SENATE FILE NO. SF0141

Medical malpractice reform-review panel.

Sponsored by: Senate Labor, Health and Social Services Committee

A BILL

for

AN ACT relating to medical malpractice reform, the medical review panel and alternate dispute resolution of medical malpractice claims; repealing existing statutes relating to the medical review panel; recreating the medical review panel; creating the panel pursuant to article 10, section 4 of the Wyoming Constitution, as amended; creating the medical review panel office for administrative support; providing definitions; providing for financing of the panel; providing for the admissibility of the results of the panel in further court proceedings; mandating alternate dispute resolution in specified circumstances; empowering the state health officer to take steps to correct system problems causing health care error discovered through the review panel process; providing an exception to review panel jurisdiction; providing an appropriation; and providing for effective dates.

Be It Enacted by the Legislature of the State of Wyoming:

Section 1. W.S. 9-2-1513 through 9-2-1525 are created to read:

9-2-1513. Short title.

This act may be cited as the "Wyoming Medical Review Panel Act."

9-2-1514. Purposes of provisions.

(a) The purposes of this act are:

(i) To create a medical review panel, as authorized by article 10, section 4, of the Wyoming Constitution, as amended pursuant to 2004 House Joint Resolution No. 0011, which was ratified by the voters at the 2004 general election;

(ii) To reduce the costs of the medical malpractice system so more of the money spent on the system goes to people injured by medical malpractice by

eliminating as rapidly and cheaply as possible cases where there was no malpractice and encouraging early settlement of cases where there was malpractice;

(iii) To obtain for persons who think they may have been injured by malpractice an early objective hearing on the issue and to reduce the percentage of unjust final outcomes stemming from the legal settlement process;

(iv) To prevent where possible the filing of court actions against health care providers and their employees for professional malpractice in situations where the facts do not show malpractice; and

(v) To make possible the fair and equitable disposition of the claims against health care providers which are well founded.

9-2-1515. Definitions.

(a) As used in this act:

(i) "Dentist" means a person licensed under W.S. 33-15-108;

(ii) "Director" means the director of the Wyoming medical review panel office established under this act;

(iii) "Health care provider" means a person licensed pursuant to title 33 of the Wyoming statutes as a podiatrist, chiropractor, dentist, dental hygienist, nurse, including advance practice nurse, registered nurse, licensed practical nurse or certified nursing assistant, nursing home administrator, optometrist, pharmacist, physical therapist or physical therapy assistant, physician, physician's assistant, psychologist, speech pathologist or audiologist, hearing aid specialist, emergency medical technician, radiologic technologist, occupations therapist or certified occupational therapy assistant or respiratory care practitioner or health care facility or any person employed by a health care facility who, in accordance with law or a license granted by a state agency, provides health care;

(iv) "Malpractice claim" means any claim against a health care provider for alleged medical or health care treatment, alleged lack of medical or health care treatment

or other alleged departure from accepted standards of health care which results in death or injury to the patient caused by medical error as opposed to being an expected outcome or expected risk of the care or lack thereof;

(v) "Office" means the Wyoming medical review panel office established under this act;

(vi) "Panel" means a medical review panel provided for under this act;

(vii) "Physician" means a person licensed under W.S. 33-26-303;

(viii) "Valid arbitration agreement allowed by law" means an arbitration agreement in writing, voluntarily signed by both the provider and the patient, or valid representatives of either, after the acts complained of or, if before, in circumstances in which the patient has a reasonable opportunity to obtain needed health care from a different provider in Wyoming or a different state. In all circumstances an agreement signed ninety (90) days before the acts complained of shall be deemed to have provided a

reasonable opportunity to obtain needed health care from a different provider;

(ix) "This act" means W.S. 9-2-1513 through 9-2-1525.

9-2-1516. Service of pleadings; computation of time.

(a) The claim, answer, decision and all other pleadings required to be served under this act shall be served in accordance with the Wyoming Rules of Civil Procedure.

(b) Computation of time periods prescribed or allowed under this act shall be in accordance with rule 6 of the Wyoming Rules of Civil Procedure.

(c) Where the claimant is proceeding without legal counsel, the director or his designee shall assist the claimant, if requested, in filing or serving the proper claims, pleadings and other required paperwork in a proper and timely manner. The director or his designee shall take no responsibility for the substantive contents of the

claims, pleadings and other required paperwork which is the responsibility of the claimant.

