

HOUSE No. 3634

The Commonwealth of Massachusetts

PRESENTED BY:

Steven M. Walsh

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the passage of the accompanying:

An Act establishing a birth-related neurological injury compensation program in the commonwealth.

PETITION OF:

NAME:

Steven M. Walsh

DISTRICT/ADDRESS:

11th Essex

HOUSE No. 3634

By Mr. Walsh of Lynn, a petition (accompanied by bill, House, No. 3634) of Steven M. Walsh establishing a birth related neurological injury trust fund in the Commonwealth. Health Care Financing.

The Commonwealth of Massachusetts

In the Year Two Thousand Thirteen

An Act establishing a birth-related neurological injury compensation program in the commonwealth.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. The General Laws are hereby amended by inserting after chapter 113A the
2 following chapter:-

3 CHAPTER 113B. BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION
4 PROGRAM

5 Section 1. As used in this chapter the following terms shall have the following meanings:

6 "Birth-related neurological injury", injury to the brain or spinal cord of an infant caused
7 by the deprivation of oxygen or mechanical injury occurring in the course of labor, delivery or
8 resuscitation necessitated by a deprivation of oxygen or mechanical injury that occurred in the
9 course of labor or delivery, in a hospital which renders the infant permanently motorically
10 disabled and (i) developmentally disabled or (ii) for infants sufficiently developed to be
11 cognitively evaluated, cognitively disabled. In order to constitute a "birth-related neurological
12 injury" within the meaning of this chapter, such disability shall cause the infant to be
13 permanently in need of assistance in all activities of daily living. This definition shall apply to
14 live births only and shall not include disability or death caused by genetic or congenital
15 abnormality, degenerative neurological disease, or maternal substance abuse. The definition
16 provided here shall apply retroactively to any child born on or after January 1, 2005.

17 "Board", the board of directors of the commonwealth birth-related neurological injury
18 compensation program established in section 19.

19 "Claimant", any person who files a claim pursuant to this chapter for compensation for a
20 birth-related neurological injury to an infant. Such claims may be filed by any legal
21 representative on behalf of an injured infant; and, in the case of a deceased infant, the claim may
22 be filed by an administrator, executor, or other legal representative.

23 "Division", the division of insurance.

24 "Fund", the Birth-Related Neurological Injury Compensation Fund established in section
25 18.

26 "Participating hospital", a hospital licensed in the commonwealth by the department of
27 public health to provide obstetrical care to patients. The term also includes employees of such
28 hospitals, excluding physicians or nurse midwives who are eligible to qualify as participating
29 physicians or nurse midwives, acting in the course of and in the scope of their employment.

30 "Participating physician or nurse midwife", a physician or nurse midwife licensed in the
31 commonwealth to practice medicine, who practices obstetrics or performs obstetrical services
32 either full or part time or, as authorized in the plan of operation, a licensed nurse midwife who
33 performs obstetrical services, either full or part time, within the scope of such licensure and has,
34 at the time of the injury, paid the participating physician assessment pursuant to subsection (a) of
35 section 24 for the period of time in which the birth-related neurological injury occurred. The
36 term "participating physician or nurse midwife" includes a partnership, corporation, professional
37 corporation, professional limited liability company, physician or nurse midwife group practice or
38 other entity through which the participating physician or nurse midwife practices.

39 "Program", the commonwealth birth-related neurological injury compensation program
40 established in this chapter.

41 "Tribunal", the birth-related neurological injury assessment tribunal established in section
42 4.

43 Section 2. (a) There is hereby established a commonwealth birth-related neurological
44 injury compensation program.

45 (b) Except as provided in subsection (d), the rights and remedies herein granted to an
46 infant on account of a birth-related neurological injury shall exclude all other rights and remedies
47 of such infant, his personal representative, parents, dependents or next of kin, at common law or
48 otherwise arising out of or related to a medical malpractice claim with respect to such injury to
49 the infant, including any claims by the infant's personal representative, parents, dependents or
50 next of kin that are derivative of the medical malpractice claim with respect to the infant's injury,
51 including but not limited to claims of emotional distress proximately related to the infant's injury.
52 This subsection shall not be construed to exclude other rights and remedies available to the

53 infant's mother arising out of or related to a physical injury, separate and distinct from an injury
54 to the infant, suffered by the infant's mother during the course of the infant's delivery.

55 (c) Notwithstanding this section or any other general or special law to the contrary, a civil
56 action shall not be foreclosed against a physician or nurse midwife or a hospital where there is
57 clear and convincing evidence that such physician or nurse midwife or hospital intentionally or
58 willfully caused or intended to cause a birth-related neurological injury, provided that such suit is
59 filed prior to and in lieu of payment of an award under this chapter. Such suit shall be filed
60 before the award of the tribunal becomes conclusive and binding as provided for in this act.

61 (d) Notwithstanding this section, a civil action arising out of or related to a birth-related
62 neurological injury under this chapter, brought by an infant, the infant's personal representative,
63 parents, dependents or next of kin, shall not be foreclosed against a nonparticipating physician or
64 nurse midwife or hospital; provided, that: (i) no participating physician or nurse midwife or
65 hospital shall be made a party to any such action or related action, and (ii) the commencement of
66 any such action, regardless of its outcome, shall constitute an election of remedies, to the
67 exclusion of any claim under this chapter; and provided further, that if a claim is made, accepted
68 and benefits are provided by the fund, the fund shall have the right, and be subrogated to all of
69 the common law rights, based on negligence or malpractice, which the infant, the infant's
70 personal representative, parents, dependents or next of kin may have or may have had against the
71 non-participating physician, nurse midwife or hospital.

