

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1989

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HOUSE BILL 2296
Committee Substitute Favorable 7/11/90

Short Title: Birth Impairment Fund.

(Public)

Sponsors:

Referred to:

June 4, 1990

1 A BILL TO BE ENTITLED
2 AN ACT TO ESTABLISH THE NORTH CAROLINA BIRTH-RELATED
3 NEUROLOGICAL IMPAIRMENT PROGRAM AND THE NORTH CAROLINA
4 BIRTH-RELATED NEUROLOGICAL IMPAIRMENT TRUST FUND.

5 The General Assembly of North Carolina enacts:

6 Section 1. Chapter 130A of the General Statutes is amended by adding a new
7 Article 20 to read:

8 **“ARTICLE 20.**
9 **“NORTH CAROLINA BIRTH-RELATED NEUROLOGICAL IMPAIRMENT**
10 **PROGRAM.**

11 **“§ 130A-460. Statement of purpose.**

12 In order to provide for the general welfare and to protect the lives and the health of
13 the people of the State, to provide a stable environment, to promote prenatal and
14 obstetrical care so as to reduce infant mortality and morbidity, and to provide funds and
15 services for the care of persons born in North Carolina with birth-related neurological
16 impairments, a no-fault compensation system for birth-related neurological impairments
17 is appropriate and necessary.

18 **“§ 130A-461. Definitions.**

19 The following definitions apply throughout this Article, unless the context clearly
20 implies otherwise:

21 (a) ‘Applicant’ means any person who files an application under this Article
22 claiming to have a birth-related neurological impairment. An application may be filed

1 on behalf of a minor or incompetent by a parent, guardian or guardian **ad litem**. In the
2 case of a decedent, the application may be filed by a decedent's personal representative.

3 (b) 'Birth-related neurological impairment' means an impairment of the brain
4 function of an infant which occurred or could have occurred during pregnancy, before
5 or during a delivery or in the immediate resuscitative period after a delivery, and which
6 results in a nonprogressive inability to control motor function and renders the infant
7 chronically impaired. A birth-related neurological impairment may be accompanied by
8 one or more associated symptoms, including (i) vision, speech, hearing, or learning
9 difficulties, (ii) seizures, or (iii) behavioral and psychological problems. This definition
10 shall not include disability caused by genetic abnormality.

11 (c) 'Delivery' means live birth in North Carolina.

12 (d) 'Department' means the Department of Environment, Health, and Natural
13 Resources.

14 (e) 'Director' means the Director of the North Carolina Birth-Related
15 Neurological Impairment Compensation Program.

16 (f) 'Fund' means the North Carolina Birth-Related Neurological Impairment
17 Trust Fund.

18 (g) 'Impaired person' means an applicant who has established entitlement to
19 benefits under this Article by obtaining a determination of having a birth-related
20 neurological impairment.

21 (h) 'Program' means the North Carolina Birth-Related Neurological Impairment
22 Program.

23 (i) 'Provider' means (i) a health care provider as defined in G.S. 90-21.11 who
24 performs or assists in the prenatal care, delivery, or resuscitative care immediately
25 thereafter of the applicant; (ii) a hospital facility as defined in G.S. 131E-6 in which
26 such care is performed; or (iii) a birthing facility licensed under Chapter 131E of the
27 General Statutes in which such care is performed.

28 (j) 'Secretary' means the Secretary of the Department of Environment, Health,
29 and Natural Resources.

30 **"§ 130A-462. North Carolina Birth-Related Neurological Impairment Program;**
31 **exclusive remedy; exception.**

32 (a) There is created the North Carolina Birth-Related Neurological Impairment
33 Program. The Department shall establish and administer the Program, and the Secretary
34 shall appoint a Director employed within the Division of Maternal and Child Health,
35 Section of Children and Youth, to carry out its obligations under the Program pursuant
36 to this Article. The Department shall adopt rules to implement the Program, including
37 provisions for a citizens' advisory committee to the Program, the membership of which
38 shall include representatives of children disabled by chronic inability to control motor
39 function.

40 (b) The rights and remedies granted a person with a birth-related neurological
41 impairment hereunder shall exclude all other rights and remedies of the person, the
42 person's parents, guardian, guardian **ad litem**, personal representative and all others
43 against any provider, as defined in this Article, at common law or otherwise for any
44 damages arising out of such birth-related neurological impairment. If a civil action is

1 filed involving an impairment previously and finally determined by the Department to
2 be a birth-related neurological impairment, it shall be dismissed on the motion of any
3 party to the action. If a civil action is filed involving an impairment alleged by any
4 party to be a birth-related neurological impairment, but no determination has been made
5 by the Department, upon motion of any party, the action shall be stayed pending an
6 application and determination. The action shall be dismissed if the impairment is finally
7 determined to be a birth-related neurological impairment, but the stay shall be lifted and
8 the action proceed if the impairment is finally determined not to be a birth-related
9 neurological impairment.

