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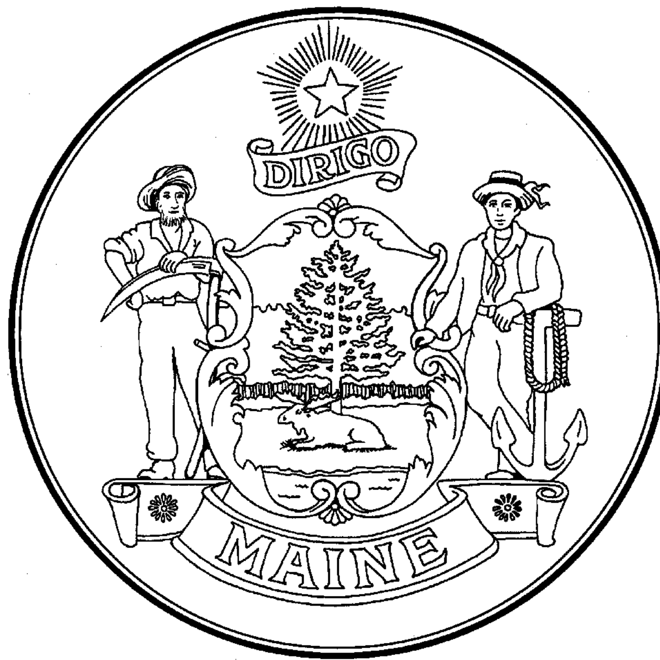

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L.D. 2023

(Filing No. H-1112)

STATE OF MAINE
HOUSE OF REPRESENTATIVES
114TH LEGISLATURE
SECOND REGULAR SESSION

HOUSE AMENDMENT "A" to S.P. 782, L.D. 2023, Bill, "An Act to Establish a Five-year Medical Liability Demonstration Project"

Amend the bill by striking out everything after the title and before the statement of fact and inserting in its place the following:

Sec. 1. 5 MRSA §12004-I, sub-§§58-A and 58-B are enacted to read:

58-A. Medicine	Medical Specialty Advisory Committee on Anesthesiology	Expenses Only	24 MRSA §2982
58-B. Medicine	Medical Specialty Advisory Committee on Obstetrics and Gynecology	Expenses Only	24 MRSA §2982

Sec. 2. 24 MRSA c. 21, sub-cc. IX and X are enacted to read:

SUBCHAPTER IX

MEDICAL LIABILITY DEMONSTRATION PROJECT

§2981. Medical liability demonstration project

The Bureau of Insurance and the Board of Registration in Medicine shall, by January 1, 1992, establish a medical liability demonstration project as provided in this subchapter.

2 **§2982. Medical specialty advisory committees established**

4 **1. Medical specialty areas.** The Medical Specialty Advisory Committee on Anesthesiology, in accordance with Title 5, section
6 12004-I, subsection 58-A, and the Medical Specialty Advisory Committee on Obstetrics and Gynecology, in accordance with Title
8 5, section 12004-I, subsection 58-B, are established and shall develop practice parameters and risk management protocols for
10 their respective medical specialty areas.

12 **2. Membership.** Each medical specialty advisory committee consists of 7 members with an interest in and knowledge of the
14 specialty area. These members are as follows:

16 A. One physician who practices in a tertiary hospital, appointed by the Board of Registration in Medicine from
18 nominations submitted by the Maine Medical Association;

20 B. One physician who practices in a medium-size hospital, appointed by the Board of Osteopathic Examination and
22 Registration from nominations submitted by the Maine Osteopathic Association;

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C. One physician who practices primarily in a rural area,
26 appointed by the Board of Registration in Medicine from nominations submitted by the Maine Medical Association;

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D. One physician who practices primarily in a rural area,
30 appointed by the Board of Osteopathic Examination and Registration from nominations submitted by the Maine
32 Osteopathic Association;

34 E. One family practice physician, appointed by the Board of Registration in Medicine from nominations submitted by the
36 Maine Academy of Family Practice Physicians; and

38 F. Two public members, one appointed by the President of the Senate and one appointed by the Speaker of the House of
40 Representatives.

42 **3. Terms.** The term of each member is 3 years.

44 **4. Proceedings.** The medical specialty advisory committees shall conduct all proceedings pursuant to the Maine
46 Administrative Procedure Act.

48 **5. Board of Registration in Medicine; administration and funding.** The Board of Registration in Medicine shall provide
50 funding and administrative support to the medical specialty

advisory committees. The Board of Registration in Medicine may accept funds from outside sources to help finance the operation of the medical specialty advisory committees.

