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THE GOVERNOR'S BUDGET PROPOSAL – THE WAR ON WOMEN AND CHILDREN

The Governor's Budget proposal would drastically limit patients' legal rights, including a \$250,000 cap on non-economic damages and a birth injury fund that limits the rights of brain-damaged babies and their families ("NII Fund"). Here are some answers about the impact of these measures on women and children.

WHAT IS THE NII FUND?

The NII Fund would establish a new liability and compensation system for the families of newborns who suffer brain damage at birth due to negligence, to cover costs for their future medical care. This process would deny these families the same kind of rights and recourse that adult men have in this state.

The NII fund is not a "no-fault" fund. The fund kicks in after a jury verdict or settlement, in other words, *after* the family endured the time and expense of proving their case in court (or settled), and the health care provider was found negligent. It is also a reimbursement fund, so the family may only recover money after they have actually incurred expenses for their child's care.

In other words, the child and their family would be forced to deal with a burdensome and humiliating struggle to get bills paid from a unaccountable entity. Adding these additional burdens on families who already face unimaginable challenges caring for a profoundly disabled child – *and have already won their case* - is without compassion.

WHAT ARE "NON-ECONOMIC DAMAGES"?

Non-economic damages compensate injured consumers for intangible but real "quality of life" injuries, like permanent disability, disfigurement, trauma, loss of a limb, blindness or other physical impairment. University of Buffalo Law Professor Lucinda Finley noted in a recent study, "certain injuries that happen primarily to women are compensated predominantly or almost exclusively through noneconomic loss damages. These injuries include sexual or reproductive harm, pregnancy loss, and sexual assault injuries."¹

HOW WOULD THE GOVERNOR'S BUDGET LIMIT NON-ECONOMIC DAMAGES?

The Governor's Budget proposals contain a \$250,000 cap on non-economic damages, which would arbitrarily limit compensation and promote a kind of caste system by branding entire

classes of low- or non-earners in our society (seniors, children, women who do not work outside the home, and the poor), as worth less than their wealthier counterparts. It would destroy yet another safety net for many vulnerable children and families.

DOES A CAP ON NON-ECONOMIC DAMAGES CONSTITUTE DISCRIMINATION AGAINST WOMEN?

Yes. According to University of Buffalo Law Professor Lucinda Finley, “[J]uries consistently award women more in noneconomic loss damages than men ... [A]ny cap on noneconomic loss damages will deprive women of a much greater proportion and amount of a jury award than men. *Noneconomic loss damage caps therefore amount to a form of discrimination against women and contribute to unequal access to justice or fair compensation for women.*”²

ARE OB/GYN’S LEAVING NEW YORK?

No. The Center for Health Workforce, part of the School of Public Health, University at Albany, State University of New York- an academic institution that monitors physician supply - found that the number of OB-GYN’s in New York State has been stable for the last decade and between 2005 and 2006, the number of physicians doing obstetrics *increased* – all while birth rates are dropping in New York State. They found that between 2000 and 2005, the number of obstetricians in relation to the state’s birthrate grew by 2.4 percent. The Center found, “demographic changes appear to be contributing to a reduction in demand for some obstetrical services in New York.”³

WHILE OB-GYN SUPPLY IS NOT DECLINING, DO SOME PHYSICIANS LEAVE AND WHY?

Sure, some leave. But the reasons have nothing to do with the malpractice system. The Center for Health Workforce Studies found that the main reasons physicians leave the state are: proximity to family; inadequate salary; and visa issues. For non-primary care physicians, no more than three percent leave due to the cost of malpractice insurance – practically dead last on the list of possible reasons for leaving New York State.

WHAT ARE THE MAIN FACTORS CONTRIBUTING TO A PHYSICIAN’S LOCATION AND SPECIALTY?

It is well-documented that lifestyle considerations are the most important factor for determining not only a doctor’s choice of location, but also his or her choice of specialty - far more important than income and expenses. The *New York Times* reported, “Today’s medical residents, half of them women, are choosing specialties with what experts call a ‘controllable lifestyle.’” That means avoiding specialties, like surgery or obstetrics, that require doctors be on call 24 hours a day.⁴

Physician shortages that exist in New York’s rural areas are longstanding and correlate to stagnating local economies and decreasing populations in those regions, not to lawsuits or insurance rates. For example, in the late 1990s, Oswego County reported great difficulty attracting physicians because of the “weather factor” and other lifestyles issues, including “boredom.” Another problem was the lack of professional jobs in the area for spouses. Officials

also noted, “because the large hospitals offer the latest in technology and research, physicians are often lured to the major cities.”⁵

In 2008, the Governor Spitzer proposed a program called “Doctors Across New York.” The plan would provide incentives for an employment commitment in these areas, with a significant medical school loan forgiveness program and increased Medicaid reimbursement rates to doctors and clinics in underserved areas. This is the proper solution to this longstanding problem.

HAVE OBSTETRICAL-RELATED INJURY PAYOUTS INCREASED RECENTLY?

No, these payouts have been stable for many years.⁶

National Practitioner Data Bank: Payments Made for Obstetrics-Related Injuries

Year	Obstetrics Related Payments	Obstetrics Related Count
1993	\$121,574,500	256
1994	\$141,881,550	224
1995	\$75,332,050	179
1996	\$77,689,500	171
1997	\$77,934,800	171
1998	\$87,503,350	189
1999	\$108,432,800	208
2000	\$116,529,350	208
2001	\$119,673,750	211
2002	\$86,070,000	130
2003	\$121,680,750	165
2004	\$171,962,750	289
2005	\$150,767,750	217
2006	\$141,323,750	224
2007	\$128,648,750	181
2008	\$115,018,750	178
2009	\$124,422,500	139

NOTES

¹ Lucinda M. Finley, “The 2004 Randolph W. Thrower Symposium: The Future Of Tort Reform: Reforming The Remedy, Re-Balancing The Scales: Article: The Hidden Victims Of Tort Reform: Women, Children, And The Elderly, Emory Law Journal,” 53 Emory L.J. 1263, Summer, 2004.

² *Ibid.* (emphasis added)

³ Changing Practice Patterns of Obstetricians/Gynecologists in New York, April 2006. Rensselaer, NY: Center for Health Workforce Studies, School of Public Health, SUNY Albany.

⁴ Matt Richtel, “Young Doctors and Wish Lists: No Weekend Calls, No Beepers, *New York Times*, January 7, 2004.

⁵ Carol Thompson, “Recruiting and Retaining Physicians Not an Easy Task,” *Oswego County Business*, April/May 1998.

⁶ March 14, 2011 Legislative Memo, Center For Justice & Democracy, Center For Medical Consumers, Consumers Union, New York Public Interest Research Group, New York Statewide Senior Action Council, Pulse Of New York.