9-2-1517. Panel office created; compensation; director of panel office; appointment and duties; rulemaking.

(a) There is created the Wyoming medical review panel office.

(b) The office shall have a director who shall be the state health officer or his designee and shall conduct the administrative business of the office and panels and otherwise implement this act. The department of health shall provide administrative support to the office. The director may employ personnel or contract for services necessary to implement this act. The director shall promulgate rules and regulations in accordance with the Wyoming Administrative Procedure Act to implement this act.

(c) The attorney general shall be the legal advisor for the office and individual panels and shall assign one (1) or more members of his staff to act as the legal

advisor for the office and for panels on specific cases and to assist with other duties imposed by this act.

(d) The state health officer may participate as a nonvoting member of the panel in the hearing of any specific case. If a panel recommends action to correct health system failures causing or contributing to health care error, or if he determines a case or series of cases show a system problem causing health care error, the state health officer may:

(i) Require the review panel assigned to a specific case to consult with him on the issues; and

(ii) Issue any recommendations, advisories or rules and regulations he finds useful to protect the public health. Any rules and regulations shall be promulgated in accordance with the Wyoming Administrative Procedure Act.

(e) The state health officer may constitute special advisory panels to advise him on:

(i) Rules, regulations, training and procedures related to the functioning of individual panels in specific cases; and

(ii) The identification and prevention of health system safety issues and medical errors identified by one (1) or more individual panels.

(f) Members of the panel who are not state employees shall receive compensation while engaged in the business of the board of forty dollars ($40.00) per hour for any hour during which a hearing or part of a hearing is held, one hundred dollars ($100.00) for preparation including review of documents for every hearing and the lesser of forty dollars ($40.00) per hour or one hundred fifty dollars ($150.00) per day for any time spent on panel training or other panel business including advising the state health officer. Compensation for travel and other expenses shall be as provided in W.S. 9-3-102 and 9-3-103. Compensation to any panel member excluding reimbursement for travel and other expenses under this subsection shall not exceed three hundred twenty dollars ($320.00) per day.

9-2-1518. Claims to be reviewed by panel; prohibition on filing claims in court; tolling of statute of limitation; immunity of panel and witnesses; administration.

(a) The panel shall review all malpractice claims against healthcare providers filed with the panel except those claims subject to a valid arbitration agreement allowed by law or upon which suit has been filed prior to July 1, 2005. No complaint alleging malpractice shall be filed in any court against a health care provider before a claim is made to the panel and its decision is rendered. The running of the applicable limitation period in a malpractice action is tolled upon receipt by the director of the application for review and does not begin again until thirty (30) days after the panel's final decision is served upon the claimant.

(b) Panel members and witnesses are absolutely immune from civil liability for all acts in the course and scope of the duties under this act, including but not limited to communications, findings, opinions and conclusions. Notwithstanding this subsection, panel members and witnesses who are licensed professionals acting within the

scope of their license may be disciplined as provided by law by their professional licensing board or organization. The immunity provided by this subsection extends only to civil liability and does not extend to criminal penalties for criminal conduct or to court ordered restitution for criminal conduct.

(c) The director may provide for the administration of oaths, the receipt of claims filed, the promulgation of forms required under this act and the performance of all other acts required to fairly and effectively administer this act. The director or the panel in an individual case shall not allow depositions except with the consent of all parties or when the testimony sought on deposition is essential for the panel to make a decision and the witness cannot reasonably be present at the hearing.

(d) The director or the panel in individual cases may provide for the issuance of subpoenas in connection with the administration of this act. The panel shall ordinarily grant reasonable requests for subpoenas for access to medical, dental, hospital or other health care records pertaining to the claim unless the matter sought is privileged under federal law or pursuant to W.S. 35-17-105.

For other matters, the panel shall consider the cost of complying with the subpoena relative to the need for the information sought in determining the panel's action on the case and may deny requests based on excessive cost of compliance or lack of relevance to the decisions needed. A party requesting a subpoena shall bear all costs of mileage and witness fees.

9-2-1519. Claim review procedure; contents of claim; service of claim on provider; answer.

