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LEGISLATIVE ACTION

Senate

.

House

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04/22/2021 02:32 PM

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Senator Burgess moved the following:

Senate Amendment (with title amendment)

Delete everything after the enacting clause
and insert:

Section 1. Subsection (4) is added to section 766.303,
Florida Statutes, to read:

766.303 Florida Birth-Related Neurological Injury
Compensation Plan; exclusiveness of remedy.—

(4) The Florida Birth-Related Neurological Injury
Compensation Association shall administer the plan in a manner
that promotes and protects the health and best interests of



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12 children with birth-related neurological injuries who have been
13 accepted into the plan, and the association shall strive to
14 ensure that all of their medically necessary needs are being
15 met.

16 Section 2. Subsection (5) of section 766.305, Florida
17 Statutes, is amended to read:

18 766.305 Filing of claims and responses; medical
19 disciplinary review.—

20 (5) Upon receipt of such petition, the Division of Medical
21 Quality Assurance shall review the information therein and
22 determine whether it involved conduct by a physician licensed
23 under chapter 458 or an osteopathic physician licensed under
24 chapter 459 which that is subject to disciplinary action. If a
25 physician is involved in more than one filed claim, the division
26 also must review the circumstances of all such claims together
27 to determine whether the physician's conduct establishes a
28 pattern of practice subject to disciplinary action. Section
29 456.073 applies in such cases, in which case the provisions of
30 s. 456.073 shall apply.

31 Section 3. Present subsection (3) of section 766.31,
32 Florida Statutes, is redesignated as subsection (4), a new
33 subsection (3) is added to that section, and subsections (1) and
34 (2) are amended, to read:

35 766.31 Administrative law judge awards for birth-related
36 neurological injuries; notice of award.—

37 (1) Upon determining that an infant has sustained a birth-
38 related neurological injury and that obstetrical services were
39 delivered by a participating physician at the birth, the
40 administrative law judge shall make an award providing



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41 compensation for the following items relative to such injury:

42 (a) Actual expenses for medically necessary and reasonable
43 medical and hospital, habilitative and training, family
44 residential or custodial care, professional residential, and
45 custodial care and service, for medically necessary drugs,
46 special equipment, and facilities, and for related travel. At a
47 minimum, compensation must be provided for the following actual
48 expenses:

49 1. Diapers and baby formula for the child from the time of
50 birth and pureed baby food or other baby food for the child at
51 the appropriate age or developmental stage.

52 2. A total annual benefit of up to \$10,000 for immediate
53 family members who reside with the infant for psychotherapeutic
54 services obtained from providers licensed under chapter 490 or
55 chapter 491.

56 3. Transportation-related assistance, including, but not
57 limited to, the following:

58 a. Reimbursement for all medically necessary trips,
59 including travel to the pharmacy each month to purchase the
60 child's prescription medications.

61 b. For the life of the child, providing parents or legal
62 guardians with a reliable method of transportation for the care
63 of the child or reimbursing the cost of upgrading an existing
64 vehicle to accommodate the child's needs when it becomes
65 medically necessary for wheelchair transportation. The mode of
66 transportation must take into account the special accommodations
67 required for the specific child. The plan may not limit such
68 transportation assistance based on the child's age or weight.
69 The plan must replace any vans purchased by the plan every 7



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70 years or 150,000 miles, whichever comes first.

71 4. Housing assistance of up to \$100,000 for the lifetime of
72 the child, including home construction and modification costs.

73 (b) However, the following expenses are not subject to
74 compensation such expenses shall not include:

75 1. Expenses for items or services that the infant has
76 received, or is entitled to receive, under the laws of any state
77 or the Federal Government, except to the extent such exclusion
78 may be prohibited by federal law.

79 2. Expenses for items or services that the infant has
80 received, or is contractually entitled to receive, from any
81 prepaid health plan, health maintenance organization, or other
82 private insuring entity.