72 Section 3. The following records of the program shall be confidential: (i) records subject
73 to the attorney-client privilege; (ii) medical and mental health records of claimants obtained by
74 the board of directors in the course of administering the program; (iii) records concerning
75 deliberations of the board of directors in connection with specific claims; (iv) reports of expert
76 witnesses retained by the board of directors that have not become part of the record before the
77 tribunal; and (v) all records required to be kept confidential by federal law. Except as herein
78 authorized, an officer, agent or employee of the program, and any person who has held any such
79 position, shall not disclose, directly or indirectly, any such confidential record or information.

80 Section 4. (a) There shall be established within the office of patient protection and care
81 established in section 16 of chapter 6D, but not subject to the control of said office, a tribunal be
82 known as the birth-related neurological injury assessment tribunal. A trial court shall refer every
83 civil action for malpractice, error or mistake, or actions of tort or contract to recover for personal
84 injuries involving an injury alleged to be a birth related neurological injury, as defined in section
85 1, to the tribunal. The tribunal shall set the matter for hearing pursuant to section 8, at which
86 hearing said tribunal shall determine if the action satisfies the requirements of this chapter. The
87 tribunal shall have the functions, powers and duties established in this chapter.

88 (b) The tribunal shall consist of: (i) a justice of the superior court, who shall be appointed
89 by the governor; (ii) a physician licensed to practice medicine in the commonwealth under the

90 provisions of section 2 of chapter 12, who shall be selected by the office of patient protection and
91 care from a list submitted by the Massachusetts Medical Society representing the fields of
92 obstetrics, pediatrics, pediatric neurology, neonatology, physical medicine and rehabilitation, or
93 any other specialty particularly appropriate to the facts of a particular claim; and (iii) an attorney
94 authorized to practice law in the commonwealth, who shall be selected by the single justice from
95 a list submitted by the Massachusetts Bar Association.

96 The tribunal may appoint such attorneys, clerks and other attorneys and agents as it may
97 deem necessary, fix their compensation within the limitations provided by law, and prescribe
98 their duties.

99 Section 5. (a)(1) In all claims filed under this chapter, the claimant shall file with the
100 tribunal a petition, setting forth the following information:

101 (A) The name and address of the legal representative and the basis for his representation
102 of the injured infant;

103 (B) The name and address of the injured infant;

104 (C) The name and address of any physician or nurse midwife providing obstetrical
105 services who was present at the birth and the name and address of the hospital at which the birth
106 occurred;

107 (D) A description of the disability for which the claim is made;

108 (E) The time and place where the birth-related neurological injury occurred;

109 (F) A brief statement of the facts and circumstances surrounding the birth-related
110 neurological injury and giving rise to the claim;

111 (G) All available relevant medical records relating to the person who allegedly suffered a
112 birth-related neurological injury and an identification of any unavailable records known to the
113 claimant and the reasons for their unavailability;

114 (H) Appropriate assessments, evaluations, and prognoses and such other records and
115 documents as are reasonably necessary for the determination of the amount of compensation to
116 be paid to, or on behalf of, the injured infant on account of a birth-related neurological injury;

117 (I) Documentation of expenses and services incurred to date, which indicates whether
118 such expenses and services have been paid for, and if so, by whom; and

119 (J) Documentation of any applicable private or governmental source of services or
120 reimbursement relative to the alleged impairments.

121 (2) The claimant shall furnish the tribunal with as many copies of the petition as required
122 for service upon the program, any physician, nurse midwife or hospital named in the petition, the
123 board of registration in medicine, the board of registration in nursing and the department of
124 public health, along with a \$15 filing fee. Upon receipt of the petition the tribunal shall
125 immediately serve the program by service upon the agent designated to accept service on behalf
126 of the program in the plan of operation by registered or certified mail, and shall mail copies of
127 the petition to any physician, nurse midwife or hospital named in the petition, the board of
128 registration in medicine and the department of public health.

129 (b) Upon receipt of the petition or the filing of a claim relating to the conduct of a
130 participating physician or nurse midwife, the board of registration in medicine or board of
131 registration in nursing shall, consistent with the authority granted to said boards, investigate the
132 petition or claim and take action as necessary . If a notice or order is issued by the board of
133 registration in medicine or board of registration in nursing, a copy shall be mailed to the
134 petitioner or claimant. The board of registration in medicine and the board of registration in
135 nursing may promulgate rules and regulations for the investigation of claims relating to the
136 conduct of participating physicians and nurse midwives arising pursuant to this chapter.

137 (c) Upon receipt of the petition or the filing of a claim relating to the conduct of a
138 participating hospital, the department of public health shall investigate the petition or claim. If
139 the department of public health determines that there is reason to believe that the alleged injury
140 resulted from, or was aggravated by, substandard care on the part of the hospital at which the
141 birth occurred, it shall take any appropriate action consistent with the authority granted to it. The
142 department may promulgate rules and regulations for the investigation of claims relating to the
143 conduct of participating hospitals arising pursuant to this chapter.