10 (c) For every injury giving rise to an application under this Article, there shall be
11 an independent investigation by the Office of the Attorney General and the North
12 Carolina Board of Medical Examiners of the provider or providers performing the
13 delivery. The results of the investigation by the Office of the Attorney General, with
14 recommendations, shall be submitted to the Board of Medical Examiners or any other
15 appropriate licensing board. The Board of Medical Examiners shall have the power to
16 restrict, suspend, or revoke a license or other authority to practice medicine in this State,
17 issued by the Board to any person when that person is found by the Board to have
18 committed any act or acts showing: (i) lack of ability or competence to practice
19 medicine with reasonable skill or safety to patients; (ii) unprofessional conduct,
20 including, but not limited to, any departure from, or the failure to conform to, the
21 standards of acceptable and prevailing medical practice among providers with similar
22 training and experience situated in the same or similar communities at the time of the
23 act; or (iii) any other reason for which a person is otherwise subject to disciplinary
24 action. If upon investigation there is reasonable cause for disciplinary action against
25 any provider, as determined in the discretion of the Board of Medical Examiners or any
26 other appropriate licensing board to which the investigation has been referred,
27 disciplinary proceedings shall be commenced. Before the Board of Medical Examiners
28 may revoke, restrict, or suspend a license, charges shall be brought and opportunity for
29 public hearing shall be afforded pursuant to Article 1, Chapter 90 of the General
30 Statutes and Chapter 150B of the General Statutes. The Office of the Attorney General
31 and the Board of Medical Examiners shall receive copies of all applications and
32 accompanying documentation in order to commence investigations. Any authority
33 conducting an investigation may obtain assistance from one or more impartial
34 physicians in evaluating the clinical aspects of such investigation. Necessary and
35 reasonable funds shall be made available for this investigation from the Fund. A report
36 of the number and type of recommendations made by the Office of the Attorney General
37 and a report of final disciplinary actions taken against health care providers under this
38 section shall be made annually to the Secretary and shall be a matter of public record.

39 **"§ 130A-463. Comprehensive, integrated assistance.**

40 The Department shall develop a program for referral to evaluation centers, assistance
41 with applications, clinical assessment of needs and available resources, determination of
42 eligibility, management of care, and compensation. To the extent feasible and
43 consistent with the purposes of this Article, the Department shall integrate the Program
44 with existing assistance programs for disabled or impaired children in North Carolina.

1 **"§ 130A-464. Referrals.**

2 Referrals will be accepted from all sources, including, but not limited to, the
3 following: (i) local health departments, (ii) departments of social services, (iii)
4 hospitals, (iv) health care providers, (v) preschool and school health programs, (vi)
5 volunteer agencies, (vii) impaired persons and their families and (viii) early intervention
6 programs. Referrals shall be made to the most accessible Department evaluation center.

7 **"§ 130A-465. Application assistance.**

8 The Director, by and through a service coordinator individually assigned, shall assist
9 each applicant in the preparation of an application for benefits under the Program on
10 forms provided by the Department. The service coordinator shall also assist in
11 obtaining appropriate information, including identification of providers, time and place
12 where the birth occurred, medical records, evaluations, other clinical information, and
13 information relative to the applicant's medical condition and needs.

14 **"§ 130A-466. Determination of impairment.**

15 The Director shall timely determine whether the applicant has a birth-related
16 neurological impairment. In making such determination, the Director shall consider the
17 evaluations, prognoses, and other documentation in or with the application. Upon the
18 request of any applicant or provider, or upon the Director's own initiative, the Director
19 may solicit further evaluations and prognoses by one or more qualified and impartial
20 physicians. The Director shall consider, but is not bound by, such solicited
21 recommendations.

22 **"§ 130A-467. Clinical assessment; need; resources.**

23 (a) If the Director determines that the applicant has a birth-related neurological
24 impairment, a written clinical assessment shall be made identifying the impairment and
25 associated disabilities or special needs. The assessment shall be interdisciplinary and
26 shall include collection and review of pertinent historical and medical information,
27 evaluation of overall health status, developmental level, child/family relations, and
28 where possible, the etiology of the impairment. The clinical assessment shall include a
29 comprehensive coordinated care plan for the delivery of services and necessary
30 appliances to the impaired person.

