

HOUSE OF REPRESENTATIVES STAFF FINAL BILL ANALYSIS

BILL #: CS/CS/HB 1165 Florida Birth-related Neurological Injury Compensation Plan
SPONSOR(S): Judiciary Committee and Civil Justice & Property Rights Subcommittee, Koster and others
TIED BILLS: **IDEN./SIM. BILLS:** CS/CS/SB 1786

FINAL HOUSE FLOOR ACTION: 117 Y's 0 N's **GOVERNOR'S ACTION:** Approved

SUMMARY ANALYSIS

CS/CS/HB 1165 passed the House on April 28, 2021, as CS/CS/1786 as amended, and was returned to the Senate. The bill was further amended in the Senate on April 29, 2021, and the Senate concurred with the House amendment as amended. The House concurred with the Senate amendment and passed the bill as amended on April 29, 2021.

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. 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 rising medical malpractice costs and diminishing availability of liability insurance 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 generally available to eligible families without the need for litigation.

The bill makes several changes to the Plan. Specifically, the bill:

- Requires the Florida Birth-Related Neurological Injury Compensation Association (NICA) to administer the Plan in a manner that promotes and protects the health and best interests of birth-injured children.
- Raises the maximum one-time award amount for parents of a birth-injured infant from \$100,000 to \$250,000, with the amount to be increased annually.
- Raises the death benefit for a birth-injured infant from \$10,000 to \$50,000.
- Requires a retroactive payment of the one-time award or death benefit by July 1, 2021.
- Adds specific expenses that NICA must pay.
- Specifies that a Plan beneficiary may file a petition to dispute reimbursements of actual expenses.
- Adds public notice requirements for NICA meetings.
- Increases the number of directors on NICA's board from five to seven, which must include one parent who is a beneficiary and one representative of an advocacy organization for disabled children.
- Prohibits a director from serving more than six consecutive years on NICA's board.
- Requires specified NICA directors and employees to comply with a code of ethics and conflict of interest provisions.
- Requires the Agency for Health Care Administration (AHCA) to conduct a review and provide recommendations for development of policies and procedures regarding Medicaid third party benefits.
- Requires AHCA to report the extent and value of NICA liabilities by November 1, 2021.
- Requires NICA to:
 - Furnish annually to each parent receiving benefits under the Plan a list of expenses compensable under the Plan.
 - Publish annual reports.
- Requires the Auditor General to perform an operational audit of NICA every three years.

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

The bill was approved by the Governor on June 21, 2021, ch. 2021-134, L.O.F., and became effective on that date.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF 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.¹ The Florida Legislature determined that obstetrician-gynecologists (ob-gyns) disproportionately accounted for medical liability claims, both in number of claims and amount of payout.² 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.³ 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.⁴ Moreover, some physicians became reluctant to treat high-risk patients and practice certain high-risk specialties altogether.⁵ 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 \$23,300.⁶

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 rising medical malpractice costs and diminishing availability of liability insurance by creating a hybrid no-fault and tort medical liability system.⁷ 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.

Florida Birth-Related Neurological Injury Compensation Association

In February 1988, the Legislature created the Florida Birth-Related Neurological Injury Compensation Association (NICA) to manage the Plan.⁸ 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 (CFO) for staggered terms of 3 years or until their successors are appointed, but there is no limit on the number of terms a director may serve.⁹ The board of directors is composed of:

- One citizen representative.
- One representative of participating physicians.
- One representative of hospitals.
- One representative of casualty insurers.
- One representative of physicians other than participating physicians.¹⁰

The board of directors may:

- Administer the Plan.

¹ 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 May 6, 2021).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ S. 766.315, F.S. and ch. 88-1, s. 74, Laws of Fla.

