

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 1165 Payments for Birth-related Neurological Injuries

**SPONSOR(S):** Civil Justice & Property Rights Subcommittee, Koster

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 1786

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Property Rights Subcommittee	15 Y, 0 N, As CS	Brascomb	Jones
2) State Administration & Technology Appropriations Subcommittee	14 Y, 0 N	Lee	Topp
3) Judiciary Committee			

### SUMMARY ANALYSIS

During the 1970s and 1980s, medical liability insurance in Florida had become so expensive that, although technically available, it was functionally unavailable. The Florida Legislature determined that obstetrician-gynecologists (ob-gyns) disproportionately accounted for medical liability claims, both in number of claims and amount of payout. Some patients became nearly disenfranchised as physicians resisted treating high-risk patients and practicing in certain high-risk specialties altogether. Moreover, in 1985, ob-gyns in Florida paid an average medical malpractice liability premium of \$185,460, compared to a national average of \$23,300.

The Florida Birth-Related Neurological Injury Compensation Plan (Plan) was part of the Legislature's efforts to manage both spiraling medical malpractice costs and diminishing liability insurance availability by creating a hybrid no-fault and tort medical liability system. The Plan pays for the care of infants born with certain neurological injuries and is available to eligible families without litigation. By eliminating costly legal proceedings, the Plan ensures that birth-injured infants receive the care they need while reducing the financial burden on both medical providers and families.

The bill increases the maximum amount that may be awarded to parents or legal guardians of an infant who has sustained a birth-related neurological injury from \$100,000 to \$250,000 for pending petitions or claims filed under the Plan seeking compensation on or after January 1, 2021. The bill requires the maximum award amount to increase by 3 percent each year on January 1.

The bill also increases the death benefit for an infant who sustained a birth-related neurological injury from \$10,000 to \$50,000.

The bill does not appear to have an impact on state or local governments. See *Fiscal Comments*.

The bill provides an effective date of July 1, 2021.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Background**

##### Medical Malpractice Crisis

During the 1970s and 1980s, medical liability insurance in Florida had become so expensive that, although technically available, it was functionally unavailable.<sup>1</sup> The Florida Legislature determined that obstetrician-gynecologists (ob-gyns) disproportionately accounted for medical liability claims, both in number of claims and amount of payout.<sup>2</sup> Therefore, in 1986, the Legislature created a special task force to study the Florida medical malpractice crisis and address the ob-gyn impact on that crisis.<sup>3</sup> The task force evaluated the rising insurance costs and reported that litigation costs and attorney's fees had increased between 1975 and 1986, but there was no particular change in substantive law to account for the change.<sup>4</sup> Moreover, some physicians became reluctant to treat high-risk patients and practice certain high-risk specialties altogether.<sup>5</sup> In 1985, ob-gyns in Florida paid an average medical malpractice liability premium of \$185,460, compared to a national average for ob-gyns of \$23,300.<sup>6</sup>

##### Florida Birth-Related Neurological Injury Compensation Plan

The Florida Birth-Related Neurological Injury Compensation Plan (Plan) was part of the Legislature's efforts to manage both spiraling medical malpractice costs and diminishing liability insurance availability by creating a hybrid no-fault and tort medical liability system.<sup>7</sup> The Plan was created to pay for the care of infants born with certain neurological injuries and is available to eligible families without the need for litigation. By eliminating costly legal proceedings, the Plan aims to ensure that birth-injured infants receive the care they need while reducing the financial burden on both medical providers and families. In February 1988, the Legislature created the Florida Birth-Related Neurological Injury Compensation Association (NICA) to manage the Plan.<sup>8</sup> NICA is an independent association. Although it is not a state agency, NICA is subject to regulation and oversight by the Office of Insurance Regulation (OIR) and the Joint Legislative Auditing Committee. Directors on NICA's board are appointed by the Chief Financial Officer.<sup>9</sup>

