

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1989

H

1

HOUSE BILL 2296

Short Title: Birth Impairment Fund.

(Public)

Sponsors: Representatives Miller; and Warner.

Referred to: Appropriations.

June 4, 1990

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

The General Assembly of North Carolina enacts:

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

“ARTICLE 20.
“NORTH CAROLINA BIRTH-RELATED NEUROLOGICAL IMPAIRMENT
PROGRAM.

“§ 130A-460. Statement of purpose.

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

“§ 130A-461. Definitions.

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

(a) ‘Applicant’ means any person who files an application under this Article claiming to have a birth-related neurological impairment. An application may be filed on behalf of a minor or incompetent by a parent, guardian, guardian ad litem, or other

1 legal representative. In the case of a decedent, the application may be filed by an
2 administrator, executor, or other legal representative.

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

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

14 (d) 'Department' means the Department of Environment, Health, and Natural
15 Resources.

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

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

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

23 (h) 'Program' means the North Carolina Birth-Related Neurological Impairment
24 Program.

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

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

32 **"§ 130A-462. North Carolina Birth-Related Neurological Impairment Program;**
33 **exclusive remedy; exception.**

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

42 (b) The rights and remedies granted a person with a birth-related neurological
43 impairment hereunder shall exclude all other rights and remedies of the person, the
44 person's parents, guardian, guardian **ad litem**, personal representative and all others

1 against any provider, as defined in this Article, at common law or otherwise, for any
2 damages arising out of such birth-related neurological impairment. If an action for the
3 rights and remedies excluded by this Article is filed, it shall be dismissed on the motion
4 of any party under law. If a civil action is filed involving an impairment alleged by any
5 party to be a birth-related neurological impairment, but no determination has been made
6 by the Department, upon motion of any party, the action shall be stayed pending a
7 determination and dismissed if the impairment is determined to be a birth-related
8 neurological impairment.

9 (c) For every injury giving rise to an application under this Article, there shall be
10 an investigation of the provider performing the delivery by the office of the Attorney
11 General and the North Carolina Board of Medical Examiners. Disciplinary action shall
12 be taken against a physician provider for an act or acts showing (i) lack of ability or
13 competence to practice medicine with reasonable skill or safety to patients; (ii)
14 unprofessional conduct, including, but not limited to, any departure from, or the failure
15 to conform to, the standards of acceptable and prevailing medical practice or the ethics
16 of the profession; or (iii) for any other reason for which a physician is otherwise subject
17 to disciplinary action. If upon investigation there is reasonable cause for disciplinary
18 action against any provider, as determined in the discretion of either the Attorney
19 General, the Board of Medical Examiners, or any other appropriate licensing board to
20 which the investigation has been referred, disciplinary proceedings shall be commenced.
21 The office of the Attorney General and the Board of Medical Examiners shall receive
22 copies of all applications and accompanying documentation in order to commence
23 investigations. Any authority conducting an investigation may obtain assistance from
24 one or more impartial physicians in evaluating the clinical aspects of such investigation.
25 Necessary and reasonable funds shall be made available for this investigation from the
26 Fund. A report of disciplinary actions taken shall be made annually and shall be of
27 public record.

28 **"§ 130A-463. Comprehensive, integrated assistance.**

29 The Department shall develop a program for referral to evaluation centers, assistance
30 with applications, clinical assessment of needs and available resources, determination of
31 eligibility, management of care, and compensation. To the extent feasible and
32 consistent with the purposes of this Article, the Department shall integrate the Program
33 with existing assistance programs to further the goal that all disabled or impaired
34 children in North Carolina may receive comprehensive, interdisciplinary assistance and
35 service in gaining access to all available resources for which they are eligible.

36 **"§ 130A-464. Referrals.**

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

42 **"§ 130A-465. Application assistance.**

43 The Director, by and through a service coordinator individually assigned, shall assist
44 each applicant in the preparation of an application for benefits under the Program on

1 forms provided by the Department. The service coordinator shall also assist in
2 obtaining appropriate information, including identification of providers, time and place
3 where the birth occurred, medical records, evaluations, other clinical information, and
4 information relative to the applicant's medical condition and needs.

5 **"§ 130A-466. Determination of impairment.**

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

13 **"§ 130A-467. Clinical assessment; need; resources.**

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

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

32 **"§ 130A-468. Determination letter.**

33 The determination of whether the applicant has a birth-related neurological
34 impairment, the basis for the determination, and if affirmative, the clinical and financial
35 resource assessments, shall be set forth in writing in a determination letter from the
36 Director to the applicant. Written notice of the determination shall be sent by the
37 Director to the Secretary, the named providers, the Attorney General, and the Board of
38 Medical Examiners or other appropriate licensing board.

39 **"§ 130A-469. Case management; payments.**

40 (a) Case management shall be provided through the evaluation centers and
41 service coordinators. It shall include assistance to assure that impaired persons receive
42 adequate services consistent with the care plan, regular consultation and follow-up, and
43 to assure that changing needs are identified and satisfied by the provision of adequate
44 services. Impaired persons shall receive Program support for unmet expenses for (i)

1 necessary and essential case coordination, (ii) developmental evaluation, (iii) special
2 education, (iv) vocational training, (v) physical, emotional, or behavioral therapy and
3 other medical care and (vi) devices and rehabilitative services relative to and
4 necessitated by the impairment. Long-term custodial care shall not be deemed to be
5 necessary and essential medical care. Medical conditions not associated with the
6 impairment do not qualify for Program support. Subject to this Article, Fund payments
7 shall be disbursed for case management and authorized payments consistent with the
8 care plan, on a supplemental basis after all other sources of payment, benefits, or
9 services are exhausted. In circumstances in which a newly-eligible impaired person has
10 incurred otherwise qualifying unmet expenses prior to determination, retroactive Fund
11 reimbursement is authorized.