(a) Claimants shall submit a case for the consideration of a panel prior to filing a complaint in any court in this state by addressing a verified written claim, signed under oath, by the claimant or his representative if the claimant is unable to sign, and his attorney if he is represented by an attorney, to the director of the panel. The claim shall contain:

(i) A statement in reasonable detail of the elements of the health provider's conduct which are believed to constitute a malpractice claim, the dates the conduct occurred, and the names and addresses of all health

care providers having contact with the claimant relevant to the claim and all witnesses;

(ii) A medical record release form signed by the claimant, authorizing the panel to obtain access to all medical, dental, hospital and other care records and information pertaining to the claim, and for the purposes of its consideration of this matter only, including consideration of any recommendations needed to protect the public health and arising from this matter, waiving any privilege as to the contents of those records. Nothing in the statement may in any way be construed as waiving that privilege for any other purpose or in any other context, in or out of court, except that the contents of the records may be cited, with identifying information removed, in any recommendations, advisories or rules and regulations arising in whole or in part from this matter and useful to protect the public health;

(iii) A written analysis showing the conduct complained of constituted malpractice, signed under oath, by a physician or other health care provider in the same profession and specialty as the health care provider complained of, or in a profession or specialty requiring as

much or more education and training as the provider complained of and whose scope of practice normally includes the condition the patient had or was diagnosed as having. In the case of a health care provider that is an institution, the analysis must be signed by a person with at least three (3) years experience working in or attending patients in that kind of institution and in a profession and specialty relevant to the issue in the case; and

(iv) A filing fee of one hundred dollars ($100.00) which shall be deposited in the review panel account.

(b) The claim may be amended by filing an amendment not less than thirty (30) days prior to the hearing date.

(c) Upon receipt of a claim, the director shall cause a true copy of the claim to be served on the health care providers against whom the claim has been filed.

(d) The health care provider shall answer the claim within thirty (30) days after service and shall submit a statement authorizing the panel to inspect all medical, dental, hospital and other health care records and

information pertaining to the claim except those records which are privileged pursuant to W.S. 35-17-105 or applicable federal law. The answer shall be filed with the director who shall serve a copy on the claimant. The health care provider shall have the right to file a supplemental answer in response to any amendment to the claim which shall be forwarded to each panel member before the hearing if received at least fifteen (15) days before the hearing and otherwise at the hearing.

9-2-1520. Panel composition; selection; disqualification of panelist; multiple defendants.

(a) Between December 1 and December 31 in every even numbered year, the director shall solicit a list of potential panelists from every licensing agency for health care providers. By July 1 of every odd numbered year, each licensing agency shall submit the list to the director. Agencies with two hundred (200) or fewer licensees shall submit a list of at least ten (10) of their licensed professionals; agencies with more than two hundred (200) shall submit a list of at least twenty (20) of their licensed professionals. By agreement with the director, more names than the minimums may be submitted. For

institutions licensed by the department of health, the department shall submit a list of at least ten (10) individuals with experience working in the institutions and may aggregate similar institutions into one (1) list. To the extent practical, the department shall consult with trade associations representing the institutions on the composition of the list. The lists shall be valid for a two (2) year period and the licensing agencies may resubmit the same names for additional periods. The governor shall appoint at least twelve (12) and no more than fifty (50) individuals with at least a bachelors degree education to serve as lay panel members. Each person appointed shall be available for a two (2) year term starting July 31 of the year in which they are appointed, except one-half (1/2) of the initial appointees shall be available for a one (1) year term. Persons completing their two (2) year term may be reappointed at the discretion of the governor. Supplemental lists with additional names may be requested and additional names may be submitted at any time.

(b) Each licensing agency shall also inform the director of one (1) or more members or staff with whom the director may consult about panelists for individual panels.

(c) The panel for each claim reviewed under this act shall consist of five (5) members. The director shall name the panelists for each claim from the lists provided by the licensing agencies and the governor. No more than two (2) of the panelists may be physicians, nor more than two (2) of the panelists may be laymen, at least three (3) members shall be health care professionals or employees of health care providers and at least one (1) member shall be a layman. At least one (1) member of the panel shall be from the health care provider's profession and specialty unless the director determines that such a provider is not available in which case he shall select an individual from a profession or specialty as closely related as practical. The director may consult with the persons named in subsection (b) of this section as to the appropriate choice for the panel. If any appropriate professional is not available on the list submitted, the director may, after consultation, select an individual not on the list. In selecting a layman, the director may consider the residency of the layman, any professional skills the layman may have relevant to the case and whether or not the layman has served on a previous panel.