83 3. Expenses for which the infant has received
84 reimbursement, or for which the infant is entitled to receive
85 reimbursement, under the laws of any state or the Federal
86 Government, except to the extent such exclusion may be
87 prohibited by federal law.

88 4. Expenses for which the infant has received
89 reimbursement, or for which the infant is contractually entitled
90 to receive reimbursement, pursuant to the provisions of any
91 health or sickness insurance policy or other private insurance
92 program.

93 (c) Expenses included under this paragraph (a) may not
94 exceed usual and customary shall be limited to reasonable
95 charges prevailing in the same community for similar treatment
96 of injured persons when such treatment is paid for by the
97 injured person.

98 (d) 1.a. (b) 1. Periodic payments of an award to the parents



99 or legal guardians of the infant found to have sustained a
100 birth-related neurological injury, which award may ~~shall~~ not
101 exceed \$100,000. However, at the discretion of the
102 administrative law judge, such award may be made in a lump sum.
103 Beginning on January 1, 2021, the award may not exceed \$250,000,
104 and each January 1 thereafter the maximum award authorized under
105 this paragraph shall increase by 3 percent.

106 b. Parents or legal guardians who received an award
107 pursuant to this section before January 1, 2021, and whose child
108 currently receives benefits under the plan must receive a
109 retroactive payment in an amount sufficient to bring the total
110 award paid to the parents or legal guardians pursuant to sub-
111 paragraph a. to \$250,000. This additional payment may be made
112 in a lump sum or in periodic payments as designated by the
113 parents or legal guardians.

114 2. Death benefit for the infant in an amount of \$50,000.
115 Parents or legal guardians who received an award pursuant to
116 this section, and whose child died since the inception of the
117 program, must receive a retroactive payment in an amount
118 sufficient to bring the total award paid to the parents or legal
119 guardians pursuant to this subparagraph to \$50,000. This
120 additional payment may be made in a lump sum or in periodic
121 payments as designated by the parents or legal guardians
122 \$10,000.

123 (e)-(e) Reasonable expenses incurred in connection with the
124 filing of a claim under ss. 766.301-766.316, including
125 reasonable attorney ~~attorney's~~ fees, which are ~~shall~~ be subject
126 to the approval and award of the administrative law judge. In
127 determining an award for attorney ~~attorney's~~ fees, the



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128 administrative law judge shall consider the following factors:

129 1. The time and labor required, the novelty and difficulty
130 of the questions involved, and the skill requisite to perform
131 the legal services properly.

132 2. The fee customarily charged in the locality for similar
133 legal services.

134 3. The time limitations imposed by the claimant or the
135 circumstances.

136 4. The nature and length of the professional relationship
137 with the claimant.

138 5. The experience, reputation, and ability of the lawyer or
139 lawyers performing services.

140 6. The contingency or certainty of a fee.

141

142 Should there be a final determination of compensability, and the
143 claimants accept an award under this section, the claimants are
144 ~~shall~~ not be liable for any expenses, including attorney
145 ~~attorney's~~ fees, incurred in connection with the filing of a
146 claim under ss. 766.301-766.316 other than those expenses
147 awarded under this section.

148 (2) The award shall require the immediate payment of
149 expenses previously incurred and shall require that future
150 expenses be paid as incurred.

151 (3) (a) To request reimbursement from the plan for actual
152 expenses, the parents or legal guardians of a child under the
153 plan must submit a letter of medical necessity to the plan from
154 the child's physician, who must be licensed under chapter 458 or
155 chapter 459 or, if the child resides in another state, must be
156 licensed under the laws of that state, or from another licensed



