

**Not Germane
AMENDMENT NO 2 PROPOSED TO**

Cmte Sub for House Bill No. 2

BY: Representative Reynolds

1 **AMEND** after line 1493 by inserting the following language and
2 by renumbering the succeeding sections:

3 **SECTION 35. Medical review panel.**

4 (1) **Claims; statute of limitations.**

5 (a) **Definitions.** For purposes of this section:

6 (i) "Board" means the Tort Claims Board
7 established by Section 11-46-18, Mississippi Code of 1972.

8 (ii) "Health care provider" means a person,
9 partnership, limited liability partnership, limited liability
10 company, corporation, facility, or institution licensed by this
11 state to provide health care or professional services as a
12 physician, hospital, institution for the aged or infirm, community
13 blood center, tissue bank, dentist, registered or licensed
14 practical nurse or certified nurse assistant, ambulance service,
15 certified registered nurse anesthetist, nurse-midwife, licensed
16 midwife, pharmacist, optometrist, podiatrist, chiropractor,
17 physical therapist, occupational therapist, psychologist, social
18 worker, licensed professional counselor, or any nonprofit facility
19 considered tax-exempt under Section 501(c)(3), Internal Revenue
20 Code, pursuant to 26 USC 501(c)(3), for the diagnosis and
21 treatment of cancer or cancer-related diseases, whether or not
22 such a facility is required to be licensed by this state, or any

23 professional corporation a health care provider is authorized to
24 form under the Mississippi Code of 1972, or any partnership,
25 limited liability partnership, limited liability company, or
26 corporation whose business is conducted principally by health care
27 providers, or an officer, employee, partner, member, shareholder,
28 or agent thereof acting in the course and scope of his employment.

29 (iii) "Malpractice" means any unintentional tort
30 or any breach of contract based on health care or professional
31 services rendered, or which should have been rendered, by a health
32 care provider, to a patient, including failure to render services
33 timely and the handling of a patient, including loading and
34 unloading of a patient, and also includes all legal responsibility
35 of a health care provider arising from acts or omissions in the
36 training or supervision of health care providers, or from defects
37 in blood, tissue, transplants, drugs and medicines, or from
38 defects in or failures of prosthetic devices, implanted in or used
39 on or in the person of a patient.

40 (b) (i) All malpractice claims against health care
41 providers, other than claims validly agreed for submission to a
42 lawfully binding arbitration procedure, shall be reviewed by a
43 medical review panel as provided in this section unless all
44 parties specifically waive the use of the medical review panel.

45 (ii) An action against a health care provider or
46 his insurer commenced in any court shall be presented to a medical
47 review panel and an opinion rendered by the panel pursuant to this
48 section, and the court's request for review shall constitute a
49 stay pending the panel's decision.

50 (iii) The request for review of a malpractice
51 claim under this section shall be made by the court on its own
52 motion or on the motion of any party.

53 (c) (i) The request for review must be in writing,
54 delivered to the board in person or by certified or registered
55 United States mail, and include as an exhibit the complaint filed.

56 (ii) Each defendant shall file a written answer
57 within thirty (30) days of service of the request. If the
58 defendant fails to file an answer as required, the board shall
59 notify the defendant of the obligation to file and penalty for
60 failure to file; notice shall be by certified or registered United
61 States mail. If the defendant has not filed within thirty (30)
62 days of the receipt of the notice specified in this subparagraph
63 (ii), the request for review shall be dismissed; the panel, if
64 formed, shall be dissolved, and the plaintiff shall be allowed to
65 proceed in court upon the complaint filed.

66 (2) **Dismissal of review; dissolution of panel.**

67 (a) During the pendency of proceedings under this
68 section, a health care provider against whom a claim has been
69 filed may raise any exception or defenses available pursuant to
70 Mississippi law, whether a procedural, statute of limitations or
71 other exception or defense, at any time without need for
72 completion of the review process by the medical review panel.

73 (b) If the court finds for the party raising the
74 exception or defense, that party shall be dismissed. If there are
75 no defendants remaining, the panel, if established, shall be
76 dissolved.