144 (d) The program shall file a response to the petition and submit relevant written
145 information relating to the issue of whether the injury alleged is a birth-related neurological
146 injury within the meaning of this chapter within 10 days after the date the panel report required
147 by section 10 is filed with the tribunal.

148 (e) Any hospital at which a birth occurred, upon receipt of written notice from the legal
149 representative of an injured infant that he intends to file a petition under this chapter, shall
150 promptly deliver to such person all available medical records relating to the infant who allegedly
151 suffered a birth-related neurological injury. For the purposes of this chapter, fetal monitoring
152 strips, whether printed or in electronic format, shall be considered part of the medical records
153 relating to an infant who allegedly suffered a birth-related neurological injury.

154 Section 6. (a) Each physician, nurse midwife or hospital shall disclose in writing to their
155 obstetrical patients, at such time or times and in such detail as the board shall determine to be
156 appropriate, whether such physician, nurse midwife or hospital is or is not a participating
157 provider under the program.

158 (b) In addition to any other postpartum materials provided to the mother or other
159 appropriate person, every hospital shall provide for each infant who was hospitalized in a
160 neonatal intensive care unit an informational brochure prepared or approved by the board. The
161 brochure shall describe the rights and limitations under the program, including the program's
162 exclusive remedy provision under subsection (b) of section 2.

163 (c) When a claim is made to an insurance company, as described in this chapter, licensed
164 to do business in the commonwealth or to any self-insurer, alleging that a possible birth-related
165 neurological injury or a severe adverse outcome related to a birth has occurred, such insurance
166 company or self-insurer shall report such claim to the program on a form provided by the
167 program. Upon receipt of such report, the program shall inform the parent or parents or
168 guardians of the child on whose behalf such claim has been made of the program's existence and
169 eligibility requirements.

170 (d) No liability or inference of liability or eligibility shall attach to the making of a report
171 pursuant to subsection (c). Evidence of the making of such report shall not be admissible in any
172 court.

173 Section 7. The statute of limitations with respect to any civil action that may be brought
174 by or on behalf of an injured infant allegedly arising out of or related to a birth-related
175 neurological injury shall be tolled by the filing of a claim in accordance with this chapter, and the
176 time such claim is pending shall not be computed as part of the period within which such civil
177 action may be brought.

178 Section 8. (a) Immediately after the program's response is filed pursuant to subsection (d)
179 of section 5 the tribunal shall set the date for a hearing, which shall be held no sooner than 15
180 days and no later than 90 days after the filing of the program's response, and shall notify the
181 parties to the hearing of the time and place of such hearing. The hearing shall be held in the city
182 or county where the birth-related neurological injury occurred, or in a contiguous city or county,
183 unless otherwise agreed to by the parties and authorized by the tribunal.

184 (b) The parties to the hearing required under this section shall include the claimant and
185 the program.

186 (c) The tribunal may subpoena witnesses, compel their attendance, administer oaths, take
187 the testimony of any person under oath, and in connection therewith, require the production for
188 examination of any evidence relating to any issue in question before the tribunal. Admissible
189 evidence shall include, but not be limited to: hospital and medical records, nurses' notes, x-rays
190 and other records kept in the usual course of the practice of a health care provider without the
191 necessity for other identification or authentication, statements of fact or opinion on a subject
192 contained in a published treatise, periodical, book or pamphlet or statements by experts without
193 the necessity of such experts appearing at said hearing. The tribunal may, upon the application of

194 either party or upon its own decision summon or subpoena any records or individuals necessary
195 to substantiate or clarify any evidence which has been presented before it.

196 Section 9. Any party to a proceeding under this chapter may, upon application to the
197 tribunal setting forth the materiality of the information requested, serve interrogatories or cause
198 the depositions of witnesses residing within or without the commonwealth to be taken, the costs
199 to be taxed as expenses incurred in connection with the filing of a claim, in accordance with
200 section 12. Such depositions shall be taken after notice and in the manner prescribed by law for
201 depositions in actions at law; provided, however, that they shall be directed to the tribunal before
202 whom the proceedings may be pending.

203 Section 10. (a) The tribunal shall determine, on the basis of the evidence presented to it,
204 the following issues:

205 (1) Whether the injury claimed is a birth-related neurological injury as defined in this
206 chapter.

207 (A) A rebuttable presumption shall arise that the injury alleged is a birth-related
208 neurological injury where it has been demonstrated, to the satisfaction of the tribunal, that the
209 infant has sustained a brain or spinal cord injury caused by oxygen deprivation or mechanical
210 injury, and that the infant was thereby rendered permanently motorically disabled and (i)
211 developmentally disabled or (ii) for infants sufficiently developed to be cognitively evaluated,
212 cognitively disabled.

213 If either party disagrees with such presumption, that party shall have the burden of
214 proving that the injuries alleged are not birth-related neurological injuries within the meaning of
215 this chapter.

216 (B) A rebuttable presumption of fetal distress, an element of a birth-related neurological
217 injury, shall arise if the hospital fails to provide the fetal heart monitor tape to the claimant, as
218 required by subsection (e) of section 5.

219 (2) Whether obstetrical services were delivered by a participating physician or nurse
220 midwife at the birth.

221 (3) Whether the birth occurred in a participating hospital.