#### *Eligibility*

An administrative law judge (ALJ) within the Division of Administrative Hearings<sup>10</sup> hears all claims under the Plan and determines whether a claim is compensable.<sup>11</sup> To qualify, there must have been a birth injury to the brain or spinal cord of a live infant in which:

- The birth occurred in a hospital;
- The infant weighed 2500g at birth for single gestation or 2000g for multiple gestation at birth;
- There was oxygen deprivation or mechanical injury;
- The injury occurring during labor, delivery or resuscitation efforts in the immediate post delivery period;

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<sup>1</sup> Sandy Martin, *NICA - Florida Birth-Related Neurological Injury Compensation Act*, 26 Nova L. R. 609 (2002), <https://core.ac.uk/download/pdf/51081713.pdf> (last visited Mar. 23, 2021).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> S. 766.315, F.S. and section 74 of ch. 88-1, Laws of Fla.

<sup>9</sup> *Id.*

<sup>10</sup> S. 766.302, F.S. The Division of Administrative Hearings is housed within the Florida Department of Management Services.

<sup>11</sup> S. 766.304, F.S.

- The infant experienced permanent and substantial mental and physical impairment;
- The injury was not caused by genetic or congenital abnormality; and
- The physician must be participating in the Plan.<sup>12</sup>

A participating physician under the Plan is a licensed Florida physician who either practices obstetrics or performs obstetrical services on a full or part-time basis and pays a yearly NICA assessment.<sup>13</sup> If the physician did not pay his or her assessment for the year in which the injury occurred, there is no NICA coverage. Hospitals that allow doctors who do not participate in NICA to deliver babies are subject to multi-million dollar catastrophic injury lawsuits despite having paid into the NICA fund.<sup>14</sup>

### *Benefits*

Once accepted by an order from the ALJ, the child is covered for lifetime, and no other compensation from a medical malpractice lawsuit or settlement is available.<sup>15</sup> Instead, there are lifetime benefits and care available through the Plan, which include actual expenses for:

- Medical and hospital services;
- Rehabilitation, therapy, and training;
- Family residential or custodial care;
- Professional residential and custodial care;
- Medications;
- Special equipment and facilities; and
- Related travel expenses.<sup>16</sup>

The Plan may also provide:

- A one-time cash award, not to exceed \$100,000, to the infant's parents or guardians.
- A death benefit for the infant of \$10,000.<sup>17</sup>
- Compensation for reasonable expenses incurred for filing the claim, including attorney's fees.<sup>18</sup>

### *Funding*

In July 1988, the Legislature authorized a transfer of \$20 million to NICA from the Department of Insurance (predecessor agency to OIR)<sup>19</sup> to provide initial funding to administer the Plan. Currently, the Plan is funded by a combination of physician fees and hospital assessments.<sup>20</sup> A participating physician is required to pay a \$5,000 fee each year for coverage which runs January 1 through December 31.<sup>21</sup> All licensed Florida physicians pay a mandatory fee of \$250, regardless of specialty. Hospitals pay \$50 for each live birth during the previous calendar year. Certain exemptions apply to all these categories, including resident physicians, retired physicians, government physicians, and facilities.<sup>22</sup> In 2019, NICA collected \$26,989,960 in hospital and physician assessments; in 2020, NICA collected \$ 27,000,000.<sup>23</sup>

Section 766.314, F.S., requires OIR to maintain a \$20 million reserve in the Insurance Regulatory Trust Fund. If the assessments collected and the appropriation of funds provided by section 41 of ch. 88-277, Laws of Fla., to the Plan from the trust fund are insufficient to maintain the Plan on an actuarially sound

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<sup>12</sup> S. 766.302(2), F.S.

<sup>13</sup> S. 766.314, F.S.

<sup>14</sup> S. 766.302(7), F.S.

<sup>15</sup> *Id.*

<sup>16</sup> S. 766.31, F.S.

<sup>17</sup> S. 766.31(1)(b)2., F.S. In 2003, the \$10,000 death benefit for an infant replaced the requirements to pay funeral expenses up to \$1,500. (Section 78, ch. 2003-416, Laws of Fla.)