31 (b) A written financial assessment shall also be made of the availability of
32 potential third party payment sources and of direct services or other benefits, from all
33 sources, including governmental or private insurance. Resources of the applicant or the
34 applicant's family shall not be considered in making the financial assessment. The
35 service coordinator shall assist in providing information on possible resources and in
36 securing eligibility for and access to them. The Program shall have a plan for integrated
37 access to benefits through other State programs and agencies. When sources of benefits
38 are exhausted or insufficient to meet the established needs of the impaired person,
39 Program payments shall be disbursed from the Fund pursuant and subject to this Article.

40 **"§ 130A-468. Determination letter.**

41 The determination of whether the applicant has a birth-related neurological
42 impairment, the basis for the determination, and if affirmative, the clinical and financial
43 resource assessments, shall be set forth in writing in a determination letter from the
44 Director to the applicant. Written notice of the determination shall be sent by the

1 Director to the Secretary, the named providers, the Attorney General, and the Board of
2 Medical Examiners or other appropriate licensing board.

3 **"§ 130A-469. Case management; payments.**

4 (a) Case management shall be provided through the evaluation centers and
5 service coordinators. It shall include assistance to assure that impaired persons receive
6 adequate services consistent with the care plan, regular consultation and follow-up, and
7 to assure that changing needs are identified and satisfied by the provision of adequate
8 services. Impaired persons shall receive Program support for unmet expenses for
9 necessary (i) case coordination, (ii) developmental evaluation, (iii) special education,
10 (iv) vocational training, (v) physical, emotional, or behavioral therapy, and (vi) other
11 devices, medical care, custodial care and rehabilitative services relative to and
12 necessitated by the impairment. Medical conditions not associated with the impairment
13 do not qualify for Program support. Subject to this Article, Fund payments shall be
14 disbursed for case management and authorized payments consistent with the care plan,
15 on a supplemental basis after all other sources of payment, benefits, or services for the
16 impaired person are exhausted or not available. In circumstances in which qualifying
17 unmet expenses have been incurred by a newly eligible impaired person or on such
18 person's behalf, retroactive Fund reimbursement is authorized. An impaired person, as
19 defined, shall be eligible for Program benefits and services regardless of whether the
20 impaired person is located within the State of North Carolina.

21 (b) Fund payments shall not be considered in determinations of assets or income
22 in governmental assistance programs where the level of support is based upon assets or
23 income. Fund payments shall not be considered a third party benefit entitlement in
24 calculations of eligibility for private third party payment or for governmental assistance
25 programs.

26 (c) Fund payments shall be made for services or benefits authorized by the
27 Department. Fund payments will be paid directly to providers or suppliers of benefits
28 after receipt of statements. Fund payments shall be at reasonable levels, using Medicaid
29 and other comparable government assistance program payment levels as guidelines.
30 Provided, providers and suppliers shall be reimbursed at no less than their verifiable
31 cost or Medicaid rate, whichever is higher. When the Department authorizes payment
32 for expenses incurred by or on behalf of an impaired person prior to determination of
33 impairment by the Department, reimbursement shall be for the full amount of the
34 expenses incurred, if reasonable. Fund payments to providers and suppliers shall
35 constitute payment in full and any further billing is not permitted.

36 **"§ 130A-470. Appeals.**

37 Determinations pursuant to G.S. 130A-468 and G.S. 130A-469 are subject to
38 administrative and judicial review under Chapter 150B of the General Statutes and
39 applicable Department rules governing agency appeals. Without limiting the rights of
40 any other person, the Secretary, representing the interests of the State in assuring
41 accurate determinations, shall have standing to appeal. If an applicant prevails in any
42 civil action seeking judicial review, the court may, in its discretion, allow that applicant
43 to recover reasonable attorneys' fees incurred in pursuing the appeal, to be taxed as
44 court costs against the Department, and to be reimbursed from the Fund. An applicant

1 shall petition for attorneys' fees within 30 days of final disposition of the applicant's
2 case.