222 (4) How much compensation, if any, is awardable pursuant to this chapter.

223 (b) If the Tribunal determines (i) that the injury alleged is not a birth-related neurological
224 injury as defined in this chapter or (ii) that obstetrical services were not delivered by a
225 participating physician or nurse midwife at the birth and that the birth did not occur in a
226 participating hospital, it shall dismiss the petition and cause a copy of its order of dismissal,
227 together with a statement of the findings of fact, rulings of law, and other matters pertinent to the

228 questions at issue to be sent immediately to the parties by registered or certified mail and filed
229 with the record of the proceedings.

230 (c) All parties are bound for all purposes, including any suit at law against a participating
231 physician or nurse midwife or participating hospital, by the finding of the tribunal, with respect
232 to whether such injury is a birth-related neurological injury.

233 (d) The dean of the University of Massachusetts Medical School shall: (i) develop a plan
234 whereby each claim filed with the tribunal under this chapter is reviewed by a panel of three
235 qualified and impartial physicians or nurse midwives drawn from the fields of obstetrics,
236 pediatrics, pediatric neurology, neonatology, physical medicine and rehabilitation, or any other
237 specialty particularly appropriate to the facts of a particular case; (ii) appoint the panel; and (iii)
238 designate a chairperson. In no event shall the panel contain more than 1 member from the field of
239 obstetrics. The tribunal shall direct the program to pay to the University of Massachusetts
240 Medical School the sum of \$3,000 per claim reviewed.

241 (e) The panel created pursuant to subsection (d) shall prepare a report that provides a
242 detailed statement of the opinion of the panel's members regarding whether the infant's injury
243 does or does not satisfy each of the criteria of a birth-related neurological injury enumerated in
244 such term's definition in this chapter. The report shall include the panel's basis for its
245 determination of whether each such criteria was or was not satisfied. In addition, the report shall
246 include such supporting documentation as the board of directors of the program may reasonably
247 request. The panel shall file its report with the tribunal 60 days from the date the petition was
248 filed with the tribunal. At the same time that the panel files its report with the tribunal, the panel
249 shall send copies thereof to the program and all parties to the proceeding. At the request of the
250 tribunal, at least 1 member of the panel shall be available to testify at the hearing. The tribunal
251 shall consider, but shall not be bound by, the recommendation of the panel.

252 Section 11. Upon a timely motion, all parties to a claim under this chapter shall have the
253 right to confront and cross-examine witnesses. In pursuing that right, a party shall not be
254 precluded from conducting depositions by oral examination or cross-examination at a hearing of
255 any witnesses from whom evidence is elicited.

256 Section 12. (a) Upon determining (i) that an infant has sustained a birth-related
257 neurological injury and (ii) that obstetrical services were delivered by a participating physician
258 or nurse midwife at the birth or that the birth occurred in a participating hospital, the tribunal
259 shall make an award providing compensation for the following items relative to such injury:

260 (1) Actual medically necessary and reasonable expenses of medical and hospital,
261 rehabilitative, therapeutic, nursing, attendant, residential and custodial care and service,
262 medications, supplies, special equipment or facilities and related travel, such expenses to be paid
263 as they are incurred. Reimbursement may be provided for nursing and attendant care that is
264 provided by a relative or legal guardian of a program beneficiary so long as that care is beyond

265 the scope of child care duties and services normally and gratuitously provided by family
266 members to uninjured children. However, such expenses shall not include:

267 (A) Expenses for items or services that the infant has received, or is entitled to receive,
268 under the laws of any state or the federal government except to the extent prohibited by federal
269 law;

270 (B) Expenses for items or services that the infant has received, or is contractually entitled
271 to receive, from any prepaid health plan, health maintenance organization, or other private
272 insuring entity;

273 (C) Expenses for which the infant has received reimbursement, or for which the infant is
274 entitled to receive reimbursement, under the laws of any state or federal government except to
275 the extent prohibited by federal law; or

276 (D) Expenses for which the infant has received reimbursement, or for which the infant is
277 contractually entitled to receive reimbursement, pursuant to the provisions of any health or
278 sickness insurance policy or other private insurance program.

279 Expenses of medical and hospital services under this subdivision shall be limited to such
280 charges as prevail in the same community for similar treatment of injured persons of a like
281 standard of living when such treatment is paid for by the injured person.

282 In order to provide coverage for expenses of medical and hospital services under this
283 subdivision, the tribunal, in all cases where a comparative analysis of the costs, including the
284 effects on the infant's family's health insurance coverage, and benefits indicates that such action
285 is more cost-effective than awarding payment of medical and hospital expenses, shall (i) require
286 the claimant to purchase private health insurance providing coverage for such expenses,
287 provided, that the premium or other costs of such coverage shall be paid by the fund; (ii) require
288 the claimant to participate in health coverage programs under Title XIX or XXI of the Social
289 Security Act, or any other state or federal health insurance program for which the infant is
290 eligible; or (iii) if the tribunal determines that it would be unreasonably burdensome to require
291 the claimant to purchase private health insurance and that the infant is ineligible for any health
292 insurance program pursuant to clause (ii), to make an award providing compensation for the cost
293 of private accident and sickness insurance for the infant.