(d) The director shall exclude from the panel any panelist who cannot be, or reports he cannot be, objective due to personal or business ties with any party and any panelist who cannot serve due to ill health or disability. The director may excuse any panelist who seeks to be excused and who:

(i) Has prior commitments due to family or professional obligations;

(ii) Is pregnant or is the principal caregiver for an infant or a disabled or aged person;

(iii) Has been called for or seated on a jury and service on the jury could conflict with panel duties; or

(iv) Is an elected official whose duties could conflict with panel duties.

(e) Any person selected as a panelist pursuant to this act who has not been called for or seated on a jury at the time of his selection is exempt from jury duty until the completion of that person's panel service.

(f) Prior to the hearing, the director shall select a chairman from among the panel members. The chairman shall preside over the panel proceedings.

(g) The attorney general shall select an attorney to be present at the panel hearing and advise the panel on legal and procedural matters.

(h) If, within fifteen (15) days of receipt of the notice of selection of the panelists, the claimant or the health car provider against whom the claim is made files an affidavit stating his belief that a panelist selected by the director cannot be impartial in reviewing the claim, the panel member is disqualified, and the director shall select another from an appropriate list. Each party may disqualify not more than three (3) panel members under this subsection.

(j) When a claim is filed against two (2) or more health care providers, the claim against each health care provider shall be consolidated for hearing unless, by stipulation of all parties or at the discretion of the panel, the claims are heard separately. In selecting the

panel under these circumstances, the director shall follow the requirements of this section, except he shall not be bound by the requirements for a panel member in the same profession and specialty as each health care provider although he shall meet this requirement to the extent practical.

9-2-1521. Hearing procedure; review of decision prohibited.

(a) The director shall set a time and place for the hearing and provide notice to all parties at least thirty (30) days prior to the hearing. The proper place for hearing shall be the county in which an action is required to be brought according to W.S. 1-5-101 through 1-5-109. The hearing date shall not be more than ninety (90) days after the director receives the claim unless the director or the panel finds good cause to delay the hearing. At least twenty-five (25) days before the hearing, the director shall provide each panel member copies of all claims, answers, briefs, records and other documents the director considers necessary.

(b) The hearing shall be conducted in accordance with rules and regulations promulgated by the director. The hearing shall be informal, and the Wyoming rules of evidence and, except as specified in this act, the Wyoming Administrative Procedure Act do not apply. No decision of the director or the panel is subject to review in a court. A record of the hearing may be made if so stipulated by all the parties and the panel. The panel may issue subpoenas to compel the attendance of witnesses as provided under the Wyoming Administrative Procedure Act.

(c) The panel may take the case under advisement or may request that additional facts, records, witnesses or other information be obtained and presented to it at a supplemental hearing, which shall be set for a date not later than thirty (30) days from the date of the original hearing unless the claimant or his attorney consents in writing to a longer period.

(d) To preserve the privacy of the individuals involved and to avoid tainting by publicity the jury pool before a trial, the hearing shall be closed to the public unless all parties and the panel agree otherwise. The director may admit to the hearing health department staff

with responsibilities relevant to the issue including responsibilities for correcting health care error. The claimant may admit members of his family and others needed to assist him. The health care providers against whom the claim is made may admit their family members, employees and others needed to assist them. Other individuals may be admitted by consent of all parties and the panel.

9-2-1522. Panel deliberations and decisions; decisions not binding.

(a) Upon consideration of all the relevant material, the panel shall determine whether there is:

(i) A preponderance of evidence that the acts or omissions complained of occurred and that the acts deviated from the applicable standard of care;

(ii) A preponderance of evidence that the acts or omissions constituted the proximate cause of the injury; and

(iii) A preponderance of evidence that the contributory fault of the claimant, if any, is not more than fifty percent (50%) of the total fault of all actors.

(b) All proceedings on the panel are confidential except as provided by this section. The decision shall be by a majority vote of the panel and shall be signed by the chairman.

(c) The decision shall be in writing and forwarded to the director who shall serve copies on all parties.