77 (3) **Composition and selection of panel.**

78 (a) The medical review panel shall consist of three (3)
79 physicians who each hold an unlimited license to practice medicine
80 in Mississippi and one (1) attorney who shall be the nonvoting
81 chair of the panel. The parties may agree on the attorney member
82 of the medical review panel within thirty (30) days after the
83 filing of the answer; if no agreement can be reached, then the

84 attorney member of the medical review panel shall be selected as
85 follows:

86 (i) The board shall draw five (5) names at random
87 from the list of attorneys maintained by the board who have
88 medical malpractice experience. The names of judges, magistrates,
89 district attorneys and assistant district attorneys shall be
90 excluded if drawn and new names drawn in their place. After
91 selection of the attorney names, the board shall notify the
92 parties of the attorney names from which the parties, within five
93 (5) days, may choose the attorney member of the panel. If no
94 agreement can be reached within five (5) days, the parties shall
95 immediately initiate a procedure of selecting the attorney by each
96 striking two (2) names alternately, with the plaintiff striking
97 first and so advising the defendant of the name of the attorney so
98 stricken; thereafter, the defendant and the plaintiff shall
99 alternately strike until both sides have stricken two (2) names
100 and the remaining name shall be the attorney member of the panel.
101 If either the plaintiff or defendant fails to strike, the board
102 shall strike for that party within five (5) additional days.

103 (ii) After the striking, the board shall notify
104 the attorney and all parties of the name of the selected attorney.
105 An attorney who has a conflict of interest shall decline to serve.

106 (b) The attorney shall act as chairman of the panel and
107 shall have no vote. The chairman shall preside at panel meetings,
108 advise the panel as to questions of law, and shall prepare the
109 opinion of the panel as required in subsection (7) of this
110 section. It is the duty of the chairman to expedite the selection
111 of the other panel members, to convene the panel and expedite the
112 panel's review of the proposed complaint. The attorney chairman
113 shall establish, by order, a reasonable schedule for submission of
114 evidence to the medical review panel, but must allow sufficient
115 time for the parties to make full and adequate presentation of

116 related facts and authorities within one hundred twenty (120) days
117 following selection of the panel.

118 (c) The qualification and selection of physician
119 members of the medical review panel shall be as follows:

120 (i) All physicians who hold a license to practice
121 medicine in the State of Mississippi and who are engaged in the
122 active practice of medicine in this state, whether in the teaching
123 profession or otherwise, shall be available for selection and,
124 unless excused for cause, required to serve upon selection.

125 (ii) Each party to the action shall have the right
126 to select one (1) physician and upon selection the physician shall
127 be required to serve.

128 (iii) When there are multiple plaintiffs or
129 defendants, there shall be only one (1) physician selected per
130 side. The plaintiff, whether single or multiple, shall have the
131 right to select one (1) physician, and the defendant, whether
132 single or multiple, shall have the right to select one (1)
133 physician. The two (2) physicians so chosen shall jointly select
134 the third physician.

135 (iv) If any defendant is a physician, the
136 physicians selected must be of the same specialty as at least one
137 (1) physician defendant.

138 (v) Parties and their attorneys are absolutely
139 prohibited from contact with the physician whose name is
140 submitted, either before or after submission. No physician may be
141 informed of the method of any panel member's selection.

142 (vi) No physician may be selected to serve on more
143 than four (4) medical review panels in a twelve-month period.

144 (vii) The physician selection process shall be
145 completed within thirty (30) days of the selection of the attorney
146 chairman.

147 (d) Attorneys and physicians selected shall disclose

148 any financial, employment, or personal or family ties to any party
149 or attorney for a party. Any conflict that cannot be resolved
150 shall be decided by the court upon the motion of any party.

151 (4) **Evidence.**

152 (a) The evidence to be considered by the medical review
153 panel shall be promptly submitted by the respective parties in
154 written form only.

155 (b) The evidence may consist of:

156 (i) Medical records;

157 (ii) Sworn statements;

158 (iii) Expert reports signed by experts;

159 (iv) Deposition transcripts;

160 (v) Any other evidence allowed by the medical
161 review panel or submitted by the parties.