294 (2) Loss of earnings from the age of 18 are to be paid in regular installments beginning
295 on the eighteenth birthday of the infant. An infant found to have sustained a birth-related
296 neurological injury shall be conclusively presumed to have been able to earn income from work
297 from the age of 18 through the age of 65, if he had not been injured, in the amount of 50 per cent
298 of the average weekly wage in the commonwealth of workers in the private sector. Payments
299 shall be calculated based on the commonwealth's reporting period immediately preceding the

300 eighteenth birthday of the claimant child, and subsequently adjusted based upon the succeeding
301 annual reports of the commonwealth.

302 (3) Reasonable expenses incurred by the claimant in connection with the filing of a claim
303 under this chapter, including reasonable attorneys' fees of the claimant's attorney, but excluding
304 attorney fees incurred in opposing a claimant's admission. Any award for expenses, including
305 attorneys' fees, incurred by the claimant in connection with the filing of a claim under this
306 chapter shall be subject to the approval and award of the tribunal.

307 A copy of the award, together with a statement of the findings of fact, rulings of law and
308 other matters pertinent to the questions at issue, shall be sent immediately by registered or
309 certified mail to the parties and shall be filed with the record of the proceedings.

310 (b) The tribunal shall not award compensation in connection with a claim for attorneys'
311 fees or other expenses incurred by any participating physician, nurse midwife or hospital that is
312 party to a proceeding under this chapter or by a medical malpractice liability insurer of such
313 party.

314 Section 13. (a) For births occurring on or after the effective date of this act, if the
315 tribunal determines that an infant has sustained a birth-related neurological injury and that
316 obstetrical services were delivered by a participating physician or nurse midwife at the birth or
317 that the birth occurred in a participating hospital, and the infant dies within 180 days of birth, the
318 tribunal, in its discretion, may make an award in an amount not exceeding \$100,000 to the
319 infant's family, which award shall be in addition to and not in lieu of any other award providing
320 compensation.

321 (b) Prior to making an award pursuant to this section, the tribunal shall conduct a hearing
322 for the purpose of determining whether such award is appropriate and, if so, the proper amount
323 of such an award and how it should be paid, after receiving evidence pertaining to sorrow,
324 mental anguish, solace, grief associated with the death of the infant, and all other material factors
325 that are relevant.

326 (c) As used in this section, an infant's family means the infant's father, mother, or both, or
327 if neither is a party to the proceeding, the infant's legal guardian.

328 Section 14. (a) Any party aggrieved by a determination or award of the tribunal pursuant
329 to this chapter may obtain judicial review thereof, and the tribunal may obtain an order of court
330 for enforcement thereof within 30 days from the date of such determination or award; provided,
331 however, that the tribunal's determination as to whether an alleged injury is a birth-related
332 neurological injury shall not be reviewable.

333 (b) A proceeding for judicial review shall be brought in the superior court of the
334 commonwealth within the county wherein the tribunal hearing was held. Such proceeding shall

335 be initiated by the filing of a petition in said court, together with a written transcript of the record
336 of the hearing before the tribunal, and the issuance and service of an order of notice as in
337 proceedings in equity. No objection that has not been urged before the tribunal shall be
338 considered by the court, unless the failure or neglect or urge such objection shall be excused
339 because of extraordinary circumstances. The determination or award of the tribunal shall be
340 reviewed in accordance with the standards for review provided in paragraph (7) of section 14 of
341 chapter 30A. All such proceedings shall be heard and determined by the court as expeditiously
342 as possible and shall take precedence over all other matters before it, except matters of like
343 nature. The jurisdiction of the superior court shall be exclusive and its final order or decree shall
344 be subject to review by the supreme judicial court in the same manner and form and with the
345 same effect as in appeals from a final order or decree in proceedings in equity.

346 (c) A copy of a petition for judicial review shall be filed with the clerk of the tribunal.
347 The filing of a petition for judicial review shall operate as a suspension of any award by the
348 tribunal, and the program shall not be required to make payment of the award involved in the
349 review until the questions at issue therein have been fully determined in accordance with the
350 provisions of this chapter.

351 Section 15. A determination or award of the tribunal pursuant to this chapter, if not
352 reviewed within the time prescribed by section 14 shall be conclusive and binding upon the
353 parties.

354 Section 16. The tribunal has full authority to enforce its orders and punish for
355 disobedience of said orders.

356 Section 17. Notwithstanding section 60D of chapter 231, section 7 of chapter 260, or any
357 other general or special law to the contrary, a claim under this chapter may be brought within 10
358 years of the birth of an infant alleged to have a birth-related neurological injury.

359 Section 18. (a) There is hereby established and set up on the books of the
360 commonwealth a separate fund to be known as the Birth-Related Neurological Injury
361 Compensation Fund to finance the commonwealth birth-related neurological injury
362 compensation program created by this chapter. The assets of the fund administered by the board
363 are trust funds and shall be used solely in the interest of the recipients of awards pursuant to this
364 chapter and to administer the program.

365 (b) An independent certified public accountant selected by the board shall annually audit
366 the accounts of the fund, and the cost of such audit services shall be borne by the program and be
367 paid from moneys designated for such purposes in the fund. The audit shall be performed at least
368 each fiscal year, in accordance with generally accepted auditing standards and, accordingly,
369 include such tests of the accounting records and such auditing procedures as considered
370 necessary under the circumstances. The board shall furnish copies of the audit to the same
371 persons who are entitled to receive copies of the board's report on investment of the fund's assets.