§2983. Practice parameters; risk management protocols

Each medical specialty advisory committee shall develop practice parameters and risk management protocols in the medical specialty area relating to that committee. The practice parameters must define appropriate clinical indications and methods of treatment within that specialty. The risk management protocols must establish standards of practice designed to avoid malpractice claims and increase the defensibility of the malpractice claims that are pursued. The parameters and protocols must be consistent with appropriate standards of care and levels of quality. The Board of Registration in Medicine shall review the parameters and protocols, approve the parameters and protocols appropriate for each medical specialty area and adopt them as rules under the Maine Administrative Procedure Act.

§2984. Report to Legislature

1. Initial report. By April 1, 1991, each medical specialty advisory committee shall provide a report to the joint standing committee of the Legislature having jurisdiction over judiciary matters and the Office of the Executive Director of the Legislative Council setting forth the parameters and protocols developed by that medical specialty advisory committee and adopted by the Board of Registration in Medicine. The medical specialty advisory committees also shall report the extent to which the risk management protocols reduce the practice of defensive medicine.

2. Additional reports. Within 30 days of the effective date of any proposed revision of the practice parameters and risk management protocols for that medical specialty area, each medical specialty advisory committee shall provide a report to the joint standing committee of the Legislature having jurisdiction over judiciary matters and the Office of the Executive Director of the Legislative Council setting forth the revisions in the parameters and protocols as developed and adopted.

§2985. Application to professional negligence claims

1. Introduced by defendant. In any claim for professional negligence against a physician or the employer of a physician participating in the project established by this subchapter in which a violation of a standard of care is alleged, the physician or the physician's employer may introduce into evidence, as an

affirmative defense, the existence of the practice parameters and risk management protocols developed and adopted pursuant to section 2983 for that medical specialty area.

2. Burden of proof; parameters and protocols. Any physician or physician's employer who pleads compliance with the practice parameters and risk management protocols as an affirmative defense to a claim for professional negligence has the burden of proving that the physician's conduct was consistent with those parameters and protocols which were introduced to rely upon the affirmative defense as the basis for a determination that the physician's conduct did not constitute professional negligence. This subsection does not affect the plaintiff's burden to prove the plaintiff's cause of action by a preponderance of the evidence as otherwise provided by law.

3. No change in burden of proof. Nothing in this subchapter alters the burden of proof in existence as of December 31, 1991, in professional negligence proceedings.

4. Application. This section applies to causes of action accruing between January 1, 1992, and December 31, 1996.

§2986. Participation

1. Voluntary participation. Each physician practicing in any of the medical specialty areas for which practice parameters and risk management protocols have been developed and adopted pursuant to section 2983 shall file notice with the Board of Registration in Medicine before November 1, 1991, indicating whether that physician elects to participate in the project.

2. Necessary level of participation. If less than 75% of the physicians in a medical specialty area have filed notice with the board indicating that they will participate in the project, section 2985 does not apply to physicians practicing in that medical specialty area.

3. Continued participation. A physician agreeing to participate in the project shall continue to participate for the duration of the project.

§2987. Evidence; inadmissibility

Unless independently developed from a source other than the demonstration project, the practice parameters and risk management protocols are not admissible in evidence in a lawsuit against any physician who is not a participant in the demonstration project, or against any physician participating in the project who is defending against a cause of action accruing before January 1, 1992 or after December 31, 1996.

§2988. Information and reports

1. Reports by insurers. Any insurance company providing professional, malpractice or any other form of liability insurance for any physician practicing in a medical specialty area described in section 2982 or for any hospital in which that practice has taken place shall provide to the Bureau of Insurance in a format established by the Superintendent of Insurance the following:

A. A report of each claim alleging malpractice during the 5-year period ending December 31, 1991, involving any physician practicing in a medical specialty area described in section 2982. Each report must include the name of the insured, policy number, classification of risk, medical specialty, date of claim and the results of the claim, including defense costs and indemnity payments as a result of settlement or verdict, as well as any awards paid in excess of policy limits. For any claim still open, the report must include the amount of any funds allocated as reserve or paid out. The insurance company shall annually report on any claims that have remained open;

B. For the 5-year period ending December 31, 1991, an annualized breakdown of the medical liability premiums earned for physicians practicing in the medical specialty areas described in section 2982. This information must be provided according to a schedule established by the bureau;

C. A report of each claim brought against any physician practicing in a medical specialty area described in section 2982, alleging malpractice as a result of incidents occurring on or after January 1, 1992, and before January 1, 1997, that must include, but not be limited to, the name of the insured, policy number, classification of risk, medical specialty, date of claim, the results of each claim, including defense costs and indemnity payments as a result of settlement or verdict, any awards or amounts paid in excess of policy limits and any finding, if made, as to whether the physician's practice was consistent with the parameters and protocols developed and adopted under section 2983. These reports must be provided not less than semiannually according to a schedule established by the Bureau of Insurance. At the discretion of the Bureau of Insurance, reports must be provided until all claims are closed; and

D. An annualized breakdown of the medical liability premiums earned as of January 1, 1992, for physicians practicing in the medical specialty areas described in section 2982. This information must be provided according to a schedule established by the Bureau of Insurance.

