of award.**

154 A. Upon determining (i) that an infant has sustained a birth-related neurological injury and (ii) that
155 obstetrical services were delivered by a participating physician at the birth or that the birth occurred in a
156 participating hospital, the Commission shall make an award providing compensation for the following items
157 relative to such injury:

158 1. Actual medically necessary and reasonable expenses of medical and hospital, rehabilitative, therapeutic,
159 nursing, attendant, residential and custodial care and service, medications, supplies, special equipment or
160 facilities, and related travel, such expenses to be paid as they are incurred. Reimbursement may be provided
161 for nursing ~~and~~, attendant, *residential, and custodial* care that is provided by a relative or legal guardian of a
162 Program beneficiary ~~so long as that care is beyond the scope of child care duties and services normally and~~
163 ~~gratuitously provided by family members to uninjured children.~~ However, such expenses shall not include:

164 a. Expenses for items or services that the infant has received, or is entitled to receive, under the laws of
165 any state or the federal government except to the extent prohibited by federal law;

166 b. Expenses for items or services that the infant has received, or is contractually entitled to receive, from
167 any prepaid health plan, health maintenance organization, or other private insuring entity;

168 c. Expenses for which the infant has received reimbursement, or for which the infant is entitled to receive
169 reimbursement, under the laws of any state or federal government except to the extent prohibited by federal
170 law; and

171 d. Expenses for which the infant has received reimbursement, or for which the infant is contractually
172 entitled to receive reimbursement, pursuant to the provisions of any health or sickness insurance policy or
173 other private insurance program.

174 Expenses ~~of~~ *for* medical ~~and~~, hospital, *rehabilitative, therapeutic, nursing, attendant, residential, and*
175 *custodial care services and medications, supplies, special equipment, or facilities* under this subdivision shall
176 be limited to such charges as prevail in the same community for similar treatment of injured persons of a like
177 standard of living when such treatment is paid for by the injured person.

178 In order to provide coverage for expenses of medical and hospital services under this subdivision, the
179 Commission, in all cases where a comparative analysis of the costs, including the effects on the infant's
180 family's health insurance coverage, and benefits indicates that such action is more cost-effective than

181 awarding payment of medical and hospital expenses, ~~shall~~ *may* (i) require the claimant to purchase private
 182 health insurance providing coverage for such expenses, provided that the premium or other costs of such
 183 coverage shall be paid by the Fund; (ii) ~~require the claimant to participate in the State Medicaid Program, the~~
 184 ~~Children's Health Insurance Program or other state or federal health insurance program for which the infant is~~
 185 ~~eligible; or (iii) or (ii) if the Commission determines that it would be unreasonably burdensome to require the~~
 186 ~~claimant to purchase private health insurance and that the infant is ineligible for a health insurance program~~
 187 ~~described in clause (ii), to make an award providing compensation for the cost of private accident and~~
 188 ~~sickness insurance for the infant.~~

189 *2. Reasonable expenses associated with private health insurance premiums.*

190 *3. Reasonable and medically necessary housing assistance for the life of the infant, including home*
 191 *construction and modification costs.*

192 *4. Reasonable and medically necessary expenses associated with the purchase of a motor vehicle*
 193 *specifically equipped to accommodate persons with disabilities.*

194 *5. A total annual benefit of up to \$10,000 for immediate family members who reside with the infant for*
 195 *psychotherapeutic services.*

196 *6. Loss of earnings from the age of 18 are to be paid in regular installments beginning on the eighteenth*
 197 *birthday of the infant. An infant found to have sustained a birth-related neurological injury shall be*
 198 *conclusively presumed to have been able to earn income from work from the age of 18 through the age of 65,*
 199 *if he had not been injured, in the amount of 50 percent of the average weekly wage in the Commonwealth of*
 200 *workers in the private, nonfarm sector. Payments shall be calculated based on the Commonwealth's reporting*
 201 *period immediately preceding the 18th birthday of the claimant child, and subsequently adjusted based upon*
 202 *the succeeding annual reports of the Commonwealth. Expenses associated with appointment of a legal*
 203 *guardian, creation of trust documents, or other expenses necessary to receive payments under this provision*
 204 *shall be considered expenses incurred by the claimant in connection with the filing of a claim. The provisions*
 205 *of § 65.2-531 shall apply to any benefits awarded under this subdivision.*

