COMMENTS AND RESPONSE TO KIP PURCELL REPRESENTING
PRESBYTERIAN HOSPITAL AND OTHER COMMENTS BEFORE
THE HEARING OFFICER, ROBERT DESIDERIO

The fundamental impetus to the hospitals’ efforts to seek admission to the Fund is the
Superintendent’s policy of granting the hospitals’ coverage under the Act for an unlimited number
of occurrences in any given year as well as providing coverage for the hospitals’ nurses. Doing
so is in clear violation of the Medical Malpractice Act.

Nurses are not defined healthcare providers under the Act. Section 41-5-3 of the Medical
Malpractice Act defines a healthcare provider as:

Healthcare provider means a person, corporation, organization, facility, or institution licensed or certified by this State to provide
healthcare for professional health services as a doctor of medicine, hospital, out-patient healthcare facility, doctor of osteopathy,
chiropractor, pediatrician, nurse anesthetist, or physician’s assistant.

Since the inception of the Act in 1976, nurses have not been included as healthcare
providers entitled to receive the benefits of the Act. Excluding nurses from coverage under the Act
was a deliberate choice by the Legislature since the number of nurses is infinite, as well as the
variety of actions they undertake involving patient care. Providing coverage for their infinite
numbers and liabilities would, predictably, put the Fund at risk. Accordingly, when a medical
entity, such as Dr. McAneny’s New Mexico Cancer Center, obtains medical negligence coverage
for its employees, it obtains coverage under the Medical Malpractice Act for its physicians and
physician’s assistants, but obtains separate coverage outside the Act from a different carrier for
each of its nurses. This was clearly explained by Dr. McAneny to the Superintendent’s lawyers
when they took her deposition.

The Medical Malpractice Act limits the number of occurrences for which a healthcare
provider is covered in any given year to three occurrences. Section 41-5-5A states that a healthcare
provider’s deposit or policy shall provide for coverage for “not more than three occurrences”. The
limitation in 41-5-5A is not confined to physicians; it applies to “healthcare providers” without
limitation.

A healthcare provider not qualifying under Section 41-5-5A shall not have the benefit of
any provision of the Medical Malpractice Act in the event of a malpractice claim against it. See
Section 41-5-5C. Therefore, the Superintendent’s practice of allowing coverage for a healthcare
provider for more than three occurrences per year does no favor for any healthcare provider.
Instead, it disqualifies the healthcare provider from having any coverage under the Act.

The obvious purpose of the Legislature’s enactment of Section 41-5-5A was to protect the
solvent of the Fund. It would be unreasonable to suppose that the Legislature would limit
physicians to three occurrences per year but allow hospitals an unlimited number of occurrences
in any given year. Had that been the Legislature’s intent, it would have had to have been expressly
set forth in Section 41-5-5.
Finally, there seemed to be some surprise at the hearing that the Superintendent’s decision on the charge to be imposed on any hospital or outpatient care facility seeking admission to the Fund is subject to the adjudicatory provisions of the Administrative Practices Act. Qualifying a hospital as a healthcare provider under the Act constitutes the granting of a privilege or benefit under the APA. It is, thus, subject to the adjudicatory provisions of the APA. The Superintendent should set forth this requirement in one of its emergency rules to alert the Superintendent’s staff and the public as to the requirement for following the adjudicatory procedures of the APA.

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