(d) The panel's decision is not binding upon any party unless all the parties have stipulated in writing that the decision shall be binding. The panel may, by stipulation of the parties, recommend an award and this award shall be binding only if all the parties have so stipulated.

(e) Based on the information received, the panel may recommend to the state health officer steps needed to protect the public health and reduce health care error. At the initiative of the state health officer or the panel, the panel may discuss their proceedings and the information

received concerning the claim with the state health officer and his staff. These discussions are privileged and not discoverable in any court proceeding and may not be revealed by anyone except as provided by this section. After removing identifying information and details, the state health officer may reveal information obtained relevant to the steps he may take or may be considering to protect the public health and prevent health care error pursuant to this act.

(f) The panel may recommend to the state health officer that he forward the case to the health care provider's professional licensing agency for further action. If the state health officer concurs, he shall forward the relevant portions of the complaint, the analysis showing malpractice occurred and the answers to the health care provider's professional licensing agency together with his recommendation that they consider the matter for possible action and the reasons for his recommendation. The state health officer shall inform the health care provider if the matter is forwarded to a professional licensing agency pursuant to this subsection.

(g) If a case is exempt from the review panel procedure due to a valid arbitration agreement pursuant to W.S. 9-2-1518, the arbitrators shall have the same right and duty to make recommendations to the state health officer as a review panel pursuant to subsections (e) and (f) of this section and the state health officer may proceed in the same manner as with recommendations received from a panel.

9-2-1523. Confidentiality of panel proceedings; privilege; decision admissible.

(a) The director shall maintain records of all proceedings before the panel, which shall include the nature of the act or omissions alleged in the claim, a brief summary of the evidence presented and the decision of the panel. Except as otherwise provided by this act, any records which may identify any party to the proceedings shall not be made public and are not subject to subpoena but are to be used solely for the purpose of compiling statistical data and facilitating ongoing studies of medical malpractice and health care error in this state.

(b) The director shall make an annual report to the legislature showing:

(i) The expenses of the panels and the office;

(ii) The filing fees and assessments received to support the panels and the office;

(iii) The number of claims filed with the panel, the number of health care providers against whom claims were filed and summary statistics by type of provider and nature of the claim to the extent these can be revealed without revealing identities of specific claims and specific providers or claimants;

(iv) The number of claims on which a hearing was held and a statistical summary of the recommendations resulting from those hearings; and

(v) The number of claims, aggregated by type of recommendation if possible, where an action has been subsequently filed, the number of claims for which an action has not been filed but the statute of limitations

has not yet run and the number of claims where an action has not been filed and the statute of limitations has run.

(c) No panel member may be called to testify in any proceeding concerning the deliberations, discussions, decisions and internal proceedings of the panel.

(d) The decision of the panel is admissible as evidence in any subsequent legal proceeding concerning the claim.

9-2-1524. Mandatory arbitration in the event of affirmative findings; suits after negative findings; costs and attorney fees.

(a) If the panel finds there was malpractice by affirmative findings on all of the issues required to be considered pursuant to W.S. 9-2-1522(a)(i) through (iii) and a lawsuit is subsequently filed validly complying with the applicable statute of limitations and procedural requirements, the issue shall immediately go to arbitration. Within thirty (30) days of the filing of the lawsuit, each party shall appoint an arbitrator and the two (2) arbitrators shall select a third arbitrator. If there

is more than one (1) defendant in the action, the defendants shall jointly select an arbitrator. If they cannot agree, the district court shall select an arbitrator for them. The arbitration shall be subject to the Uniform Arbitration Act to the extent that act is not inconsistent with this act.

(b) Each party, within thirty (30) days of the arbitrators' decision, shall notify the district court whether that party accepts or rejects the arbitrators' decision. A party who fails to notify the court is deemed to have accepted the arbitrators' decision. If all parties accept the arbitrators' decision, the decision is binding. If the plaintiff or all of the defendants reject the arbitrators' decision, the matter shall proceed to trial. If the plaintiff accepts the arbitrators' decision and one (1) or more of the defendants accepts and one or more reject the decision, the arbitration shall be binding with respect to the accepting defendants and the matter shall proceed to trial for the remaining defendants. If a party rejects the arbitration decision which an opposing party accepts, the rejecting party shall be liable for the costs, including attorney fees, of any prevailing opposing party. The plaintiff is the prevailing party if he receives an

award larger than the award of the arbitrators. The defendant is the prevailing party if the plaintiff receives an award less than the award of the arbitrators. Where there are multiple defendants, the results for each defendant shall be determined separately for the purpose of determining the prevailing party. If there are multiple plaintiffs, the action shall be divided into separate actions prior to the arbitration.