162 (c) Depositions of the parties only may be taken, and
163 may be taken prior to the convening of the panel.

164 (d) Upon request of any party or panel member, the
165 board shall issue subpoenas and subpoenas duces tecum in aid of
166 the taking of depositions and the production of documentary
167 evidence for inspection, copying or both.

168 (e) The plaintiff must sign a valid authorization
169 allowing defendants to obtain the plaintiff's medical records.
170 The defendant shall treat all medical records in a confidential
171 manner and shall not disclose the contents of the records to
172 anyone other than the panel or other experts; all other experts
173 must treat the plaintiff's records as confidential.

174 (f) The board shall send a copy of the evidence to each
175 member of the panel.

176 (5) **Hearings.** (a) After submission of all evidence and
177 upon ten (10) days' notice to the other side, either party or the
178 panel shall have the right to convene the panel at a time and
179 place agreeable to the members of the panel; each party is

180 entitled to request only one (1) hearing. The panel may hold as
181 many hearings as it chooses. The purpose of a hearing is to ask
182 questions as to additional evidence needed and to afford an
183 opportunity to make oral presentation of the facts. The chairman
184 of the panel shall preside at all hearings, which shall be
185 informal.

186 (b) The following are locations where hearings may be
187 held:

188 (i) At a courthouse or other available public
189 building in the county where the act or omission is alleged to
190 have occurred.

191 (ii) The attorney chairman shall decide the
192 location in the event of any dispute.

193 (iii) Private offices in the county where the act
194 or omission is alleged to have occurred may be used if there is no
195 cost or if the parties pay for the cost.

196 (6) **Panel deliberations and decision.** After receiving all
197 evidence from the parties, the panel shall convene to discuss the
198 evidence presented not less than one (1) time, and, not later than
199 sixty (60) days after receiving all evidence from the parties,
200 shall render a written decision signed by the panelists, together
201 with written reasons for their conclusions, as follows:

202 (a) There was a breach of the appropriate standard of
203 care;

204 (b) There was not a breach of the appropriate standard
205 of care; or

206 (c) Whether the defendant or defendants failed to
207 comply with the appropriate standard of care cannot be determined.

208 (7) **Form of decision.** The decision reached by the medical
209 review panel shall be in writing, shall state the facts upon which
210 it is based, shall be of public record, and shall be admissible as
211 evidence in the civil case filed.

212 (8) **Panelist immunity.** A panelist shall have absolute
213 immunity from civil liability for all communications, findings,
214 opinions and conclusions made in the course and scope of duties
215 prescribed by this section.

216 (9) **Panelist compensation.**

217 (a) (i) Each physician member of the medical review
218 panel shall be paid a fee of Five Hundred Dollars (\$500.00) for
219 all work performed as a member of the panel, and in addition
220 thereto, per diem as provided in Section 25-3-69, Mississippi Code
221 of 1972, and travel expenses as would be calculated for a state
222 employee pursuant to Section 25-3-41, Mississippi Code of 1972.

223 (ii) The attorney chairman of the medical review
224 panel shall be paid at the rate of One Hundred Fifty Dollars
225 (\$150.00) per hour, not to exceed a total of Three Thousand
226 Dollars (\$3,000.00), for all work performed as a member of the
227 panel, and in addition thereto, per diem as provided in Section
228 25-3-69, Mississippi Code of 1972, and travel expenses as would be
229 calculated for a state employee pursuant to Section 25-3-41,
230 Mississippi Code of 1972.

231 (b) The costs of the medical review panel shall be
232 split between the parties. The panel members shall by affidavit
233 request the payment due under this subsection (9) from the board,
234 which in turn shall bill the parties for the proportionate share
235 of each party.

236 (10) **Delivery and effect of decision.** The chairman shall
237 submit a copy of the panel's report to the board and all parties
238 and attorneys by registered or certified mail within five (5) days
239 after the panel renders its opinion. The panel's report shall be
240 of public record.

