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December 17, 2007

Eric R. Dinallo, Superintendent
State Of New York
Insurance Department
One Commence Plaza
Albany, New York 12257

Richard F. Daines, M.D., Commissioner
Department of Health
Corning Tower, Empire State Plaza
Albany, NY 12237

Dear Superintendent Dinallo and Commissioners Daines:

You have asked task force members to submit proposed solutions and data for a meeting to be held on December 19, 2007, where there will be presentations of "potential solutions." It continues to be difficult to provide information that is meaningful to the task force without being advised in advance of what the insurance department is considering with regard to claims: some variation of an NII fund, some variation of COPIC's early offer and settlement process that was presented at the last meeting, a medical indemnity fund, etc.?

Accompanying this letter is our analysis of the medical malpractice insurance situation in New York State. That analysis finds that the deficit figure is unknown, and is based on figures that the insurance department admits may not be accurate yet is asserted without caveat. For this reason, this analysis strongly cautions against any precipitous action, and urges the department to evaluate this situation on a year-by-year cash flow basis. The department should not be trying to collect money for something that may never happen. We also incorporate by reference the various patient safety recommendations that we have included in prior task force submissions, and we support recommendations made by Public Citizen, NYPIRG and the Center for Medical Consumers in its recent report,[1] as well as some patient safety initiatives presented to the task force (explained later).

Among the proposals you may be considering is restricting the legal rights of women and their newborns who were the victims of medical malpractice leading to birth injuries, and/or providing

[1] Public Citizen, *A Self-Inflicted "Crisis:" New York's Medical Malpractice Insurance Troubles Caused by Flawed State Rating Setting and Raid on Rainy Day Fund,* November 28, 2007.
http://www.citizen.org/documents/NYFinal.pdf

some type of neurologically impaired infant ("NII") fund to obtain compensation for the child's lifetime of care. Such a fund may ostensibly become a vast new social program to cover all similar birth outcomes whether or not malpractice was involved. These are cases not currently within the medical malpractice insurance system. Obviously, this proposal not only goes far beyond immediate insurance problems and is apparently motivated by other considerations, but also it infringes directly on the third branch of government, which is not represented on this task force.

We are somewhat hampered in our current analysis of any NII fund under consideration because we do not know important details, including what the fund would look like, what it would cost and who would be on the hook to pay for it currently and for years into the future. Unknown details include the types of birth outcome covered, the burdens that any family would face obtaining compensation under a fund and the types of compensation that would be prohibited, costs or fees penalizing victims who are not successful, who would make decisions or advise decision-makers and how connected would they be to the medical industry, or the amount of windfall that the insurance industry would receive by no longer having to pay for some or all of these claims.

We also do not know if under consideration is, instead, an early-offer-and-settlement program, modeled on one employed by Colorado's COPIC Insurance Company and mentioned by Michelle Mello at the last task force meeting. COPIC employs a process whereby settlements are offered to patients and, while not requiring patients to waive the right to jury trial, does not allow patients to consult attorneys. Hospitals, physicians and COPIC are all permitted to consult their attorneys, "leaving patients completely unprotected in the face of COPIC-coached 'apologists' pressuring them to settle their claims."[2] We would strongly oppose such a system, as well as any system that, unlike Colorado's, does not allow appeals to court.

Another possibility that we have heard bandied about is establishing a medical indemnity fund for these cases. Under such a proposal, a victim (who may have already won their case) would have to ask a fund for compensation or reimbursement for future medical expenses, forcing families into a burdensome and humiliating process of begging (likely without legal assistance) some entity to pay for a child's medical bills. We would strongly oppose this idea as well.