372 Section 19. (a) The birth-related neurological injury compensation program shall be
373 governed by a board of 11 directors.

374 (b) Except as provided in subsection (c), directors shall be appointed for a term of 3 years
375 or until their successors are appointed and have qualified.

376 (c)(1) The directors shall be appointed by the governor as follows:

377 (A) Seven citizen representatives: 1 of whom shall have a minimum of 5 years of
378 professional investment experience; 1 of whom shall have a minimum of 5 years of professional
379 experience in finance and be licensed as a certified public accountant or hold a similar
380 professional designation; 1 of whom shall have professional experience working with the
381 disabled community; 1 of whom shall be the relative of a disabled child experienced in the care
382 of the disabled child; 1 of whom shall be an attorney with a minimum of 3 years of experience in
383 the practice of law representing clients with physical personal injuries; and 2 of whom shall be at
384 large representatives deemed qualified to serve by knowledge, education, training, interest or
385 experience. The initial term of the members appointed in the year of the effective date of this act
386 shall commence when appointed and shall be for 2 years;

387 (B) One physician and 1 nurse midwife. The initial term of the members appointed in the
388 year of the effective date of this act shall commence when appointed and shall be for 1 year;

389 (C) One representative of participating hospitals. The initial term of the member
390 appointed in the year of the effective date of this act shall commence when appointed and shall
391 be for 2 years; and

392 (D) One representative of liability insurers. The initial term of the member appointed in
393 the year of the effective date of this act shall commence when appointed and shall be for 3 years.

394 (2) The governor shall select: the physician and nurse midwife from a list of at least 3
395 names to be recommended by the Massachusetts Chapter of the American Congress of
396 Obstetricians and Gynecologists and the Massachusetts Association of Professional Nurse
397 Midwives, respectfully; the representative of participating hospitals from a list of at least 3
398 names to be recommended by the Massachusetts Hospital Association; the representative of
399 liability insurers from a list of at least 3 names, 1 of whom is recommended by the American
400 Insurance Association and 2 of whom are recommended by the Property Casualty Insurers
401 Association of America; the attorney member from a list of at least 4 names to be recommended
402 by the Massachusetts Bar Association; and the professional investment member, professional
403 finance member, the 2 at large members and the parent of a disabled child member from
404 applications duly submitted. Nothing contained herein shall preclude qualified applicants for any
405 position on the board from submitting an application to the governor to serve as a member of the
406 board. In no case shall the governor be bound to make any appointment from among the
407 nominees of the respective associations.

408 (d) The governor shall promptly notify the appropriate association, which may make
409 nominations, of any vacancy other than by expiration among the members of the board
410 representing a particular interest and like nominations may be made for the filling of the
411 vacancy.

412 (e) The directors shall act by majority vote with 5 directors constituting a quorum for the
413 transaction of any business or the exercise of any power of the program. The directors shall serve
414 without salary, but each director shall be reimbursed for actual and necessary expenses incurred
415 in the performance of his official duties as a director of the program. The directors shall not be
416 subject to any personal liability with respect to the administration of the program or the payment
417 of any award.

418 (f) The board shall have the power to (i) administer the program, (ii) administer the fund,
419 which shall include the authority to purchase, hold, sell or transfer real or personal property and
420 the authority to place any such property in trust for the benefit of claimants who have received
421 awards; (iii) appoint a service company or companies to administer the payment of claims on
422 behalf of the program, (iv) direct the investment and reinvestment of any surplus in the fund over
423 losses and expenses, provided any investment income generated thereby remains in the fund, (v)
424 reinsure the risks of the fund in whole or in part, and (vi) obtain and maintain directors' and
425 officers' liability insurance. The board shall discharge its duties with respect to the fund solely in
426 the interest of the recipients of awards and shall invest the assets of the fund with the care, skill,
427 prudence, and diligence under the circumstances then prevailing that a prudent person acting in a
428 like capacity and familiar with such matters would use in the conduct of an enterprise of a like
429 character and with like aims. Any decisions regarding the investment of the assets of the fund
430 shall be based on the advice of 1 or more investment advisors retained by the board, provided
431 that any investment advisor retained by the board shall be registered pursuant to chapter 110A or
432 shall be a federal covered advisor who has filed such documents and paid such fees as may be
433 necessary to transact business in the commonwealth pursuant to said chapter 110A. The board
434 shall report annually to the governor and to the clerks of the house of representatives and the
435 senate regarding the investment of the Fund's assets. The board shall establish a procedure in the
436 plan of operation for notice to be given to obstetrical patients concerning the no-fault alternative
437 for birth-related neurological injuries provided in this chapter, such notice to include a clear and
438 concise explanation of a patient's rights and limitations under the program.

439 (g) The board shall establish a procedure in the plan of operation for maintaining a list of
440 program claimants. Each claimant may consent to have his name, address, phone number, and
441 other personal information included on such list, for distribution to other program claimants. The
442 board shall distribute the list to program claimants who have given consent to be included on
443 such list, and to no other person.