206 ~~3-~~ *7. Reasonable expenses associated with the funeral, burial, cremation, and disposition of the remains of*
 207 *such infant, not to exceed \$10,000.*

208 *8. Reasonable expenses incurred by the claimant in connection with the filing of a claim under this*
 209 *chapter, including reasonable attorneys' attorney fees of the claimant's attorney, but excluding attorney fees*
 210 *incurred in opposing a claimant's admission pursuant to § 8.01-273.1. Any award for expenses, including*
 211 *attorney's attorney fees, incurred by the claimant in connection with the filing of a claim under this chapter*
 212 *shall be subject to the approval and award of the Commission.*

213 A copy of the award shall be sent immediately by registered or certified mail to the parties.

214 *9. Reasonable expenses associated with the services of an education advocate.*

215 *B. Where the Commission finds the Program has delayed payment or reimbursement of a covered benefit*
 216 *without reasonable grounds, the Commission shall calculate and add to the amount of the covered benefit an*
 217 *award of interest at the judgment rate from the date payment or reimbursement of the covered benefit was*
 218 *first requested and shall assess a monetary penalty against the Program in an amount of up to three times the*
 219 *covered benefit.*

220 ~~B-~~ *C. Regardless of whether the Commission makes either of the determinations described in clauses (i)*
 221 *and (ii) of subsection A, the Commission shall not award compensation in connection with a claim under this*
 222 *chapter, or any claim pursuant to § 8.01-273.1, for any attorney's attorney fees or other expenses incurred by*
 223 *any physician, hospital, or nurse midwife that is party to a proceeding under this chapter, or pursuant to*
 224 *§ 8.01-273.1, or by a medical malpractice liability insurer of such party. This prohibition shall not affect the*
 225 *requirement that the Program make reimbursement for photocopying costs as set forth in § 8.01-273.1, or the*
 226 *requirement under § 38.2-5002.1 that the Program compensate the Office of the Attorney General for its*
 227 *provision of legal services to the Program.*

228 ~~C-~~ *D. The amendments to this section enacted pursuant to Chapter 535 of the Acts of Assembly of 1990*
 229 *shall be retroactively effective in all cases arising prior to July 1, 1990, that have been timely filed and are not*
 230 *yet final.*

231 **§ 38.2-5009.1. Infants dying shortly after birth.**

232 *A. For births occurring on or after July 1, 2003, if the Commission determines that an infant has sustained*
 233 *a birth-related neurological injury and that obstetrical services were delivered by a participating physician at*
 234 *the birth or that the birth occurred in a participating hospital, and the infant dies within 180 days of birth, the*
 235 *Commission, in its discretion, may make an award in an amount not exceeding ~~\$100,000~~ \$500,000 to the*
 236 *infant's family, which award shall be in addition to and not in lieu of any other award providing compensation*
 237 *as provided in § 38.2-5009.*

238 *B. Prior to making an award pursuant to this section, the Commission shall conduct a hearing for the*
 239 *purpose of determining whether such award is appropriate and, if so, the proper amount of such an award and*
 240 *how it should be paid, after receiving evidence pertaining to sorrow, mental anguish, solace, grief associated*
 241 *with the death of the infant, and all other material factors that are relevant.*

242 *C. The hearing referred to in subsection B may be conducted as part of a hearing conducted pursuant to*

243 § 38.2-5009. The same procedural requirements applicable to a hearing conducted pursuant to § 38.2-5009
244 shall apply to a hearing conducted hereunder.

245 D. As used in this section, an infant's family means the infant's father, mother, or both, or if neither is a
246 party to the proceeding, the infant's legal guardian.