⁹ *Id.*

¹⁰ *Id.*

- Administer the funds collected on behalf of the Plan.
- Administer the payment of claims on behalf of the Plan.
- Direct the investment and reinvestment of any surplus funds over losses and expenses, provided that any investment income generated thereby remains credited to the Plan.
- Reinsure the risks of the Plan in whole or in part.
- Sue, be sued, appear, and defend in all actions relating to the Plan.
- Exercise all powers necessary to effect any of the purposes for which the Plan is created.
- Enter into such contracts as are necessary or proper to administer the Plan.
- Employ or retain such persons as are necessary to perform the administrative and financial transactions and responsibilities of the Plan.
- Take such legal action as may be necessary to avoid payment of improper claims.
- Indemnify any person acting on behalf of the Plan in an official capacity, provided that such person acted in good faith.¹¹

Annually, NICA must furnish audited financial reports to:

- Any Plan participant upon request;
- The OIR; and
- The Joint Legislative Auditing Committee.¹²

The reports must be prepared in accordance with accepted accounting procedures. The OIR or the Joint Legislative Auditing Committee may conduct an audit of the Plan at any time.¹³

Eligibility

An administrative law judge (ALJ) within the Florida Division of Administrative Hearings¹⁴ hears all claims under the Plan and determines whether a claim is compensable.¹⁵ 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;
- The infant experienced permanent and substantial mental and physical impairment;
- The injury was not caused by genetic or congenital abnormality; and
- The physician is participating in the Plan.¹⁶

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.¹⁷ 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.¹⁸

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ S. 766.302, F.S. The Division of Administrative Hearings is housed within the Florida Department of Management Services.

¹⁵ S. 766.304, F.S.

¹⁶ S. 766.302(2), F.S.

¹⁷ S. 766.314, F.S.

¹⁸ S. 766.302(7), F.S.

Benefits

Once an ALJ determines a child is eligible under the Plan, the child is covered for life, and no other compensation from a medical malpractice lawsuit or settlement is available.¹⁹ 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.²⁰

The Plan may also provide:

- A one-time cash award, not to exceed \$100,000, to the infant's parents or guardians.
- A \$10,000 death benefit for the infant.²¹
- Compensation for reasonable expenses incurred for filing the claim, including attorney's fees.²²

Exclusions

The Plan does not reimburse or pay expenses that might otherwise be covered by insurance or any private or governmental programs, unless such exclusion is prohibited by federal law.²³ Many children with birth-related injuries are either covered by programs such as Children's Medical Services or Medicaid. Under current state and federal law, Medicaid is the payor of last resort for medically necessary goods and services furnished to Medicaid recipients; therefore, current law appears to prohibit NICA from shifting covered costs onto Medicaid.²⁴ However, recent court filings allege that NICA may have shifted some costs that the Association is statutorily required to pay onto Medicaid.²⁵

Funding

In July 1988, the Legislature authorized a transfer of \$20 million to NICA from the Department of Insurance (the predecessor agency to OIR)²⁶ to provide initial funding to administer the Plan. Currently, the Plan is funded by a combination of physician fees and hospital assessments.²⁷ A participating physician is required to pay a \$5,000 fee each year for coverage which runs January 1 through December 31.²⁸ 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 of these categories, including resident physicians, retired physicians, government physicians, and

¹⁹ *Id.*

²⁰ S. 766.31, F.S.

²¹ 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. (Ch. 2003-416, s. 78, Laws of Fla.)

²² S. 766.31(1)(c), F.S.

²³ S. 766.31(1)(a), F.S.

²⁴ S. 409.910, F.S.; 42 C.F.R. s. 433.136; 42 U.S.C. s. 1396a.

²⁵ *United States ex rel Arven v. Florida Birth-Related Neurological Injury Comp. Ass'n.*, No. 19-61053-CIV, 2020 WL 5540367 at *1 (S.D. Fla. Sep. 8, 2020); see also Carol Marbin Miller and Daniel Chang, *When births go terribly wrong, Florida protects doctors and forces parents to pay the price*, Miami Herald (Apr. 8, 2021), <https://www.miamiherald.com/news/state/florida/article247417990.html> (last visited May 6, 2021); Daniel Chang and Carol Marbin Miller, *Mom was consumed with caring for brain-damaged son*, Miami Herald (Apr. 8, 2021), <https://www.miamiherald.com/news/state/florida/article247417990.html> (last visited May 6, 2021); Florida Birth-Related Neurological Injury Compensation Association, *NICA responds to Miami Herald series* (Apr. 8, 2021), https://www.nica.com/downloads/NICA_Statement_040821.pdf (last visited May 6, 2021).