444 (h) In the event that initial awards to claimants exceed 80 per cent of the funds on hand
445 and the funds that will become available to the fund within the next 12 months from all sources,

446 the board may establish a protocol to pay initial awards to claimants in installments. Within 30
447 days of determining that initial awards to claimants exceed 80 per cent of the funds on hand and
448 the funds that will become available to the fund within the next 12 months from all sources, the
449 board shall notify the chairs of the house and senate committees on ways and means and the
450 chairs of the joint committee on health care financing.

451 Section 20. The investment advisor or advisors retained by the board pursuant to
452 subsection (f) of section 19 shall provide the board with annual statements explaining the
453 expected returns on its equities and fixed income portfolios.

454 Section 21. (a) Within 30 days of the effective date of this act, the board shall submit to
455 the division for review a proposed plan of operation consistent with this chapter.

456 (b) The plan of operation shall provide for the efficient administration of the program and
457 for the prompt processing of claims made against the fund pursuant to an award under this
458 chapter. The plan shall contain other provisions including:

459 (1) Establishment of necessary facilities;

460 (2) Management of the fund;

461 (3) Appointment of servicing carriers or other servicing arrangements to administer the
462 processing of claims against the fund;

463 (4) Initial and annual assessment of the persons and entities listed in this chapter to pay
464 awards and expenses, which assessments shall be on an actuarially sound basis subject to the
465 limits set forth herein; and

466 (5) Any other matters necessary for the efficient operation of the program.

467 (c) The plan of operation shall be subject to approval by the division after consultation
468 with representatives of interested individuals and organizations. If the division disapproves all or
469 any part of the proposed plan of operation, the board shall, within 30 days, submit for review an
470 appropriate revised plan of operation. If the board fails to do so, the division shall promulgate a
471 plan of operation. The plan of operation approved or promulgated by the division shall become
472 effective and operational upon order of the division.

473 (d) Amendments to the plan of operation may be made by the board, subject to the
474 approval of the division.

475 Section 22. All assessments paid pursuant to the plan of operation shall be held in a
476 separate restricted cash account under the sole control of an independent fund manager to be
477 selected by the directors. The fund, and any income from it, shall be disbursed for the payment of
478 awards as provided in this chapter and for the payment of the expenses of administration of the
479 fund and the program, including the reasonable expenses of the tribunal.

480 Section 23. (a) The division shall undertake an actuarial investigation of the requirements
481 of the fund based on the fund's experience in the first year of operation, including without
482 limitation the assets and liabilities of the fund. Pursuant to such investigation, the division shall
483 establish the rate of contribution of the entities listed in subsection (e) of section 24 for the tax
484 year beginning January 1, 2013.

485 Following the initial valuation, the division shall cause an actuarial valuation to be made
486 of the assets and liabilities of the fund no less frequently than biennially. Pursuant to the results
487 of such valuations, the division shall prepare a statement as to the contribution rate applicable to
488 contributors listed in said subsection (e) of said section 24. However, at no time shall the rate be
489 greater than one quarter of 1 per cent of net direct premiums written.

490 In conducting the actuarial evaluation, a loss reserving methodology consistent with the
491 methodology employed by the Florida Birth-Related Neurological Injury Compensation
492 Association as of July 1, 2007, may be employed in order to account for individual participant
493 costs and injury characteristics to the extent that the data are available to perform such
494 methodology and the division's actuary determines that such methodology is actuarially
495 appropriate.

496 (b) In the event that the division of insurance finds that the fund cannot be maintained on
497 an actuarially sound basis subject to the maximum assessments listed in this chapter, the division
498 shall promptly notify the board and the house and senate committees on ways & means.

499 Section 24. (a) A physician or nurse midwife who otherwise qualifies as a participating
500 physician or nurse midwife pursuant to this chapter may become a participating physician or
501 nurse midwife in the program for a particular calendar year by paying an annual participating
502 physician or nurse midwife assessment to the program in the amount of \$5,000 on or before
503 December 1 of the previous year, in the manner required by the plan of operation. Effective
504 January 1, 2015, the total annual assessment shall be \$5,600, and shall increase by \$300 for the
505 2016 assessment and by \$100 each year thereafter, to a maximum of \$6,200 per year. The board
506 may authorize a prorated participating physician or nurse midwife or participating hospital
507 assessment for a particular year in its plan of operation, but such prorated assessment shall not
508 become effective until the physician or nurse midwife or hospital has given at least 30 days'
509 notice to the program of the request for a prorated assessment.

510 (b) Notwithstanding the provisions of subsection (a), a participating hospital with a
511 residency training program accredited to the American Council for Graduate Medical Education
512 may pay an annual participating physician or nurse midwife assessment to the program for
513 residency positions in the hospital's residency training program, in the manner provided by the
514 plan of operation. However, any resident in a duly accredited family practice or obstetrics
515 residency training program at a participating hospital shall be considered a participating
516 physician or nurse midwife in the program and neither the resident nor the hospital shall be

517 required to pay any assessment for such participation. No resident shall become a participating
518 physician or nurse midwife in the program, however, until 30 days following notification by the
519 hospital to the program of the name of the resident or residents filling the particular position for
520 which the annual participating physician or nurse midwife assessment payment, if required, has
521 been made.