Over the years, mostly under pressure from insurers, states and Congress have occasionally considered proposals that require or pressure wrongly injured persons to have their disputes resolved outside the court system and/or force them to obtain compensation from an administrative system. It would be one thing if any of these systems succeeded and could be considered appropriate models for what seems to be considered here. But none have. This is due

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[2] Maxwell J. Mehlman and Dale A. Nance, *Medical Injustice: The Case Against Health Courts* (2007) at 82-85. If a patient submits any "written demand for compensation or involves an attorney, he/she becomes ineligible for further program benefits." What's more, "patient injuries are not reportable to the Colorado State Medical Board or to the National Practitioner Data Bank." In addition, "COPIC's non-waiver policy clearly is not designed to enable patients to assert their legal rights later if they feel that they have been cheated, but to discourage them from becoming suspicious and consulting an attorney in the first place. The success of this tactic is demonstrated by the fact that, according to COPIC, no case [or very few] in its 3Rs program has gone to litigation." As of March 31, 2006, it had paid only 588 "reimbursements" out of 2,456 "qualifying incidents," at an average payment of only $5,567 per incident, and makes no payment for non-economic damages.

not to poor legislative construction or elements that can be fixed. Rather, it is because of one inherent flaw that infects all such systems, namely: once an area of law is removed from the civil justice system and is codified by statute, it is immediately and forever vulnerable to manipulation by political forces and turns into a nightmare for those it was originally meant to help.

We are in favor of social programs, including guarantees of health insurance coverage to help any kind of person in need of medical care. However, provision of such care should never be accomplished by makings things more difficult for victims of negligence or recklessness, or reducing the accountability of anyone who commits wrongdoing.

THE REDUCTION OF RIGHTS AND COMPENSATION FOR MALPRACTICE VICTIMS UNDER NII FUNDS.

It is important to immediately dispose of the notion that under any sort of NII fund, there will not be a reduction in benefits for children whose injury was the result of negligence or wrongdoing. We can say this with complete confidence even without knowing the details of the plan under consideration. We would venture to say that never in the history of this country has an administrative system turned out ultimately better for victims who ceded their right to trial by jury. Even if a system starts with good intentions, taking any compensation decision out of courts subjects it eventually to influence-peddling and future budgetary/solvency considerations that no lawmaker today can control. These problems are always resolved on the backs of more powerless victims, who gave up their legal rights with vague and unenforceable promises that are ultimately broken.

There are many examples of this occurring, including workers compensation,[3] whose fiscal problems are typically solved by reducing benefits and increasing obstacles for workers, and the federal Vaccine Injury Compensation Program, which tries to reduce costs by fighting parents who try to get in the system.[4] These programs' slow political capture, fiscal problems and

[3] Without belaboring in extreme detail the problems pervading workers compensation systems, it is widely accepted that this system works poorly for the permanently disabled, most analogous to NII fund participants. Permanently disabled workers do not receive enough compensation and the compensation duration is too short as states chip away at these benefits in direct response to pressure from insurance carriers and businesses. In many states, the process workers must go through to make claims and receive compensation has become longer, less efficient, and ultimately less successful in terms of its original goals. See "Worker's Comp: Falling Down on the Job," *Consumer Reports*, 2000 (discussing the legislative reforms of the 1990s and the resulting profits for worker's compensation insurance providers); Rand Research Brief, "Compensating Permanent Workplace Injuries," 1998. According to one legal scholar who studied workers' compensation, "injured workers often face denials and delays of apparently legitimate claims, high litigation costs, discrimination, and harassment by employers and coworkers.… [M]any reports suggest that recent reforms have substantially increased injured workers' financial burdens." McCluskey, Martha T., "The Illusion of Efficiency in Workers' Compensation "Reform," 50 Rutgers L. Rev 657, 670-671, n. 34, 35 (1998). In sum, having ceded their right to jury trial at a time when the law would have left most of their injuries uncompensated, these workers now face serious disadvantages relative to those with access to the judicial system. See, Center for Justice & Democracy, *Workers Compensation – A Cautionary Tale, 2006*. http://centerjd.org/lib/Workers'Comp(NY).pdf.

[4] The Vaccine Injury Compensation Program was created by federal statute in the mid-1980s. National Childhood Vaccine Injury Act of 1986, P.L. 99-660. As originally contemplated, if you or your child receives a covered vaccine and then presents a covered injury from the vaccine, you or your child is entitled to compensation. However, as this law's implementation has been modified by new political forces, extreme problems with access and

subsequent demise as adequate alternatives for victims should serve as a loud warning as to the vulnerability of alternatives systems to address catastrophically-injured newborns. No example is more analogous than Virginia's Birth-Related Neurological Injury Compensation Program, a program that has been in place for 19 years. Except for Florida's quite-different program enacted one year later, no state has attempted to replicate these disastrous programs.