241 (11) **Allocation of attorney fees and expenses.**

242 (a) If the decision of the panel finds for the
243 defendant and the defendant prevails in court, the plaintiff shall

244 pay reasonable attorney fees and expenses of the defendant to be
245 determined by the court.

246 (b) If the decision of the panel finds for the
247 plaintiff:

248 (i) The plaintiff may submit a written settlement
249 offer for a sum certain to the defendant. If the defendant
250 rejects the settlement offer, the plaintiff prevails in court, and
251 the judgment is equal to or greater than the settlement offer, the
252 defendant shall pay reasonable attorney fees and expenses of the
253 plaintiff to be determined by the court.

254 (ii) The defendant also may submit a written
255 settlement offer for a sum certain to the plaintiff. If the
256 plaintiff rejects the settlement offer and the defendant prevails
257 in the subsequent court action, or the plaintiff prevails but the
258 judgment is less than the defendant's settlement offer, the
259 plaintiff shall pay reasonable attorney fees and expenses of the
260 defendant to be determined by the court.

261 **SECTION 36.** Section 11-46-19, Mississippi Code of 1972, is
262 amended as follows:

263 **[Until July 1, 2005, this section shall read as follows:]**

264 11-46-19. (1) The board shall have the following powers:

265 (a) To provide oversight over the Tort Claims Fund;

266 (b) To approve any award made from the Tort Claims
267 Fund;

268 (c) To pay all necessary expenses attributable to the
269 operation of the Tort Claims Fund from such fund;

270 (d) To assign litigated claims against governmental
271 entities other than political subdivisions to competent attorneys
272 unless such governmental entity has a staff attorney who is
273 competent to represent the governmental entity and is approved by
274 the board; the board shall give primary consideration to attorneys
275 practicing in the jurisdiction where the claim arose in assigning

276 cases; attorneys hired to represent a governmental entity other
277 than a political subdivision shall be paid according to the
278 department fee schedule;

279 (e) To approve all claimants' attorney fees in claims
280 against the state;

281 (f) To employ on a full-time basis a staff attorney who
282 shall possess the minimum qualifications required to be a member
283 of The Mississippi Bar, and such other staff as it may deem
284 necessary to carry out the purposes of this chapter; the employees
285 in the positions approved by the board shall be hired by the
286 director, shall be employees of the department, and shall be
287 compensated from the Tort Claims Fund;

288 (g) To contract with one or more reputable insurance
289 consulting firms as may be necessary;

290 (h) To purchase any policies of liability insurance and
291 to administer any plan of self-insurance or policies of liability
292 insurance required for the protection of the state against claims
293 and suits brought under this chapter;

294 (i) To expend money from the Tort Claims Fund for the
295 purchase of any policies of liability insurance and the payment of
296 any award or settlement of a claim against the state under the
297 provisions of this chapter or of a claim against any school
298 district, junior college or community college district, or state
299 agency, arising from the operation of school buses or other
300 vehicles, under the provisions of Section 37-41-42;

301 (j) To cancel, modify or replace any policy or policies
302 of liability insurance procured by the board;

303 (k) To issue certificates of coverage to governmental
304 entities, including any political subdivision participating in any
305 plan of liability protection approved by the board;

306 (l) To review and approve or reject any plan of
307 liability insurance or self-insurance reserves proposed or

308 provided by political subdivisions if such plan is intended to
309 serve as security for risks of claims and suits against them for
310 which immunity has been waived under this chapter;

311 (m) To administer disposition of claims against the
312 Tort Claims Fund;

313 (n) To withhold issuance of any warrants payable from
314 funds of a participating state entity should such entity fail to
315 make required contributions to the Tort Claims Fund in the time
316 and manner prescribed by the board;

317 (o) To develop a comprehensive statewide list of
318 attorneys who are qualified to represent the state and any
319 employee thereof named as a defendant in a claim brought under
320 this chapter against the state or such employee;

321 (p) To develop a schedule of fees for paying attorneys
322 defending claims against the state or an employee thereof;

323 (q) To adopt and promulgate such reasonable rules and
324 regulations and to do and perform all such acts as are necessary
325 to carry out its powers and duties under this chapter;