3 **"§ 130A-471. Scope.**

4 This Article applies to all births occurring in North Carolina on or after the effective
5 date of this Article.

6 **"§ 130A-472. North Carolina Birth-Related Neurological Impairment Trust Fund.**

7 (a) There is authorized and established in the Department the Birth-Related
8 Neurological Impairment Trust Fund to finance payments under, and administrative
9 costs of, the Program. The Secretary shall administer the Fund, subject to review,
10 recommendations, and approval by the Birth-Related Neurological Impairment Trust
11 Fund Council. The Council shall consist of the Secretary, who shall serve as Chairman,
12 the State Treasurer, and the State Controller. The Council shall advise the Secretary
13 regarding administration of the Fund, including the establishment and adjustment of
14 assessments, review and approval of budgets for expenditures and any revised budgets,
15 distribution of Program funds, and actuarial soundness of the Fund. The Council shall
16 consider any reserve payment from an insurer or carrier to the Fund pursuant to G.S.
17 130A-474(b) in calculating assessments for providers insured by such insurer or carrier
18 during the period set forth in G.S. 130A-474(b). The Council shall meet not less than
19 quarterly each year. Prior to commencement of the Program, the Secretary shall cause,
20 at the expense of the Fund, an actuarial investigation of long-term projected receipts and
21 disbursements, with the assistance of an independent actuary, and the Program shall not
22 commence until there is a written finding that, given reasonable assumptions, the
23 Program should be expected to operate on an actuarially sound basis.

24 (b) The State Treasurer shall be custodian of the Fund assets and shall invest its
25 assets in accordance with G.S. 147-69.2 and G.S. 147-69.3. The Fund is subject to the
26 oversight of the State Auditor under Article 5A of Chapter 147 of the General Statutes.
27 The Fund is hereby expressly designated and eligible to receive and accrue all interest
28 and other earnings on its assets under G.S. 147-86.11(g).

29 (c) Subject to approval of the Birth-Related Neurological Impairment Trust Fund
30 Council, necessary and reasonable administrative expenses of the Department, the
31 Office of the Attorney General, the Board of Medical Examiners, and any other
32 appropriate licensing board to which an investigation is referred, for activities directed
33 by this Article, may be charged against the Fund. After the initial two years of
34 operation of the Program such expenses shall not exceed five percent (5%) of the
35 previous year's Fund disbursements. Withdrawals from the Fund are hereby authorized
36 as needed until expended to carry out the intent and purposes of this Article, and
37 recognizing the importance thereof, all Fund principal and income shall be used to
38 support the Program pursuant to this Article.

39 **"§ 130A-473. Fund; assessments.**

40 (a) The Department shall adopt rules to administer the Fund, including rules
41 governing the establishment and management of the initial and annual assessments
42 required by this section. The Fund is eligible to receive sums from private or public
43 foundations, corporations, individuals, and other sources and from governmental
44 appropriations, which if received shall serve to supplement the Fund.

1 (b) There shall be levied by the Birth-Related Neurological Impairment Trust
2 Fund Council against the physician provider performing the delivery and the hospital or
3 birthing facility in which the delivery is performed a total combined assessment on each
4 delivery not to exceed one hundred seventy dollars (\$170.00). The Council shall
5 determine an appropriate apportionment of the total amount of the assessment between
6 the physician and the hospital or birthing facility, based on the average of three actuarial
7 studies by Fellows of the Casualty Actuarial Society of the comparative costs between
8 physicians and hospitals or birthing facilities for birth-related neurological impairments
9 in the civil liability system. Assessments shall not be required to be paid by a provider
10 on deliveries for which no fee is charged. In the event that the Birth-Related
11 Neurological Impairment Trust Fund Council finds that projected assessment receipts
12 and receipts from all other sources are inadequate relative to projected disbursements
13 for the Fund to be administered on an actuarially sound basis, there shall be levied by
14 the Council an additional interim assessment of up to twenty-five percent (25%) of the
15 maximum assessment, for a period not to exceed one year, and the General Assembly
16 shall be promptly notified by the Council of such a finding and receive
17 recommendations, prepared with the assistance of the Program Director, regarding
18 receipts and disbursements of the Fund and benefits provided through the Program.

19 (c) The Secretary shall collect and enforce collection of all assessments required
20 to be paid under this section. Any person who fails to pay or cause to be paid to the
21 Fund the assessments required under this section within 90 days of the delivery shall, in
22 addition to such unpaid assessments, pay to the Fund interest at the rate established by
23 the Secretary of Revenue under G.S. 105-241(i), and there shall also be added to said
24 unpaid assessments an amount equal to fifty percent (50%) of the amount of such
25 unpaid assessments.

26 **"§ 130A-474. Actuarial investigation; valuations; gain/loss analysis; notice if**
27 **assessments prove insufficient; reserves.**

28 (a) At least annually, the Secretary shall undertake, with the assistance of an
29 independent actuary, an actuarial investigation of the requirements of the Fund in
30 determining the amount of the assessment. The investigation shall be based on the
31 Fund's experience in the first and succeeding years of operation, and shall include,
32 without limitation, investigation of the actual and projected assets and liabilities of the
33 Fund. Any determinations and recommendations shall be filed with the Birth-Related
34 Neurological Impairment Trust Fund Council.