12 (b) Fund payments shall not be considered in determinations of assets or income
13 in governmental assistance programs where the level of support is based upon assets or
14 income. Fund payments shall not be considered a third party benefit entitlement in
15 calculations of eligibility for governmental assistance programs.

16 (c) Payments at a level comparable to amounts paid through Medicaid or other
17 comparable government assistance programs will be paid directly to providers or
18 suppliers of benefits after receipt of statements for authorized services or benefits.

19 **"§ 130A-470. Appeals.**

20 Actions pursuant to G.S. 130A-468 and G.S. 130A-469 constitute final agency
21 decisions for purposes of appeal under Chapter 150B of the General Statutes and
22 applicable Department rules governing agency appeals. Without limiting the rights of
23 any other person, the Secretary, representing the interests of the State in assuring
24 prudent use of Fund assets, shall have standing to appeal. If an applicant prevails in any
25 civil action seeking judicial review, the court may, in its discretion, allow that applicant
26 to recover reasonable attorneys' fees incurred in pursuing the appeal, to be taxed as
27 court costs against the Department, and to be reimbursed from the Fund. An applicant
28 shall petition for attorneys' fees within 30 days of final disposition of his case.

29 **"§ 130A-471. Scope.**

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

32 **"§ 130A-472. North Carolina Birth-Related Neurological Impairment Trust Fund.**

33 (a) There is authorized and established in the Department the Birth-Related
34 Neurological Impairment Trust Fund to finance payments under, and administrative
35 costs of the Program. The Secretary shall administer the Fund, subject to review,
36 recommendations, and approval by the Birth-Related Neurological Impairment Trust
37 Fund Council. The Council shall consist of the Secretary, who shall serve as Chairman,
38 the State Treasurer, and the State Auditor. The Council shall advise the Secretary
39 regarding administration of the Fund, including establishment of assessments, review
40 and approval of budgets for expenditures and any revised budgets, distribution of
41 Program funds, and actuarial soundness of the Fund. The Council shall meet not less
42 than quarterly each year.

43 (b) The State Treasurer shall be custodian of the Fund and shall invest its assets
44 in accordance with G.S. 147-69.2 and G.S. 147-69.3. The Fund is subject to the

1 oversight of the State Auditor under Article 5A of Chapter 147 of the General Statutes.
2 The Fund is hereby expressly designated and eligible to receive and accrue all interest
3 and other earnings on its assets under G.S. 147-86.11(g). The Fund and any payments
4 from the Fund are not subject to taxation.

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

15 **"§ 130A-473. Fund; assessments.**

16 (a) The Department shall adopt rules to administer the Fund, including rules
17 governing the establishment and management of the initial and annual assessments
18 required by this section. Assessments are not subject to premium taxes. The Fund is
19 eligible to receive sums from private or public foundations, corporations, individuals
20 and other sources and from governmental appropriations, which if received shall serve
21 to supplement the Fund.

22 (b) Under these rules, there shall be levied an assessment on each delivery, with
23 fifty-five percent (55%) of the assessment remitted by the physician provider or
24 providers performing or supervising the delivery, and forty-five percent (45%) of the
25 assessment remitted by the hospital or birthing facility provider in which the delivery is
26 performed. The total combined assessment shall not exceed one hundred seventy
27 dollars (\$170.00) per delivery. Assessments shall not be required to be paid by a
28 provider on deliveries for which no fee is charged.

29 (c) The Secretary shall collect and enforce collection of all assessments required
30 to be paid under this section. Any person who fails to pay to the Fund the assessments
31 required under this section within 90 days of the delivery shall, in addition to such
32 unpaid assessments, pay to the Fund interest at the rate established by the Secretary of
33 Revenue under G.S. 105-241(i), and there shall also be added to said unpaid
34 assessments an amount equal to fifty percent (50%) of the amount of such unpaid
35 assessments.

36 **"§ 130A-474. Actuarial investigation; valuations; gain/loss analysis; notice if**
37 **assessments prove insufficient; reserves.**

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

1 In the event that the Birth-Related Neurological Impairment Trust Fund Council
2 finds that maximum assessment receipts and receipts from all other sources are
3 inadequate relative to disbursements for the Fund to be administered on an actuarially
4 sound basis, the Director shall be promptly notified and disbursements shall be adjusted
5 to achieve and maintain an actuarially sound administration. The General Assembly
6 shall be promptly notified of such a finding.

7 (b) Under these rules, for so long as the Fund is effective and in force,
8 professional medical liability insurance carriers insuring obstetrical risks in this State,
9 under the supervision of the Commissioner of Insurance, shall establish reserve
10 accounts for that portion of collected insurance premiums attributable to anticipated
11 birth-related neurological impairment losses and expenses and hold the same for a
12 period of five years. At the end of this period, the reserved sums and earnings shall be
13 paid by the insurance carriers to the Fund. Carriers or insureds will not be obligated for
14 premium tax for the transferred amounts.

15 **"§ 130A-475. Right of State to bring action.**

16 If the Director makes an award to an impaired person, the State, on behalf of the
17 Fund, shall be subject to, and may bring a subrogation action against any nonprovider
18 for any right of recovery or cause of action available at law."

19 Sec. 2. In the event any provision of this act is held to be invalid by any court
20 of competent jurisdiction, the court's holding as to that provision shall not affect the
21 validity or operation of other provisions of this act; and to that end the provisions of this
22 act are severable.

23 Sec. 3. This act shall become effective January 1, 1991, except that, effective
24 upon ratification, the Department of Environment, Health, and Natural Resources shall
25 begin to adopt rules to implement this Article. These rules shall not become effective
26 until January 1, 1991.