247 **§ 38.2-5015. Birth-Related Neurological Injury Compensation Fund; assets of the Fund; audit.**

248 A. There is established the Birth-Related Neurological Injury Compensation Fund to finance the Virginia
249 Birth-Related Neurological Injury Compensation Program created by this chapter. The assets of the Fund
250 administered by the board of directors of the Program are trust funds and shall be used solely in the interest of
251 the recipients of awards pursuant to § 38.2-5009 and to administer the Program.

252 B. 1. An independent certified public accountant selected by the board of directors of the Program shall
253 annually audit the accounts of the Fund, and the cost of such audit services shall be borne by the Program and
254 be paid from moneys designated for such purposes in the Fund. The audit shall be performed at least each
255 fiscal year, in accordance with generally accepted auditing standards and, accordingly, include such tests of
256 the accounting records and such auditing procedures as considered necessary under the circumstances. The
257 board of directors shall furnish copies of the audit to the same persons who are entitled to receive copies of
258 the board's report on investment of the Fund's assets.

259 2. *The Auditor of Public Accounts shall receive and review any audit conducted pursuant to subdivision 1*
260 *and provide any relevant analysis to the Governor and the General Assembly.*

261 C. *The board of directors of the Program shall establish a program of blanket surety bonding to provide*
262 *surety for the faithful discharge of duty with respect to moneys of the Fund by all officers and employees who*
263 *receive, disburse, handle, or have access to such moneys. Coverage may be provided through the Division of*
264 *Risk Management's blanket surety bond plan under § 2.2-1840. Such officers and employees shall participate*
265 *in the program of blanket surety bonding, and the cost of the blanket surety bond shall be paid from the*
266 *Fund. The board of directors shall prescribe the amount and conditions of such coverage as it deems*
267 *sufficient to protect the Fund.*

268 **§ 38.2-5016. Board of directors; appointment; vacancies; term; list of Program claimants.**

269 A. The Birth-Related Neurological Injury Compensation Program shall be governed by a board of nine
270 directors.

271 B. ~~Except as provided in subsection C,~~ *Directors* shall be appointed for a term of three years or
272 until their successors are appointed and have qualified.

273 C. 1. The directors shall be appointed by the Governor as follows:

274 a. Six citizen representatives. One of the members shall have a minimum of five years of professional
275 investment experience. One of the members shall have a minimum of five years of professional experience in
276 finance and be licensed as a certified public accountant or hold a similar professional designation. One of the
277 members shall have professional experience working with the disabled community. ~~One of the members shall~~
278 ~~be the relative of a disabled child experienced in the care of the disabled child.~~ One of the members shall be
279 an attorney with a minimum of three years of experience in the practice of law representing clients with
280 physical personal injuries. One of the members shall be an at large representative consisting of a person
281 deemed qualified to serve by knowledge, education, training, interest or experience. *One of the members shall*
282 *be a relative of a current or former Program beneficiary;*

283 b. One representative of participating physicians: ~~The initial term of the member appointed in 1999 shall~~
284 ~~commence when appointed and shall be for one year;~~

285 c. One representative of participating hospitals: ~~The initial term of the member appointed in 1999 shall~~
286 ~~commence when appointed and shall be for two years; and~~

287 d. One representative of liability insurers: ~~The initial term of the member appointed in 1999 shall~~
288 ~~commence when appointed and shall be for three years.~~

289 2. The Governor may select the representative of the participating physicians from a list of at least three
290 names to be recommended by the Virginia Society of Obstetrics and Gynecology; the representative of
291 participating hospitals from a list of at least three names to be recommended by the Virginia Hospital &
292 Healthcare Association; and the representative of liability insurers from a list of at least three names, one of
293 whom is recommended by the American Insurance Association and two of whom are recommended by the
294 Property Casualty Insurers Association of America. The Governor may select the attorney member from a list
295 of at least four names to be recommended by the Virginia State Bar. The Governor may select the ~~parent of a~~
296 ~~disabled child member and the at large member~~ *at large member and the relative of a current or former*
297 *Program beneficiary* from applications duly submitted. Nothing contained herein shall preclude qualified
298 applicants for any position on the ~~Board~~ *board of directors of the Program* from submitting an application to
299 the Governor to serve as a member of the ~~Board~~ *board*. In no case shall the Governor be bound to make any
300 appointment from among the nominees of the respective associations.