326 (r) To establish and assess premiums to be paid by
327 governmental entities required to participate in the Tort Claims
328 Fund;

329 (s) To contract with a third-party administrator to
330 process claims against the state under this chapter;

331 (t) To annually submit its budget request to the
332 Legislature as a state agency;

333 (u) To dispose of salvage obtained in settlement or
334 payment of any claim at fair market value by such means and upon
335 such terms as the board may think best; * * *

336 (v) To administer the Medical Malpractice Insurance
337 Availability Plan under Section 83-48-5; and

338 (w) To act as the board as required under House Bill
339 No. 2, 2004 First Extraordinary Session, dealing with medical
340 malpractice claims as follows:
341 (i) To accept filings under the act;
342 (ii) To coordinate the selection of panels;
343 (iii) To maintain lists of attorneys eligible for
344 appointment as attorney chairmen;
345 (iv) To promulgate rules in reference to the
346 qualifications of attorneys serving as panel members;
347 (v) To promulgate rules and regulations necessary
348 to implement the provisions of Section 35 of House Bill No. 2,
349 2004 First Extraordinary Session; and
350 (vi) To provide general administrative support.

351 (2) Policies of liability insurance purchased for the
352 protection of governmental entities against claims and suits
353 brought under this chapter shall be purchased pursuant to the
354 competitive bidding procedures set forth in Section 31-7-13.

355 (3) The department shall have the following powers and
356 duties:

357 (a) To annually report to the Legislature concerning
358 each comprehensive plan of liability protection established
359 pursuant to Section 11-46-17(2). Such report shall include a
360 comprehensive analysis of the cost of the plan, a breakdown of the
361 cost to participating state entities, and such other information
362 as the department may deem necessary.

363 (b) To provide the board with any staff and meeting
364 facilities as may be necessary to carry out the duties of the
365 board as provided in this chapter.

366 (c) To submit the board's budget request for the
367 initial year of operation of the board in order to authorize
368 expenditures for the 1993-1994 fiscal year and for the

369 appropriation of such general funds as shall be required for the
370 commencement of its activities.

371 **[From and after July 1, 2005, this section shall read as**
372 **follows:]**

373 11-46-19. (1) The board shall have the following powers:

374 (a) To provide oversight over the Tort Claims Fund;

375 (b) To approve any award made from the Tort Claims
376 Fund;

377 (c) To pay all necessary expenses attributable to the
378 operation of the Tort Claims Fund from such fund;

379 (d) To assign litigated claims against governmental
380 entities other than political subdivisions to competent attorneys
381 unless such governmental entity has a staff attorney who is
382 competent to represent the governmental entity and is approved by
383 the board; the board shall give primary consideration to attorneys
384 practicing in the jurisdiction where the claim arose in assigning
385 cases; attorneys hired to represent a governmental entity other
386 than a political subdivision shall be paid according to the
387 department fee schedule;

388 (e) To approve all claimants' attorney fees in claims
389 against the state;

390 (f) To employ on a full-time basis a staff attorney who
391 shall possess the minimum qualifications required to be a member
392 of The Mississippi Bar, and such other staff as it may deem
393 necessary to carry out the purposes of this chapter; the employees
394 in the positions approved by the board shall be hired by the
395 director, shall be employees of the department, and shall be
396 compensated from the Tort Claims Fund;

397 (g) To contract with one or more reputable insurance
398 consulting firms as may be necessary;

399 (h) To purchase any policies of liability insurance and
400 to administer any plan of self-insurance or policies of liability

401 insurance required for the protection of the state against claims
402 and suits brought under this chapter;

403 (i) To expend money from the Tort Claims Fund for the
404 purchase of any policies of liability insurance and the payment of
405 any award or settlement of a claim against the state under the
406 provisions of this chapter or of a claim against any school
407 district, junior college or community college district, or state
408 agency, arising from the operation of school buses or other
409 vehicles, under the provisions of Section 37-41-42;

410 (j) To cancel, modify or replace any policy or policies
411 of liability insurance procured by the board;