The Virginia program was established in the mid-1980s, during this country's last so-called "insurance crisis." It was enacted not as a liberal social program, but rather under an extortionate threat by insurance companies. The state's main insurance provider stopped providing obstetrical insurance. When asked what would be needed to make them provide insurance again, the provider responded that "if the legislature passes legislation which takes the 'birth-related neurological injury' out of the tort system, we will lift the moratorium."[5]

The program was set up as an injury compensation system for catastrophically injured newborns. It is the exclusive remedy for children delivered by a participating OB/GYNs and hospital. All claims go before an administrative panel, established within the workers compensation system. The panel is "aided" by an "expert" panel of three doctors who determine if the injury is a covered birth-related neurological injury.

This program has been a tremendous failure on every level. Virginia's Joint Legislative Audit and Review Commission suggested "abandoning or overhauling" the program[6] and "ridding the board of its heavy presence of medical professionals," [7] and has found that the program could not be made fiscally sound.[8] In testimony before the Virginia Legislature, one parent called the program "a generous system of care gone awry, of state-sanctioned impunity for doctors and hospitals, and of the struggle families face caring for society's weakest children."[9]

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compensation for victims have developed. Although originally proposed as a no-fault model that would be efficient and provide for quick compensation, many experts say that the program has been co-opted by political forces and turned into a victim's nightmare. See Elizabeth C. Scott, "*The National Childhood Vaccine Injury Act Turns Fifteen*," 56 FOOD & DRUG L.J. 351 (2001)(stating that, as of 2001, 75 percent of claims were denied after long and contentious legal battles taking an average of 7 years to resolve). See also, Statement of the National Vaccine Information Center Co-Founder & President Barbara Loe Fisher, September 28, 1999, House Oversight Hearing, "*Compensating Vaccine Injury: Are Reforms Needed?*" (discussing the unilateral power HHS has to change the burdens of proof and other restrictions); Derry Ridgway, "*No-Fault Vaccine Insurance: Lessons from the National Vaccine Injury Compensation Program*," 24 J. HEALTH POL'Y & L. 59, 69 (1999) (describing how the program originally awarded many more claims, until the Department of Justice decided to aggressively argue against claimants.)

[5] See David G. Duff, "*Compensation for Neurologically Impaired Infants: Medical No-Fault in Virginia*," 27 HARV. J. on LEGIS. 391, 405-407, fn. 110 (1990)(citing Letter from Gordon D. McLean, Executive Vice-President, The Virginia Insurance Reciprocal to Ronald K. Davis, Virginia Surgical Associates, (chairman of MSV's Professional Liability Committee) Jan. 13, 1987 (on file at the Harv. J. on Legis.).

[6] Bill McKelway, "Study Faults Program for Brain-Injured; Shortcomings Found in Care for Children," *Richmond Times Dispatch*, Nov. 13, 2002; Liz Szabo & Elizabeth Simpson, "Birth Injuries Get 'Minimal Review; State Report Says Board Must Hold Doctors Accountable," *Virginian-Pilot*, Nov. 15, 2002.

[7] Bill McKelway, "Brain-Injury Program's Outlook Dim; Cost Savings for Doctors Meant Less for Children," *Richmond Times Dispatch*, Nov. 16, 2002.

[8] *Ibid*.

[9] Bill McKelway, "Danville Has High Birth-Injury Rate; Critics Say Virginia Law Shields Doctors from Lawsuits," *News Virginian*, June 1, 2003.

To begin, the program has been in fiscal crisis for years. This is so even though the child's nonconomic damages (for pain, disfigurement, trauma, loss of a limb, blindness etc.) are not simply capped – but entirely eliminated. The fund is close to $130 million short of cash and it now looks like the legislature will decide to fix the problem on the backs of the victims and their families even further, in complete contradiction to the law's original intent, i.e., "by giving up their right to bring suit, families were promised lifelong medical care for eligible children."[10] As recently reported in the *Richmond Post-Dispatch*, "documents obtained by *The Times-Dispatch* show that the [legislative] plan would erase as much as half the shortage, about $70.3 million, by capping benefit payments to children and through accounting adjustments that lessen cash obligations by some $44 million."[11]