301 D. The Governor shall promptly notify the appropriate association, which may make nominations, of any
302 vacancy other than by expiration among the members of the board representing a particular interest and like
303 nominations may be made for the filling of the vacancy.

304 E. The directors shall act by majority vote with five directors constituting a quorum for the transaction of

305 any business or the exercise of any power of the Program. The directors shall serve without salary, but each
 306 director shall be reimbursed for actual and necessary expenses incurred in the performance of his official
 307 duties as a director of the Program. The directors shall not be subject to any personal liability with respect to
 308 the administration of the Program or the payment of any award.

309 F. The board shall have the power to (i) administer the Program, (ii) administer the Birth-Related
 310 Neurological Injury Compensation Fund, which shall include the authority to purchase, hold, sell or transfer
 311 real or personal property and the authority to place any such property in trust for the benefit of claimants who
 312 have received awards pursuant to § 38.2-5009, (iii) appoint a service company or companies to administer the
 313 payment of claims on behalf of the Program, (iv) direct the investment and reinvestment of any surplus in the
 314 Fund over losses and expenses, provided any investment income generated thereby remains in the Fund, (v)
 315 reinsure the risks of the Fund in whole or in part, ~~and~~ (vi) obtain and maintain directors' and officers' liability
 316 insurance, *and (vii) compromise and settle or discharge claims for compensation without the approval of the*
 317 *Attorney General or the Governor.* The board shall discharge its duties with respect to the Fund solely in the
 318 interest of the recipients of awards pursuant to §§ 38.2-5009 and 38.2-5009.1 and shall invest the assets of the
 319 Fund with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent
 320 person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a
 321 like character and with like aims. Any decisions regarding the investment of the assets of the Fund shall be
 322 based on the advice of one or more investment advisors retained by the board, provided that any investment
 323 advisor retained by the board shall be registered pursuant to the provisions of Article 3 (§ 13.1-504 et seq.) of
 324 Chapter 5 of Title 13.1 or shall be a federal covered advisor as defined in § 13.1-501 who has filed such
 325 documents and paid such fees as may be necessary to transact business in the Commonwealth pursuant to
 326 § 13.1-504. The board shall report annually to the Governor and to the Speaker of the House of Delegates and
 327 the Clerk of the House of Delegates and to the ~~Chairman~~ *Chair* of the Senate Rules Committee and the Clerk
 328 of the Senate regarding the investment of the Fund's assets. The board shall establish a procedure in the plan
 329 of operation for notice to be given to obstetrical patients concerning the no-fault alternative for birth-related
 330 neurological injuries provided in this chapter, such notice to include a clear and concise explanation of a
 331 patient's rights and limitations under the ~~program~~ *Program*.

332 G. The board shall establish a procedure in the plan of operation for maintaining a list of Program
 333 claimants. Each claimant may consent to have his name, address, phone number, and other personal
 334 information included on such list, for distribution to other Program claimants. The ~~Board~~ *board* shall
 335 distribute the list to Program claimants who have given consent to be included on such list, and to no other
 336 person.

337 *H. The board shall meet at least once monthly and allow access to the public portion of such meeting*
 338 *through electronic communications means.*

339 **§ 38.2-5017. Plan of operation.**

340 A. On or before September 30, 1987, the directors of the Program shall submit to the State Corporation
 341 Commission for review a proposed plan of operation consistent with this chapter.