2. Reports by Bureau of Insurance and Board of Registration in Medicine. The Bureau of Insurance and the Board of Registration in Medicine shall report the results of the project to the Legislature and the Office of the Executive Director of the Legislative Council by December 1, 1997. The report must include the following.

A. The Bureau of Insurance shall report:

(1) The number of claims brought against physicians in the project alleging malpractice as a result of incidents occurring on or after January 1, 1992;

(2) The results of any closed claims described in this section, including defense costs and indemnity payments as a result of settlement or verdict;

(3) The status of all open claims described in this section, including defense costs, indemnity payments and any amounts held in reserve; and

(4) The effect of the project on the medical liability claims experience and premiums of those physicians in the project.

B. The Board of Registration in Medicine shall quantify and report on any identifiable impact of the project on the cost of the practice of defensive medicine.

(1) The Board of Registration in Medicine shall establish an economic advisory committee to establish the methodology for evaluating the effect of the project on the cost, the utilization and the practice of defensive medicine. The economic advisory committee shall report the methodology developed to the Board of Registration in Medicine by January 1, 1992.

3. Immunity. All insurers reporting under this section, and their agents or employees; the superintendent and the superintendent's representatives; and the Board of Registration in Medicine, and its agents or employees, including members of the medical specialty advisory committees established under section 2982, are immune from liability for any action taken by them pursuant to this subchapter.

4. Confidentiality. Reports made to the superintendent and report records kept by the superintendent are not subject to discovery and are not admissible in any trial, civil or criminal, other than proceedings brought before or by the Board of Registration in Medicine. The superintendent shall maintain the reports filed in accordance with this section, and all

2 4 6 information derived from the reports that identifies or permits identification of the insured or the incident for which a claim was made, as strictly confidential records. Information derived from reports filed in accordance with this section that does not identify or permit identification of any insured or incident for which a claim was made may be released by the superintendent or otherwise made available to the public.

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10 **5. Rules.** The Superintendent of Insurance and the Board of Registration in Medicine may adopt rules necessary to implement this subchapter.

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SUBCHAPTER X

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RURAL MEDICAL ACCESS PROGRAM

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§3001. Short title

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20 This subchapter is known and may be cited as the "Rural Medical Access Program."

22 **§3002. Purpose**

24 26 The purpose of this subchapter is to promote, through financial incentives to physicians who practice in underserved areas of the State, the availability of physicians who deliver babies in those areas.

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§3003. Definitions

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32 For purposes of this subchapter, unless the context indicates otherwise, the following terms have the following meanings.

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36 **1. Insurer.** "Insurer" means any insurer authorized to transact insurance in this State and any insurer authorized as a surplus lines insurer pursuant to Title 24-A, chapter 19.

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40 **2. Self-insured.** "Self-insured" means any physician or hospital insured against professional negligence through any entity other than an insurer as defined in subsection 1.

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44 **3. Superintendent.** "Superintendent" means the Superintendent of Insurance.

46 **§3004. Assessments authorized**

48 50 To provide funds for the Rural Medical Access Program, insurers shall collect pursuant to this subchapter assessments from physicians, surgeons, osteopaths and hospitals located in the State.

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1. Assessment from policyholders. With respect to professional liability insurance policies for physicians, surgeons, osteopaths and hospitals issued on or after September 1, 1991, each insurer shall collect an assessment from each policyholder. The superintendent shall determine the amount of the assessment in accordance with this subchapter. Notwithstanding any provision of law, assessments made and collected pursuant to this subchapter do not constitute "premium," as defined in Title 24-A, section 2403, for purposes of any laws of this State relating to taxation, filing of insurance rates or assessment purposes other than as expressly provided under this subchapter. The assessments are considered "premium" only for purposes of any law of this State relating to cancellation or nonrenewal of insurance coverage.