35 (b) For a period of five years, so long as the Fund is in effect and operating as
36 authorized under this Article during that time, each professional medical liability
37 insurance carrier and other entity insuring obstetrical risks in this State, under the
38 authority and approval of the Commissioner of Insurance, shall establish reserve
39 accounts for that portion of collected insurance premiums attributable to actuarially
40 anticipated birth-related neurological impairment losses and expenses and hold the same
41 for the five-year period. Such reserves shall be determined without regard to or
42 consideration of the effect of G.S. 130A-462(b) on the rights and remedies of any
43 person arising out of any birth-related neurological impairment. At the end of this
44 period, and annually thereafter, actuarially indicated reserved funds, less funds held for

1 claims alleging birth-related neurological impairments not covered by this act, and
2 earnings approved by the Commissioner shall be paid by each insurance carrier and
3 other insuring entity to the Fund. Such carriers and insurers may retain loss adjustment
4 expenses incurred in connection with claims arising out of birth-related neurological
5 impairments. In the event of the insolvency of a carrier or insurer prior to the end of
6 this period, the reserves and earnings required by this section shall be held in trust by
7 the Commissioner as receiver until the end of this period. Insurance carriers and other
8 insuring entities shall supply the Commissioner of Insurance with claims experience
9 information and other relevant data, in the form and manner requested by the
10 Commissioner of Insurance, regarding obstetrical risks and establishment of the
11 reserves required in this section. The Commissioner of Insurance may adopt rules and
12 regulations regarding the establishment, collection, maintenance, and payment of the
13 reserves and earnings required by this section.

14 **"§ 130A-475. Right of State to bring action.**

15 The Secretary, on behalf of the Fund, to the extent of all current Fund payments and
16 expenses and to the estimated present value of all future Fund payments and expenses,
17 shall be subrogated to all rights of recovery of the impaired person against any person or
18 entity not a provider as defined in this Article.

19 **"§ 130A-476. Provider responsibilities.**

20 (a) Providers covered under this Article are required to participate in an
21 obstetrical care coverage plan which assures continuity and quality of care, developed
22 by their local health department or community, migrant, or rural health center, and must
23 agree to provide services to pregnant women who receive Medicaid.

24 (b) The Department of Environment, Health, and Natural Resources, Division of
25 Maternal and Child Health, and the Department of Human Resources, Division of
26 Medical Assistance and Office of Rural Health and Resource Development, shall upon
27 request, assist in the development of local obstetrical care coverage plans.

28 **"§ 130A-477. Reports.**

29 (a) The Department of Environment, Health, and Natural Resources, through the
30 Secretary, shall evaluate the effectiveness of this Article in achieving its stated purposes
31 and shall prepare a report of its findings no later than January 1, 1994. The report shall
32 include an evaluation of the numerical and geographic redistribution of health care
33 providers performing obstetrics in this State.

34 (b) The Department of Insurance shall use collected information from
35 professional medical liability insurance carriers and other insuring entities to include in
36 its annual report to the General Assembly an evaluation of the effectiveness of this
37 Article on insurance claims experience, rate making, and rates.

38 (c) The Department of Environment, Health, and Natural Resources, Division of
39 Maternal and Child Health, and the Department of Human Resources, Division of
40 Medical Assistance and Office of Rural Health and Resource Development, shall
41 prepare a report on the local obstetrical care coverage plans and the extent of
42 participation by local providers in these plans. This report shall be provided to the
43 General Assembly no later than March 15, 1992."

1 Sec. 2. No funds shall be appropriated to implement the provisions of this
2 act. Any cost of the Program, including actuarial investigations, and any other costs of
3 administration of the Program or Fund prior to July 1, 1991, shall be paid from sums
4 received from private or public foundations, corporations, individuals, and other
5 sources.

6 Sec. 3. This act shall become effective July 1, 1991, except G.S. 130A-
7 462(a), 130A-472, 130A-473(a) and 130A-473(b) shall become effective upon
8 ratification, and the Department of Environment, Health, and Natural Resources shall
9 begin to adopt rules required in G.S. 130A-462(a) and G.S. 130A-473(a) to implement
10 Article 20 of Chapter 130A of the General Statutes, and the Birth-Related Neurological
11 Impairment Trust Fund Council shall commence the actuarial investigations and
12 determination of assessments required in G.S. 130A-472 and G.S. 130A-473(b). These
13 rules and assessments shall not become effective until July 1, 1991.