342 B. The plan of operation shall provide for the efficient administration of the Program and for the prompt
 343 processing of claims made against the Fund pursuant to an award under this chapter. The plan shall contain
 344 other provisions, including:

345 1. Establishment of necessary facilities;

346 2. Management of the Fund;

347 3. Appointment of servicing carriers or other servicing arrangements to administer the processing of
 348 claims against the Fund;

349 4. Initial and annual assessment of the persons and entities listed in § 38.2-5020 to pay awards and
 350 expenses, which assessments shall be on an actuarially sound basis subject to the limits set forth in
 351 § 38.2-5020; ~~and~~

352 5. *A process by which the Program, within 15 business days of claim submission, promptly acknowledges*
 353 *receipt of the claim and begins processing the reimbursement request;*

354 6. *A system for the tracking of claims for reimbursement and their status once submitted;*

355 7. *An explanation of benefits for each claim submitted, including the service date, amount claimed,*
 356 *Program's payment, reason for any denial, and explanation of how to appeal denials;*

357 8. *A timeline for reimbursements;*

358 9. *Establishment of a system to ensure payments are made in a timely manner;*

359 10. *A secure portal that is compliant with the Health Insurance Portability and Accountability Act (42*
 360 *U.S.C. § 1320d et seq.) for the submission of claims; and*

361 11. Any other matters necessary for the efficient operation of the Program.

362 C. The plan of operation shall be subject to approval by the State Corporation Commission after
 363 consultation with representatives of interested individuals and organizations. If the State Corporation
 364 Commission disapproves all or any part of the proposed plan of operation, the directors shall within ~~thirty~~ *thirty* 30
 365 days submit for review an appropriate revised plan of operation. If the directors fail to do so, the State
 366 Corporation Commission shall promulgate a plan of operation. The plan of operation approved or

367 promulgated by the State Corporation Commission shall become effective and operational upon order of the
368 State Corporation Commission.

369 D. Amendments to the plan of operation may be made by the directors of the Program, subject to the
370 approval of the State Corporation Commission.

371 **§ 38.2-5020. Assessments.**

372 A. A physician who otherwise qualifies as a participating physician pursuant to this chapter may become a
373 participating physician in the Program for a particular calendar year by paying an annual participating
374 physician assessment to the Program in the amount of \$5,000 on or before December 1 of the previous year,
375 in the manner required by the plan of operation. Effective January 1, 2009, the total annual assessment shall
376 be \$5,600, and shall increase by \$300 for the 2010 assessment and by \$100 each year thereafter, to a
377 maximum of \$6,200 per year. The board may authorize a prorated participating physician or participating
378 hospital assessment for a particular year in its plan of operation, but such prorated assessment shall not
379 become effective until the physician or hospital has given at least 30 days' notice to the Program of the
380 request for a prorated assessment.

381 B. Notwithstanding the provisions of subsection A, a participating hospital with a residency training
382 program accredited to the American Council for Graduate Medical Education may pay an annual
383 participating physician assessment to the Program for residency positions in the hospital's residency training
384 program, in the manner provided by the plan of operation. However, any resident in a duly accredited family
385 practice or obstetrics residency training program at a participating hospital shall be considered a participating
386 physician in the Program and neither the resident nor the hospital shall be required to pay any assessment for
387 such participation. No resident shall become a participating physician in the Program, however, until 30 days
388 following notification by the hospital to the Program of the name of the resident or residents filling the
389 particular position for which the annual participating physician assessment payment, if required, has been
390 made.

391 C. A hospital that otherwise qualifies as a participating hospital pursuant to this chapter may become a
392 participating hospital in the Program for a particular year by paying an annual participating hospital
393 assessment to the Program, on or before December 1 of the previous year, amounting to \$50 per live birth for
394 the prior year, as reported to the Department of Health in the Annual Survey of Hospitals. Effective January
395 1, 2009, the annual participating hospital assessment shall increase by \$2.50 per live birth for the prior year,
396 as reported to the Department of Health in the Annual Survey of Hospitals, and shall be increased at that rate
397 each year thereafter to a maximum of \$55 per live birth so reported for the prior year. The participating
398 hospital assessment shall not exceed \$150,000 for any participating hospital in any 12-month period until
399 January 1, 2005. Effective January 1, 2005, the maximum total annual assessment shall be \$160,000, and
400 shall increase by \$10,000 each year thereafter, to a maximum of \$200,000 in any 12-month period.