522 (c) A hospital that otherwise qualifies as a participating hospital pursuant to this chapter
523 may become a participating hospital in the program for a particular year by paying an annual
524 participating hospital assessment to the program, on or before December 1 of the previous year,
525 amounting to \$50 per live birth for the prior year, as reported to the department of public health
526 in the annual survey of hospitals. Effective January 1, 2020, the annual participating hospital
527 assessment shall increase by \$2.50 per live birth for the prior year, as reported to the department
528 of public health, and shall be increased at that rate each year thereafter to a maximum of \$55 per
529 live birth so reported for the prior year. The participating hospital assessment shall not exceed
530 \$150,000 for any participating hospital in any 12-month period until January 1, 2020. Effective
531 January 1, 2020, the maximum total annual assessment shall be \$160,000, and shall increase by
532 \$10,000 each year thereafter, to a maximum of \$200,000 in any 12-month period.

533 (d) All licensed physicians or nurse midwives practicing in the commonwealth on
534 September 30 of a particular year, other than participating physicians or nurse midwives, shall
535 pay to the program an annual assessment of \$250 for the following year, in the manner required
536 by the plan of operation until January 1, 2020. Effective January 1, 2020, the total annual
537 assessment shall be \$260, and shall increase by \$10 each year thereafter to a maximum of \$300
538 per year.

539 Upon proper certification to the program, the following physicians or nurse midwives
540 shall be exempt from the payment of the annual assessment under this subsection:

541 (1) A physician or nurse midwife who is employed by the commonwealth or federal
542 government and whose income from professional fees is less than an amount equal to 10 per cent
543 of the annual salary of the physician or nurse midwife.

544 (2) A physician or nurse midwife who is enrolled in a full-time graduate medical
545 education program accredited by the American Council for Graduate Medical Education.

546 (3) A physician or nurse midwife who has retired from active clinical practice.

547 (e) Taking into account the assessments collected pursuant to subsections (a) to (d),
548 inclusive, of this section, if required to maintain the fund on an actuarially sound basis, all
549 insurance carriers licensed to write and engaged in writing liability insurance in the
550 commonwealth for a particular year, shall pay into the fund an assessment for the following year,
551 in an amount determined by the division pursuant to subsection (a) of section 23 in the manner
552 required by the plan of operation

553 (1) All annual assessments against liability insurance carriers shall be made on the basis
554 of net direct premiums written for the business activity which forms the basis for each such
555 entity's inclusion as a funding source for the program in the commonwealth during the prior year
556 ending December 31, as reported to the division, and shall be in the proportion that the net direct
557 premiums written by each on account of the business activity forming the basis for their
558 inclusion in the program bears to the aggregate net direct premiums for all such business activity
559 written in the commonwealth by all such entities. For purposes of this chapter "net direct
560 premiums written" means gross direct premiums written in the commonwealth on all policies of
561 liability insurance less (i) all return premiums on the policy, (ii) dividends paid or credited to
562 policyholders, and (iii) the unused or unabsorbed portions of premium deposits on liability
563 insurance.

564 (2) The entities listed in this subsection shall not be individually liable for an annual
565 assessment in excess of 1-quarter of 1 per cent of that entity's net direct premiums written.

566 (3) Liability insurance carriers shall be entitled to recover their initial and annual
567 assessments through (i) a surcharge on future policies, (ii) a rate increase applicable
568 prospectively, or (iii) a combination of the 2, at the discretion of the division.

569 (f) On and after January 1, 2015, a participating physician or nurse midwife covered
570 under the provisions of this section who has paid an annual assessment for a particular calendar
571 year to the program and who retires from the practice of medicine during that particular calendar
572 year shall be entitled to a refund of a prorated share of his or her annual assessment for the
573 calendar year that corresponds to the portion of the calendar year remaining following his or her
574 retirement.

575 (g) Whenever the division determines the fund is actuarially sound in conjunction with
576 actuarial investigations conducted pursuant to this chapter, it shall enter an order suspending the
577 assessment required under subsection (d). The annual assessment shall be reinstated whenever
578 the division determines that such assessment is required to maintain the fund's actuarial
579 soundness.

580 Section 25. (a) Each insurer issuing or issuing for delivery in the commonwealth any
581 personal injury liability policy which provides medical malpractice liability coverage for the
582 obstetrical practice of any participating physician or nurse midwife under this chapter shall
583 provide a credit on such physician or nurse midwife's annual medical malpractice liability
584 insurance premium in an amount that will produce premiums that are neither inadequate,
585 excessive nor unfairly discriminatory, as required by this chapter and as determined by the
586 tribunal.

587 (b) Each insurer issuing or issuing for delivery in the commonwealth any personal injury
588 liability policy which provides medical malpractice liability coverage for the obstetrical services
589 of any participating hospital under this chapter shall provide a credit on such hospital's annual

590 medical malpractice liability insurance premium in an amount that will produce premiums that
591 are neither inadequate, excessive nor unfairly discriminatory, as required by this chapter and as
592 determined by the tribunal.

593 SECTION 2. Section 22 of chapter 113B of the General Laws is hereby amended by
594 striking out subsection (h).

595 SECTION 3. Section 231 of chapter 60B of the General Laws, as appearing in the 2010
596 Official Edition, is hereby amended by inserting after the word “care”, in line 2, the following
597 words:-

598 , excluding an action brought pursuant to chapter 113B,

599 SECTION 4. This act shall apply to all claims for birth-related neurological injuries
600 occurring in the commonwealth on and after January 1, 2005.

601 SECTION 5. Section 2 shall take effect on January 1, 2020.