The following are some of the more notable problems for families:

- **Prevents patients from receiving adequate compensation and understanding the medical errors and negligence responsible**: "Children born in Virginia with catastrophic neurological injuries are promised lifetime medical care by the birth-injury program. But these children and their families also have been forced to absorb stunning disparities in program benefits because of shifting priorities and cost reductions over which they had no control or voice. . . . 'The program can end up providing very little,' said Christina Rigney, referring to the minimal benefits her family received in the face of her son's traumatic birth and brief life. 'We believed there was negligence involved, but nothing ever came of it.'" Her son died three years after he was severely injured due to oxygen loss during birth. Because of the birth injury law, the family couldn't file a malpractice suit, the obstetrician was never even asked to explain what happened, and the family could learn nothing from illegible notes that failed to account for long periods of time. Families of two other brain-injured infants he delivered faced the same limits on their ability to learn what happened, or seek to show he was negligent. He is facing a lawsuit, however, for a fourth case in which a woman giving birth bled to death after delivering a healthy baby. [12] (See below on how this program shields bad doctors)

- **Cannot adjust to new medical research:** The program has been unable to adjust to current medical understanding because definitions of which injuries are covered have not changed in 15 years, despite important advances in understanding the causes of brain damage in babies. The program has rejected claims because it used out-dated criteria for assessing birth injuries. "Decisions in the [Virginia program's] cases can mean the difference between lifetime care for some of society's most-disabled children and no guarantees that medical expenses will be covered. Many families have had to opt for institutionalizing their children."[13]

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[10] Bill McKelway, "Plan could restore financial soundness," *Richmond Times Dispatch*, September 17, 2007.
[11] *Ibid*.
[12] Bill McKelway, "Danville Has High Birth-Injury Rate; Critics Say Virginia Law Shields Doctors from Lawsuits," *News Virginian*, June 1, 2003.
[13] Bill McKelway, "Old Rules Deny New Benefits; Children Rejected for Brain-Injury Program," *Richmond Times Dispatch*, June 5, 2003

- **Families of infants who died minutes after birth denied any compensation:** Until recently, the program provided for lifetime care but nothing for wrongful death (a new provision to provide up to $100,000 to deceased children went into effect in July 2003). That led to perverse situations such as a recent case where the obstetrician and hospital successfully argued before the administrative body that an infant who lived only minutes qualified for the program, protecting them from any liability other than the care provided during the deceased infant's 30-minute lifetime.[14]

Florida enacted its Birth-Related Neurological Injury Compensation Act (NICA) in 1988. However, it has been extremely underutilized and therefore difficult to compare because this law has an important procedural safeguard: it allows claimants to opt-out of the administrative scheme and proceed in civil court under normal litigation rules. This in itself provides empirical proof that, from the wrongly injured families' point of view, the civil justice system is a better process.[15]

THE FAILURE TO PROVIDE JUSTICE OR EQUALITY

NII advocates make promises that an NII system will likely provide reduced compensation to malpractice victims, but will compensate more people, including those whose conditions are not caused by others' negligence or wrongdoing. They say that a goal of an NII fund is not to ensure justice for those who have been harmed, but to ensure equality in treatment for those who suffer a particular medical problem. However, "inequality" is not eliminated by an NII program; it is simply transferred to another class of people - and in a constitutionally-suspect manner.

Medical malpractice is not a separate body of law; it is part and parcel of ordinary tort law that has been enshrined in the common law since the beginning of our civil justice system. It has several purposes, one of which is to provide recourse for injury caused by negligent or reckless practices. Despite much rhetoric to the contrary from health care providers and insurance companies, the civil justice system currently accomplishes this quite well in medical malpractice cases.[16]

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[14] Bill McKelway, "Deceased Infant Put into Program; Ruling Blocks Suits Over Death of Baby," *Richmond Times Dispatch*, June 27, 2003.

[15] See generally, Florida's Birth-Related Neurological Injury Compensation Act, Fla. Stat. §§ 766.301-766.316.