401 D. All licensed physicians practicing in the Commonwealth on September 30 of a particular year, other
402 than participating physicians, shall pay to the Program an annual assessment of \$250 for the following year,
403 in the manner required by the plan of operation until January 1, 2005. Effective January 1, 2005, the total
404 annual assessment shall be \$260, and shall increase by \$10 each year thereafter to a maximum of \$300 per
405 year.

406 Upon proper certification to the Program, the following physicians shall be exempt from the payment of
407 the annual assessment under this subsection:

408 1. A physician who is employed by the Commonwealth or federal government and whose income from
409 professional fees is less than an amount equal to 10 percent of the annual salary of the physician.

410 2. A physician who is enrolled in a full-time graduate medical education program accredited by the
411 American Council for Graduate Medical Education.

412 3. A physician who has retired from active clinical practice.

413 4. A physician whose active clinical practice is limited to the provision of services, voluntarily and
414 without compensation, to any patient of any clinic which is organized in whole or in part for the delivery of
415 health care services without charge as provided in § 54.1-106.

416 E. ~~Taking into account the assessments collected pursuant to subsections A through D of this section, if~~
417 ~~required to maintain the Fund on an actuarially sound basis, all~~ All insurance carriers licensed to write and
418 engaged in writing liability insurance in the Commonwealth of a particular year, shall pay into the Fund an
419 assessment for the following year, in an amount determined by the State Corporation Commission pursuant to
420 subsection A of § 38.2-5021, in the manner required by the plan of operation. Liability insurance for the
421 purposes of this provision shall include the classes of insurance defined in §§ 38.2-117, 38.2-118, and
422 38.2-119 and the liability portions of the insurance defined in §§ 38.2-124, 38.2-125, 38.2-130, 38.2-131, and
423 38.2-132.

424 1. All annual assessments against liability insurance carriers shall be made on the basis of net direct
425 premiums written for the business activity which forms the basis for each such entity's inclusion as a funding
426 source for the Program in the Commonwealth during the prior year ending December 31, as reported to the
427 State Corporation Commission, and shall be in the proportion that the net direct premiums written by each on
428 account of the business activity forming the basis for their inclusion in the Program bears to the aggregate net

429 direct premiums for all such business activity written in this Commonwealth by all such entities. For purposes
430 of this chapter "net direct premiums written" means gross direct premiums written in this Commonwealth on
431 all policies of liability insurance less (i) all return premiums on the policy, (ii) dividends paid or credited to
432 policyholders, and (iii) the unused or unabsorbed portions of premium deposits on liability insurance.

433 2. The entities listed in this subsection shall not be individually liable for an annual assessment in excess
434 of one quarter of one percent of that entity's net direct premiums written.

435 3. Liability insurance carriers shall be entitled to recover their initial and annual assessments through (i) a
436 surcharge on future policies, (ii) a rate increase applicable prospectively, or (iii) a combination of the two, at
437 the discretion of the State Corporation Commission.

438 F. On and after January 1, 1989, a participating physician covered under the provisions of this section who
439 has paid an annual assessment for a particular calendar year to the Program and who retires from the practice
440 of medicine during that particular calendar year shall be entitled to a refund of a prorated share of his or her
441 annual assessment for the calendar year that corresponds to the portion of the calendar year remaining
442 following his or her retirement.

443 G. Whenever the State Corporation Commission determines the Fund is actuarially sound in conjunction
444 with actuarial investigations conducted pursuant to § 38.2-5021, it shall enter an order suspending the
445 assessment required under subsection D. The annual assessment shall be reinstated whenever the State
446 Corporation Commission determines that such assessment is required to maintain the Fund's actuarial
447 soundness.