²⁶ Ch. 88-277, s. 41, Laws of Fla.

²⁷ S. 766.314, F.S.

²⁸ *Id.*

facilities.²⁹ In 2019, NICA collected \$26,989,960 in hospital and physician assessments; in 2020, NICA collected \$27,000,000.³⁰

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 Florida, to the Plan from the trust fund are insufficient to maintain the Plan on an actuarially sound basis, OIR is authorized to transfer an additional amount up to \$20 million to NICA from the Insurance Regulatory Trust Fund reserve.³¹

One-time Case Award

Since its inception in 1989 (the first birth year covered under the Plan), the one-time 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.³² Specifically, the study examined the impact of inflation on the fixed award established in the original NICA statute.³³ 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 2020.³⁴

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.³⁵ 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.³⁶ However, 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."³⁷

Auditor General

Article III, s. 2 of the State Constitution establishes the office of the Auditor General. The Auditor General is appointed by a majority vote of the members of the Joint Legislative Auditing Committee, subject to confirmation by both houses of the Legislature, and serves at the Legislature's pleasure.³⁸ The Auditor General must conduct audits, examinations, or reviews of government programs as well as audit the accounts of state agencies, state universities, state colleges, district school boards, and others as directed by the Joint Legislative Auditing Committee.³⁹ The Auditor General conducts operational and performance audits on public records and information technology systems and reviews all audit reports of local governmental entities, charter schools, and charter technical career centers.⁴⁰

A financial audit is an examination of financial statements to determine whether they conform with generally accepted accounting principles. Its purpose is also to determine whether operations are properly conducted in accordance with legal and regulatory requirements.⁴¹ An operational audit is an audit whose purpose is to evaluate management's performance in establishing and maintaining internal controls, including controls designed to prevent and detect fraud, waste, and abuse, and in

²⁹ *Id.*

³⁰ Turner Consulting, Inc., *Proposed Increase in Parental Award – Section 766.31 (1) (b) (1), Florida Statutes* (Jan. 14, 2020).

³¹ S. 766.314(5)(b), F.S.

³² Turner Consulting, Inc., *Proposed Increase in Parental Award – Section 766.31 (1) (b) (1), Florida Statutes* (Jan. 14, 2020).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* The report defines "short-term" as the 5-year period after the award increase beginning in 2020.

³⁷ *Id.*

³⁸ S. 11.42(2), F.S.

³⁹ S. 11.45(2)(d)-(f), F.S.

⁴⁰ S. 11.45(7)(b), F.S.

⁴¹ S. 11.45(1)(d), F.S.

administering assigned responsibilities in accordance with applicable laws, administrative rules, contracts, grant agreements, and other guidelines.⁴²

Effect of the Bill

The bill amends s. 766.303, F.S., to require the Florida Birth-Related Neurological Injury Compensation Association (NICA) to administer the Plan in a manner that promotes and protects the health and best interests of children with birth-related neurological injuries. The bill requires the Plan to cover the following actual expenses:

- An annual benefit up to \$10,000 for psychotherapeutic services for immediate family members residing with the birth-injured child;
- A reliable method of transportation to Plan beneficiaries;
- Replacement of any vans purchased by the Plan every 7 years or 150,000 miles, whichever comes first; and
- Housing assistance of up to \$100,000 for the lifetime of the child, including home construction and modification costs.

The bill amends s. 766.31, F.S., to increase the maximum amount that may be awarded to parents or legal guardians of an infant who sustains a birth-related neurological injury as a one-time cash award from \$100,000 to \$250,000 for Plan claims filed or petitions pending on or after January 1, 2021. This award is in addition to the other recoverable actual lifetime expenses. 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 \$50,000.⁴³

The bill also requires that specified parents and legal guardians are entitled to a retroactive payment by July 1, 2021. Specifically, a parent or legal guardian who previously received an award and whose child:

- Currently receives benefits under the Plan must receive a payment sufficient to bring the total award to \$250,000.
- Died since the inception of the Plan must receive a payment sufficient to bring the total death benefit to \$50,000.