<sup>18</sup> S. 766.31(1)(c), F.S.

<sup>19</sup> Section 41, ch. 88-277, Laws of Fla.

<sup>20</sup> S. 766.314, F.S.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Turner Consulting, Inc., *Proposed Increase in Parental Award – Section 766.31 (1) (b) (1), Florida Statutes* (Jan. 14, 2020).

basis, OIR is authorized to transfer an additional amount up to \$20 million to NICA from the Insurance Regulatory Trust Fund reserve.<sup>24</sup>

### One-time Case Award

Since its inception in 1989 (first birth year covered under the Plan), the parental award has not been increased or adjusted for inflation. In 2020, NICA commissioned an actuarial study to determine the impact if the Legislature increased the current parental award from \$100,000 to \$250,000 per accepted claim in 2020, followed by an annual increase of 3 percent each subsequent year.<sup>25</sup> Specifically, the study looked at the impact of inflation on the fixed award established in the original NICA statute.<sup>26</sup> The initial award amount of \$100,000 in 1989 adjusted for inflation based on an average annual increase of 3 percent over 31 years is equal to \$250,008 in 2020.<sup>27</sup>

The report found that increasing the parental award to \$250,000 would result in additional costs of approximately \$2.7 million for the 2020 birth year.<sup>28</sup> However, the report noted that given NICA's current net assets of approximately \$393.2 million, plus the better-than-expected inflation levels, a parental award increase is not likely to significantly impact NICA's overall financial position in the short-term (i.e., over the 5-year period beginning in 2020).<sup>29</sup> Alternatively, the report also states "that volatility in the prospective investment results and/or increases in benefit inflation levels may require assessment level increases at some point in the longer term."<sup>30</sup>

### Effect of Proposed Changes

CS/HB 1165 increases the maximum amount that may be awarded to parents or legal guardians of an infant who sustains a birth-related neurological injury from \$100,000 to \$250,000 for Florida Birth-Related Neurological Injury Compensation Plan claims filed or petitions pending on or after January 1, 2021. The bill requires that each January 1, the award cap authorized by this bill will increase by 3 percent.

The bill also increases the death benefit for an infant who has sustained a birth-related neurological injury from \$10,000 to \$50,000. The 2020 study did not examine the financial impact of a death benefit increase. Therefore, the fiscal impact of this change is indeterminate.

The bill provides an effective date of July 1, 2021.

#### B. SECTION DIRECTORY:

**Section 1:** Amends s. 766.31, F.S., relating to administrative law judge awards for birth-related neurological injuries; notice of award.

**Section 2:** Provides an unnumbered section relating to applicability.

**Section 3:** Provides an effective date of July 1, 2021.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

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<sup>24</sup> S. 766.314(5)(b), F.S.

<sup>25</sup> Turner Consulting, Inc., *Proposed Increase in Parental Award – Section 766.31 (1) (b) (1), Florida Statutes* (Jan. 14, 2020).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* The report defines "short-term" as the 5-year period after the award increase beginning in 2020.

<sup>30</sup> *Id.*

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

Although the bill increases the cap or maximum amount of the one-time parental award from \$100,000 to \$250,000, NICA's investment activities will likely absorb the increased costs estimated at \$2.7 million per year and should not result in any significant impact for NICA or increased assessments for hospitals or physicians.

Since the 2020 actuarial study did not appear to consider the impact of an increase in the death benefit for an infant from \$10,000 to \$50,000, as provided in the bill, the fiscal impact is indeterminate, but likely insignificant.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 23, 2021, the Civil Justice & Property Rights Subcommittee adopted an amendment and reported the bill favorably as a committee substitute. The amendment increased the death benefit for an infant who has sustained a birth-related neurological injury from \$10,000 to \$50,000.

This analysis is drafted to the committee substitute as passed by the Civil Justice & Property Rights Subcommittee.