2. Required support. Every insured and self-insured allopathic and osteopathic physician and hospital shall support the Rural Medical Access Program as provided in this subchapter. Any physician or hospital that fails to pay the assessment required by this subchapter is subject to a civil penalty not to exceed $2,000, payable to the Bureau of Insurance, to be recovered in a civil action.

3. Assistance from boards and Department of Human Services; insure through other means. The Board of Registration in Medicine and the Board of Osteopathic Examination and Registration shall assist the superintendent in identifying those physicians who insure against professional negligence by means other than through insurers defined in section 3003. The Department of Human Services, Division of Licensure and Certification, shall assist the superintendent in determining the insuring entity for any licensed hospital and in identifying those hospitals that insure against professional negligence by means other than through insurers defined in section 3003.

4. Certification of assessments paid. After review of the records provided by the Board of Registration in Medicine; the Board of Osteopathic Examination and Registration; the Department of Human Services, Division of Licensure and Certification; and the assessment receipts of the malpractice insurers, the superintendent shall certify those physicians and hospitals that have paid the required assessments.

§3005. Amount of assessment determined

1. Determination of assessment based on anticipated savings. This subsection governs the determination and payment of assessments.

A. Beginning in 1991, the superintendent shall determine the savings in professional liability insurance claims and claim settlement costs to insurers anticipated in each

12-month period as a result of the medical malpractice liability reforms of Public Law 1985, chapter 804, and Public Law 1987, chapter 646.

B. The superintendent shall order a total assessment to be collected each year beginning in 1991 equal to the lesser of 1/2 the savings determined or $1,000,000, but not less than $500,000.

C. The superintendent shall order each insurer to assess its policyholders the percentage of the total assessment ordered that the insurer's Maine premium volume for professional liability insurance for physicians, surgeons, osteopaths and hospital bears to the total Maine premium volume of all insurers and self-insureds for that coverage.

D. Each insurer shall assess the surcharge against its insureds as a percentage of premium unless the superintendent prescribes a different basis by rule or order.

E. Every self-insured allopathic or osteopathic physician and every self-insured hospital shall remit the assessment required by this section to the principal writer of physicians and surgeons malpractice insurance in this State. Remittance by self-insured physicians or hospitals may be made on their behalf by a self-insurer. The superintendent shall prescribe by rule a method to calculate and collect the assessment from self-insured physicians and hospitals.

2. Final evaluation of savings in 1995. The Superintendent shall determine in 1995 the final evaluation of the savings in professional liability insurance claims and claim settlement costs to insurers. Assessments to policyholders continue after 1995 based on the final determination, but may not exceed $1,000,000 per year.

§3006. Funds held by insurers

Insurers may invest assessments collected subject to chapter 13. Interest earned on investments must be credited to the Rural Medical Access Program.

§3007. Qualifications for premium assistance

1. Eligibility qualifications. A physician is a qualified physician eligible to receive professional liability premium assistance if that physician:

A. Is licensed to practice medicine in the State;

B. Accepts and serves Medicaid patients;

C. Provides complete obstetrical care for patients, including prenatal care and delivery, except that physicians without a facility for obstetrical delivery are still eligible if they provide only prenatal care and have referral agreements with physicians who meet the requirements of paragraph B; and

D. Practices at least 50% of the time in areas of the State that are underserved areas for obstetrical medical services as recommended by the Department of Human Services.

The Department of Human Services shall determine those physicians who meet the requirements of this subsection.

2. Ineligible if premium owed. Any physician who owes premiums to any insurer for any policy year prior to the year for which assistance is sought is not eligible for assistance.

§3008. Premium assistance

Each qualified physician as determined in section 3007 is entitled to an annual premium credit equal to the same percentage of that physician's professional liability insurance annual premium as the total amount of assessments collected and investment income earned with respect to those assessments bears to the total amount of premiums paid by all qualified physicians.

3009. Intercorporate transfers

The superintendent may order intercorporate transfers of funds to balance assessments and premium credits on an equitable basis among insurers and to provide for credits to eligible self-insureds.

§3010. Appeals

1. Assessments. Physicians aggrieved by an insurer's application of the assessment provided for in this chapter may request a hearing before the superintendent. The hearing must be held in accordance with Title 24-A, chapter 3, and the Maine Administrative Procedure Act and procedural rules of the Bureau of Insurance.

2. Eligibility. Physicians aggrieved by an eligibility determination by the Department of Human under section 3007 may request a hearing under the Maine Administrative Procedure Act.

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<u>§3011. Rules</u>

<u>The superintendent and the Commissioner of Human Services may adopt rules in accordance with the Maine Administrative Procedure Act to carry out this chapter.</u>

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Sec. 3. Medical Malpractice Liability Advisory Committee.