412 (k) To issue certificates of coverage to governmental
413 entities, including any political subdivision participating in any
414 plan of liability protection approved by the board;

415 (l) To review and approve or reject any plan of
416 liability insurance or self-insurance reserves proposed or
417 provided by political subdivisions if such plan is intended to
418 serve as security for risks of claims and suits against them for
419 which immunity has been waived under this chapter;

420 (m) To administer disposition of claims against the
421 Tort Claims Fund;

422 (n) To withhold issuance of any warrants payable from
423 funds of a participating state entity should such entity fail to
424 make required contributions to the Tort Claims Fund in the time
425 and manner prescribed by the board;

426 (o) To develop a comprehensive statewide list of
427 attorneys who are qualified to represent the state and any
428 employee thereof named as a defendant in a claim brought under
429 this chapter against the state or such employee;

430 (p) To develop a schedule of fees for paying attorneys
431 defending claims against the state or an employee thereof;

432 (q) To adopt and promulgate such reasonable rules and
433 regulations and to do and perform all such acts as are necessary
434 to carry out its powers and duties under this chapter;

435 (r) To establish and assess premiums to be paid by
436 governmental entities required to participate in the Tort Claims
437 Fund;

438 (s) To contract with a third-party administrator to
439 process claims against the state under this chapter;

440 (t) To annually submit its budget request to the
441 Legislature as a state agency;

442 (u) To dispose of salvage obtained in settlement or
443 payment of any claim at fair market value by such means and upon
444 such terms as the board may think best; and

445 (v) To act as the board as required under House Bill
446 No. 2, 2004 First Extraordinary Session, dealing with medical
447 malpractice claims as follows:

448 (i) To accept filings under the act;

449 (ii) To coordinate the selection of panels;

450 (iii) To maintain lists of attorneys eligible for
451 appointment as attorney chairmen;

452 (iv) To promulgate rules in reference to the
453 qualifications of attorneys serving as panel members;

454 (v) To promulgate rules and regulations necessary
455 to implement the provisions of Section 35 of House Bill No. 2,
456 2004 First Extraordinary Session; and

457 (vi) To provide general administrative support.

458 (2) Policies of liability insurance purchased for the
459 protection of governmental entities against claims and suits
460 brought under this chapter shall be purchased pursuant to the
461 competitive bidding procedures set forth in Section 31-7-13.

462 (3) The department shall have the following powers and
463 duties:

464 (a) To annually report to the Legislature concerning
465 each comprehensive plan of liability protection established
466 pursuant to Section 11-46-17(2). Such report shall include a
467 comprehensive analysis of the cost of the plan, a breakdown of the
468 cost to participating state entities, and such other information
469 as the department may deem necessary.

470 (b) To provide the board with any staff and meeting
471 facilities as may be necessary to carry out the duties of the
472 board as provided in this chapter.

473 (c) To submit the board's budget request for the
474 initial year of operation of the board in order to authorize
475 expenditures for the 1993-1994 fiscal year and for the
476 appropriation of such general funds as shall be required for the
477 commencement of its activities.

478 **AMEND further** the title on line 58 by inserting the following
479 language after the semicolon:

480 "TO PROVIDE THAT ALL MALPRACTICE CLAIMS SHALL BE REVIEWED BY A
481 MEDICAL REVIEW PANEL; TO ALLOW PARTIES TO MUTUALLY AGREE TO OPT
482 OUT OF THIS REQUIREMENT; TO ESTABLISH THE MEMBERSHIP REVIEW PANEL;
483 TO PROVIDE WHAT EVIDENCE MAY BE CONSIDERED BY THE PANEL; TO
484 PROVIDE THE FORM OF THE DECISION; TO PROVIDE FOR PANELIST IMMUNITY
485 AND COMPENSATION; TO PROVIDE THAT THE LOSING PARTY SHALL PAY
486 ATTORNEY FEES TO THE PREVAILING PARTY UNDER CERTAIN CIRCUMSTANCES;
487 TO AMEND SECTION 11-46-19, MISSISSIPPI CODE OF 1972, IN CONFORMITY
488 THERETO; "