The bill expressly authorizes parents or legal guardians receiving benefits under the Plan to file a petition with the Division of Administrative Hearings to dispute the amount of actual expenses reimbursed or the denial of reimbursement.

The bill amends s. 766.315, F.S., to increase the number of directors on NICA's board from five to seven and requires the concurrence of four votes for the transaction of business or exercise of power. Of the seven members, the CFO must appoint one parent of a child who is a beneficiary and one representative of an advocacy organization for children with disabilities. The bill prohibits a director from serving more than six consecutive years on NICA's board. The Governor or the CFO may remove a director from office for misconduct, malfeasance, misfeasance, or neglect of duty in office. The bill prohibits a participating physician who is named in a pending petition for a claim from being appointed to the board. Moreover, an appointed director who is a participating physician may not vote on any board matter relating to a claim if the physician was named in the petition. The bill also provides other conflict of interest provisions for NICA employees.

The bill subjects all NICA board meetings to the public meeting and record requirements under s. 286.011, F.S. Not less than seven days before the meeting, NICA must give notice of any board meeting on its website, along with a copy of the agenda and a telephone number for members of the

⁴² S. 11.45(1)(i), F.S.

⁴³ The 2020 study did not examine the financial impact of a death benefit increase. Therefore, the fiscal impact of this change is indeterminate.

public to participate in the board meeting telephonically. The bill also creates s. 766.3145, requiring the NICA Board of Directors and specified employees to comply with a code of ethics.

The bill also requires NICA to:

- Furnish annually to each parent receiving benefits under the Plan a list of expenses compensable under the Plan.
- Publish a report on its website by January 1, 2022, and every January 1 thereafter that includes:
 - The names and terms of each board member and executive staff member.
 - The amount of compensation paid to each association employee.
 - A summary of reimbursement disputes and resolutions.
 - A list of expenditures for attorney fees, lobbying fees, and other expenses to oppose each association claim with any personal identifying information removed.
- Submit a report to the Governor, legislature, and CFO by November 1, 2021, and every November 1 thereafter that includes:
 - The number of petitions filed for compensation with DOAH, the number of claimants awarded and denied compensation, and the reasons for the denial of compensation.
 - The number and dollar amount of paid and denied compensation for expenses by category and the reasons for any denied compensation for expenses by category.
 - The average turnaround time for paying or denying compensation for expenses.
 - Legislative recommendations to improve the program.
 - A summary of any pending or resolved litigation during the year which affects the plan.

The initial report to the the Governor, legislature, and CFO must also include an actuarial report conducted by an independent actuary which provides an analysis of the estimated costs of implementing the following changes to the plan:

- Reducing the minimum birth weight eligibility from 2,500 grams to 2,000 grams.
- Revising the eligibility of participation in the plan by providing that an infant must be permanently and substantially mentally or physically impaired, rather than permanently and substantially mentally and physically impaired.
- Increasing the annual special benefit or quality of life benefit from \$500 to \$2,500 per calendar year.

The bill also amends s. 11.45, F.S., to require the Auditor General to conduct an operational audit of NICA once every 3 years. The first operational audit of NICA conducted by the Auditor General must be completed by August 15, 2021. The bill requires the operational audit to include at a minimum, an assessment of compliance with ss. 766.303 through 766.315, F.S., and compliance with Florida's public records and public meetings laws.

The bill requires the Agency for Health Care Administration (AHCA) to conduct a review and provide recommendations for development of policies and procedures regarding Medicaid third party benefits payable by and recoverable from the Plan. AHCA must report the extent and value of NICA liabilities to the Governor, legislature, and CFO by November 1, 2021.

The bill provides an effective date of upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

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 such prospective increased costs, estimated at \$2.7 million per year.

However, 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, or making retroactive payments as provided in the bill, the fiscal impact of the bill is ultimately indeterminate.