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1. The Medical Malpractice Liability Advisory Committee is established to review the Medical Liability Demonstration Project established by the Maine Revised Statutes, Title 24, chapter 21, subchapter IX, and the Rural Medical Access Program established by Title 24, chapter 21, subchapter X, and make recommendations to the 115th Legislature regarding improvements in the project and program.

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2. The Medical Malpractice Liability Advisory Committee consists of the following 11 members:

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A. The President of the Maine Medical Association or a designee;

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B. The President of the Maine Osteopathic Association or a designee;

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C. The President of the Maine Academy of Family Practice or a designee;

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D. The President of the Maine State Bar Association or a designee;

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E. The President of the Maine Trial Lawyers Association or a designee;

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F. A representative of a tertiary teaching hospital, to be appointed by the Governor;

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G. A representative of an insurer providing medical malpractice insurance in the State, to be appointed by the President of the Senate;

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H. A representative of a nonprofit insurer, to be appointed by the Speaker of the House of Representatives; and

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I. Three public members, one to be appointed by the President of the Senate and 2 to be appointed by the Speaker of the House of Representatives.

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The appointing authorities shall make the appointments no later than August 1, 1990, and shall report the names of the members to the Office of the Executive Director of the Legislative Council. The chair of the Legislative Council shall call the first meeting.

3. The committee shall elect a chair from among the members.

4. The committee may review Title 24, chapter 21, subchapter IX, consult with interested parties and develop recommendations to be submitted to the Legislature for improvements in the Medical Liability Demonstration Project.

5. The committee may submit any implementing legislation it prepares pursuant to this section to the Joint Standing Committee on Judiciary of the 115th Legislature and the Office of the Executive Director of the Legislative Council no later than January 15, 1991. The committee members shall serve without legislative staff assistance.

6. All members of the committee shall serve without compensation and are not entitled to reimbursement for expenses.

FISCAL NOTE

The Department of Human Services, the Bureau of Insurance and the Board of Registration in Medicine will each incur some additional costs that can be absorbed within the existing budgeted resources of the respective agencies.'

STATEMENT OF FACT

This amendment replaces the bill and represents the majority report of the Joint Standing Committee on Judiciary.

The original concept of a 5-year demonstration project is retained from the bill and amended to clarify several provisions. This amendment establishes 2 advisory committees for the medical specialty areas of anesthesiology and obstetrics and gynecology. These advisory committees will consist of 7 members, 5 appointed by the Board of Registration in Medicine to represent an appropriate cross section of physicians, and 2 public members. The committees will develop practice parameters and risk management protocols applicable to each committee's medical specialty area. The committees will present the parameters and protocols to the Board of Registration in Medicine that has the authority to approve appropriate practice parameters and risk management protocols for these 2 medical specialty areas. The advisory committees will also report to the Joint Standing Committee on Judiciary and the Office of the Executive Director of the Legislative Council regarding the parameters and protocols before the demonstration project begins and again whenever they revise the parameters and protocols.

Participation in the demonstration project is voluntary, but at least 75% of the physicians practicing in the medical specialty area must agree to participate in the project or the benefits of the project will not apply to any of the physicians in the medical specialty area.

Physicians and their employers benefit from participation in the program if the physician or the physician's employer is sued for professional negligence. The physician or the employer of the physician participating in the program may offer as evidence the existence of the practice parameters and risk management protocols for that specialty. If the physician or the physician's employer proves that the physician complied with the parameters and protocols, that will serve as the basis for a determination that the physician's conduct did not constitute professional negligence.

The Bureau of Insurance and the Board of Registration in Medicine will collect information and report to the Legislature and the Office of the Executive Director of the Legislative Council in 1997 regarding the reduction in medical malpractice liability insurance costs under the demonstration project.

This amendment establishes the Rural Medical Access Program to increase access to obstetrical services, especially the delivery of babies, in underserved areas of the State. This program is funded through the savings in medical malpractice liability insurance premiums attributable to the medical malpractice liability reforms of 1986 and 1988. The total assessment amount will be 1/2 the savings attributable to the reforms or $1,000,000, whichever is less, but in any case not less than $500,000.

This amendment establishes the Medical Malpractice Liability Advisory Committee to review both new subchapters and report to the Legislature and the Office of the Executive Director of the Legislative Council in 1991 regarding any improvements that may be made in the law. The members of the advisory committee will absorb the costs of these duties, making state funding unnecessary.

Filed by Rep. Paradis of Augusta
Reproduced and distributed under the direction of the Clerk of the House
4/10/90 (Filing No. H-1112)