(c) If the panel finds in the negative for any of the issues required to be considered pursuant to W.S. 9-2-1522(a)(i) through (iii) and the claimant subsequently files a lawsuit in which he does not prevail, the claimant as plaintiff shall be liable for the defendants' reasonable costs including attorney fees.

(d) If there is a contingency fee agreement between an attorney and a plaintiff and the plaintiff is liable for costs pursuant to subsection (b) or (c) of this section, the attorney shall be liable for the same proportion of costs that the contingency fee agreement would have given him of the award.

9-2-1525. Panel funding, assessments, collection; rulemaking; medical review account; expenditures.

(a) The panel shall be funded from filing fees and from assessments levied as follows:

(i) Twenty-five percent (25%) shall be obtained from assessments on all licensed physicians, collected at the same time as the annual license fees are collected;

(ii) Twenty-five percent (25%) shall be obtained from assessments on companies admitted to sell and writing medical malpractice insurance in Wyoming with a minimum fee of one hundred dollars ($100.00) from all companies admitted to sell and writing professional malpractice insurance to any health care professional in Wyoming and the balance assessed in proportion to the premium tax paid in the most recent fiscal year. The assessments shall be made as soon as practical after the end of the fiscal year and shall be due thirty (30) days after the notice of assessment is sent by the insurance commissioner; and

(iii) Fifty percent (50%) shall be obtained from assessments on all attorneys admitted to the state bar,

collected at the same time the annual license fees are collected.

(b) For the year commencing October 1, 2005 the assessments shall be as follows:

(i) For each licensed physician, one hundred dollars ($100.00);

(ii) For each admitted malpractice insurer writing medical malpractice insurance, one hundred dollars ($100.00) with the balance of eighty-five thousand dollars ($85,000.00) collected in proportion to the amount of premium tax paid on professional malpractice insurance in the preceding fiscal year; and

(iii) For each attorney admitted to the bar, twenty dollars ($20.00).

(c) For each year, commencing July 1, 2006, the director shall determine, based on the experience of the previous year, the funding needed for the panels including the cost of administration plus a reasonable level of working capital and contingency. The funding needed shall

be subject to review and approval by the budget division of the department of administration and information. By September 1 of each year, the director shall inform the appropriate licensing agencies and the insurance commissioner shall inform insurance companies of the assessments needed for the year commencing October 1.

(d) Each licensing agency shall inform their licensees of the individual assessments due, shall collect the assessments along with the annual license fees and shall deposit the proceeds in the medical review account within the earmarked revenue fund, which is hereby created. The insurance commissioner shall perform this duty with respect to the insurance companies.

(e) All expenditures from the medical review account shall be made subject to appropriation, but in case of need the governor may authorize additional expenditures from the medical review account for the purposes of this act, subject to any restrictions enacted in the budget bill.

(f) The legislature may, by explicit provision in the budget bill, require repayment of all or a portion of any general fund appropriation made to the medical review

account. If such a provision is enacted, the funding necessary shall be included in the annual assessments.

Section 2. W.S. 9-2-1501 through 9-2-1512 are repealed.

Section 3. There is appropriated from the general fund to the medical review account five hundred thousand dollars ($500,000.00). There is appropriated from the medical review account to the department of health for the purposes of this act six hundred fifty thousand dollars ($650,000.00) for the period ending June 30, 2006. Three (3) additional full-time positions are authorized in the department of health for the purposes of this act, one (1) of which may be transferred to the attorney general's office.

Section 4. Prior to July 1, 2005, the department of health, the insurance department, the governor and the various licensing agencies may take administrative actions to prepare to implement this act, including the promulgation of rules and regulations and the development of lists of persons to serve on review panels.

Section 5.

(a) Sections 2, 3 and 4 of this act are effective immediately upon completion of all acts necessary for a bill to become law as provided by Article 4, Section 8 of the Wyoming Constitution.

(b) Except as provided in subsection (a) of this section, this act is effective July 1, 2005.

(END)