[16] The Harvard School of Public Health recently found that the current medical malpractice system works: legitimate claims are being paid, non-legitimate claims are generally not being paid, and "portraits of a malpractice system that is stricken with frivolous litigation are overblown." David M. Studdert, Michelle Mello, et al., "Claims, Errors, and Compensation Payments in Medical Malpractice Litigation," *New England Journal of Medicine,* May 11, 2006. The authors found: 63 percent of the injuries were judged to be the result of error and most of those claims received compensation while most individuals whose claims did not involve errors or injuries received nothing; 80 percent of claims involved injuries that caused significant or major disability or death. They also found, "the profile of non-error claims we observed does not square with the notion of opportunistic trial lawyers pursuing questionable lawsuits in circumstances in which their chances of winning are reasonable and prospective returns in the event of a win are high. Rather, our findings underscore how difficult it may be for plaintiffs and their attorneys to discern what has happened before the initiation of a claim and the acquisition of knowledge that comes from the investigations, consultation with experts, and sharing of information that litigation triggers." In addition, **"**disputing and paying for errors account for the lion's share of malpractice costs."

NII funds contemplate eliminating or restricting longstanding common law state rights for women and newborns. Women and newborns who are victims of malpractice would lose their ability to obtain the same level of compensation that a impartial judge or jury, listening to the facts of each individual case, might assess.[17] They would lose the right to seek any accountability from those responsible, no matter how egregious the misconduct.

On the other hand, adult men have nothing to fear from an NII fund – if they are injured by medical malpractice, they would be able to sue their doctor or hospital without any new limit, receive full compensation and obtain some measure of justice by holding the wrongdoer accountable. Indeed, the burden of an NII proposal falls entirely on the most seriously injured and vulnerable victims of medical malpractice – catastrophically-injured newborns. These individuals will not be fully compensated for their loss, while those who suffer any other kind of injury due to malpractice could receive any compensation available.

Without delving into all the constitutional problems with alternatives compensation schemes that eliminate the right to civil jury trial,[18] which are substantial, it should be noted that courts have struck down far less intrusive measures, like caps, on equal protection grounds – i.e., unequal treatment of malpractice victims - especially when the laws under scrutiny are not responsive to a perceived problem, but rather serve only to disadvantage some population unreasonably. (See discussion of insurance issues, below).[19]

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[17] Juries also provide the incentive for the vast majority of true medical malpractice cases to settle. In the Harvard closed claims study, referenced above, 15 percent of claims were decided by trial verdict. David M. Studdert, Michelle Mello, et al., "Claims, Errors, and Compensation Payments in Medical Malpractice Litigation," *New England Journal of Medicine,* May 11, 2006. Other research shows that 90 percent of cases are settled without jury trial, with some estimates indicating that the figure is as high as 97 percent. Testimony of Neil Vidmar, Russell M. Robinson, II Professor of Law, Duke Law School before The Senate Committee on Health, Education, Labor and Pensions, "Hearing on Medical Liability: New Ideas for Making the System Work Better for Patients," June 22, 2006. According to Vidmar, "Research on why insurers actually settle cases indicates that the driving force in most instances is whether the insurance company and their lawyers conclude, on the basis of their own internal review, that the medical provider was negligent.…. An earlier study by Rosenblatt and Hurst examined 54 obstetric malpractice claims for negligence. For cases in which settlement payments were made there was general consensus among insurance company staff, medical experts and defense attorneys that some lapse in the standard of care had occurred. No payments were made in the cases in which these various reviewers decided there was no lapse in the standard of care." Vidmar further testified, "Without question the threat of a jury trial is what forces parties to settle cases. The presence of the jury as an ultimate arbiter provides the incentive to settle but the effects are more subtle than just negotiating around a figure. The threat causes defense lawyers and the liability insurers to focus on the acts that led to the claims of negligence."

[18] See, e.g, Amy Widman, "Why Health Courts are Unconstitutional," 27 Pace L. Rev. 55 (Fall 2006). It should be noted that neither Virginia's nor Florida's NII program have ever been challenged on constitutional grounds. But see, e.g., Epstein, "*Market and Regulatory Approaches to Medical Malpractice: The Virginia No-Fault Statute*," 74 VA. L. REV. 1451 (1988); see also Comment, supra note 42; see also Bill McElway, "*Study Faults Program for Brain-Injured; Shortcomings Found in Care for Children," Richmond Times Dispatch*, Nov. 13, 2002 (citing study by the Joint Legislative Audit and Review Commission criticizing many aspects of the program, including the lack of accountability. "Because there is no oversight of this program, at a minimum it presents the appearance that the program and board do not have to account for their actions."). Although the Florida program has never been challenged, the fact of its opt-out provision would clearly play a large determinative role in assessing its constitutionality.

[19] See, e.g., *Ferndon v. Wisconsin Patients Compensation Fund,* 682 N.W.2d 866 (Wisc. 2005); *Boucher v. Sayeed,* 459 A.2d 87, (R.I. 1983); *Hoem v. State,* 756 P.2d 780 (Wyo. 1988). The Wyoming court went even further, stating "[t]he continued availability and vitality of *** causes of action [against health care providers] serve an important

THE MYTH THAT OBSTETRICAL INJURIES ARE NOT CAUSED BY MALPRACTICE

At the October 29, 2007 task force meeting, which was supposed to be a discussion of ways to improve patient safety, Commissioner Daines allowed Dr. Richard Berkowitz, representing the American College of Obstetricians and Gynecologists (ACOG), to conduct a 45-minute one-sided presentation on this group's view of the "science" around obstetrical injuries. Following this monologue, we took the microphone and voiced our first official protest of the conduct of this task force, noting the sweeping, unrebutted generalizations that ACOG was permitted to make, which they no doubt raise in litigation - and lose. Following our protest at the close of that meeting, Commissioner Daines approached us, saying he "just wants to know the science." I responded that there is another view of the science. He said that perhaps the task force should have a separate meeting to discuss this. This never transpired.

The presentation preceding Dr. Berkowitz was by Dr. Ronald Marcus, Director of Clinical Operations, Department of Ob/Gyn at Beth Israel Deaconess Medical Center and Assistant Professor of the Harvard Medical School. His presentation not only acknowledged the extent of birth injuries caused by OB error, but discussed the reasons for this and proven methods to correct the situation. Dr. Marcus specifically discussed the concept of team training or crew resource management that was developed by NASA to deal with pilot error. Dr. Marcus found that with crisis management training in OB emergencies, patient outcomes dramatically improved, with a 50 percent decrease in low Apgars, neonatal encephalopathy. With crew resource management in place, he has seen a 23 percent decrease in frequency and 13 percent decrease in severity of adverse events, and a 50 percent decrease in OB malpractice cases. If medical malpractice were not the cause of a certain birth-related injuries, clearly these kinds of statistics would not exist.[20]

As we have always maintained, decreasing errors and claims is the direction on which the task force should focus.

AN NII FUND CREATES SAFE HAVENS FOR BAD DOCTORS.

One of the worst aspects of Virginia's program is that it fails to hold accountable even the worst practitioners and allows them to continue practicing. National birth-injury experts expressed fear

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public policy – the preservation of quality health care for the citizens of this state. . . [and] [c]onstitutional protections exist for litigants regardless of market conditions for insurance companies and the medical industry; concerns about the latter cannot be allowed to overrun the former at the expense of those *** injured by malpractice."

[20] See also, Testimony of Neil Vidmar, Russell M. Robinson, II Professor of Law, Duke Law School before The Senate Committee on Health, Education, Labor and Pensions, "Hearing on Medical Liability: New Ideas for Making the System Work Better for Patients," June 22, 2006 (An earlier study by Rosenblatt and Hurst examined 54 obstetric malpractice claims for negligence. For cases in which settlement payments were made there was general consensus among insurance company staff, medical experts and defense attorneys that some lapse in the standard of care had occurred. No payments were made in the cases in which these various reviewers decided there was no lapse in the standard of care.").

about Virginia becoming a safe harbor for bad doctors because of a lack of disciplinary actions under this law. "The birth-injury cases … are not reported to national databases that track actions against doctors and measure physicians' insurability. With no court action, settlement or disciplinary actions, a doctor's involvement in birth-injury cases can go undetected."[21] In fact, not a single case in the program's history had produced a disciplinary action against a hospital or doctor, even though those cases "pose a high risk for findings of negligence against doctors, nurses and hospitals."[22]

Given the recent heightened criticism of the state health department for failing to discipline or sanction the state's worst doctors, including those with 10 or more malpractice payments like Dr. Finkelstein in Long Island, less accountability is obviously the wrong direction for this state right now.

AN NII FUND WILL NOT FIX THE STATE'S INSURANCE PROBLEMS.

The decision to take brain damaged baby cases out of the civil justice system is prompted, at least in part, by assertions by some insurance carriers that these cases cause their most severe financial losses and therefore must be treated differently than any other malpractice case. This is completely groundless.

On November 29, 2007, Public Citizen released a new report where the group examined National Practitioner Data Bank data of New York medical malpractice cases.[23] The group examined neurological injuries (which fall under the broader category, "Quadriplegic, Brain Damage, Lifelong Care" outcomes). Rather than leading the list of high-cost patient outcomes, these cases "rank halfway down the list – *fifth* – of ten outcome categories that show total amounts paid over the past three years (the years in which NPDB has tracked such data)." Total payment for these injuries is less than for death, significant permanent injury, major permanent injury and even minor permanent injury.

This finding is consistent with trends revealed in the Milliman report that Superintendent Dinallo cites as proof that an NII would result in certain costs saving.[24] According to the analysis of this report conducted by our actuary, Milliman reports a "significant" drop in the percentage of Neurological Damage ("ND") losses to total losses after 1991. It also states that, "excluding

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[21] Bill McKelway, "Brain Injuries Spur No Action; Case Review, Required by Law, Is Not Being Done, Va. Study Found," *Richmond Times Dispatch*, Jan. 14, 2003.

[22] Bill McKelway, "Brain-Injury Program's Outlook Dim; Cost Savings for Doctors Meant Less for Children," *Richmond Times Dispatch*, Nov. 16, 2002.

[23] Public Citizen, *A Self-Inflicted "Crisis:" New York's Medical Malpractice Insurance Troubles Caused by Flawed State Rating Setting and Raid on Rainy Day Fund,* November 28, 2007. http://www.citizen.org/documents/NYFinal.pdf

[24] Milliman USA, "Medical Liability Mutual Insurance Company, Analysis of Claims Related to Neurologically-Impaired Infants," May 17, 2002. The report concludes that if all ND (Neurological Defect) claims were removed from the tort system, the total savings in rates would be an estimated 14.6 percent. The report does not estimate the cost of any system that might be created to replace the tort system to compensate for severely ND-impaired babies. In other words, the report assumes no costs for the future for these infants to offset the alleged savings. Therefore the "savings" to society suggested by the insurance department are grossly overstated.

closure years of 2000-2001, the data…show a modest (claim cost severity) trend of 1 or 2 percent per year." While the report sees increasing severity trends, it states that, "beginning with policy year 1993, the frequency (of ND claims) appears to have dropped significantly."

According to this data, pure premium is flat or down. Moreover, Milliman says that the trend in open claims severity was "slightly downward." If these trends continue along the projections shown in the Milliman report, it would appear to lessen the cost of neurologically-impaired infant claims from that reported in the Milliman analysis.

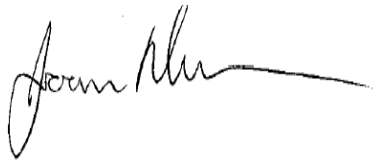
In sum, there is no justification for extreme proposals that take these cases out of the legal system, or the insurance system for that matter. Even if these claims were taken entirely out of the insurance system, according to Milliman's own numbers, the insurance savings (although not savings to taxpayers or whoever would be on the hook to pay) would be less than 15 percent in 2002 and even less likely than that today. On the other hand, simply following Dr. Marcus's patient safety recommendations would have a greater impact.

CONCLUSION

It is the lesson of history that NII funds hurt patients, do nothing to help doctors with their insurance problems and allow states to become a safe harbor for negligent and reckless doctors who should not be practicing medicine at all. They are sold to the public with slick but ultimately groundless promises. Establishing an NII fund for New York would be simply trading one crisis for another, and would place the burden of solving an insurance problem, not to mention a patient safety problem, on the backs of sick and injured children and their families. It is terrible policy and should be rejected.

Please do not hesitate to contact us with any questions or comments.

Very sincerely,



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