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157 treating health care practitioner as defined in s. 456.001
158 requesting reimbursement of the medically necessary services,
159 drugs, equipment, or treatment. Within 20 days after the receipt
160 of a request for reimbursement of expenses, the plan must
161 reimburse the expenses or notify the parents or legal guardians
162 and the ombudsman appointed pursuant to s. 766.315(4)(i)1. that
163 specific additional information or documentation is needed to
164 evaluate the request or that the request for payment of the
165 expenses is being denied. Before denying the request, the plan
166 must consult with the ombudsman concerning the request and any
167 relevant information concerning the child's unique needs. The
168 plan must provide the ombudsman with a detailed written
169 explanation for the proposed denial. If the plan denies the
170 request because it determines that the services or treatment
171 were not medically necessary, the plan must request the parents
172 or legal guardians to provide a letter of medical necessity from
173 a second licensed physician or health care provider who is not
174 affiliated with or does not have an investment interest, as
175 described in s. 456.053, with the first physician or health care
176 provider who provided the medical necessity letter. If such
177 letter is provided, the plan must reimburse the parents or legal
178 guardians for the actual expenses, including the expenses
179 associated with obtaining the second medical necessity letter
180 from a physician or other health care practitioner. If the
181 parents or legal guardians are unable to provide a second
182 letter, the plan is not required to reimburse the expenses.

183 (b) Parents or legal guardians, or their designee, must
184 submit any additional information or documentation requested by
185 the plan within 35 days after receipt of the notification by the



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186 plan that additional information or documentation is needed.
187 Additional information is considered submitted on the date it is
188 mailed or electronically submitted to the plan.

189 (c) A request for reimbursement of expenses must be paid or
190 denied within 90 days after receipt of the request. A denial of
191 reimbursement by the plan must be accompanied by a detailed
192 written explanation of why the request was denied. Failure to
193 pay or deny the request for reimbursement within 120 days after
194 receipt of the request creates an uncontestable obligation to
195 reimburse the expenses.

196 Section 4. Section 766.313, Florida Statutes, is amended to
197 read:

198 766.313 Limitation on claim.—Any claim for compensation
199 under ss. 766.301-766.316 which ~~that~~ is filed more than 8 ~~5~~
200 years after the birth of an infant alleged to have a birth-
201 related neurological injury is ~~shall be~~ barred.

202 Section 5. Section 766.3145, Florida Statutes, is created
203 to read:

204 766.3145 Code of ethics.—

205 (1) On or before July 1 of each year, employees of the
206 association must sign and submit a statement attesting that they
207 do not have a conflict of interest as defined in part III of
208 chapter 112. As a condition of employment, all prospective
209 employees must sign and submit to the association a conflict-of-
210 interest statement.

211 (2) The executive director, the ombudsman, senior managers,
212 and members of the board of directors are subject to the code of
213 ethics under part III of chapter 112. For purposes of applying
214 part III of chapter 112 to activities of the executive director,



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215 senior managers, and members of the board of directors, those
216 persons are considered public officers or employees and the
217 association is considered their agency. A board member may not
218 vote on any measure that would inure to his or her special
219 private gain or loss and, notwithstanding s. 112.3143(2), may
220 not vote on any measure that he or she knows would inure to the
221 special private gain or loss of any principal by whom he or she
222 is retained or to the parent organization or subsidiary of a
223 corporate principal by which he or she is retained, other than
224 an agency as defined in s. 112.312; or that he or she knows
225 would inure to the special private gain or loss of a relative or
226 business associate of the public officer. Before the vote is
227 taken, such member shall publicly state to the board the nature
228 of his or her interest in the matter from which he or she is
229 abstaining from voting and, within 15 days after the vote
230 occurs, disclose the nature of his or her interest as a public
231 record in a memorandum filed with the person responsible for
232 recording the minutes of the meeting, who shall incorporate the
233 memorandum in the minutes.

234 (3) Notwithstanding s. 112.3148, s. 112.3149, or any other
235 law, an employee or board member may not knowingly accept,
236 directly or indirectly, any gift or expenditure from a person or
237 entity, or an employee or representative of such person or
238 entity, which has a contractual relationship with the
239 association or which is under consideration for a contract.

240 (4) An employee or board member who fails to comply with
241 subsection (2) or subsection (3) is subject to penalties
242 provided under ss. 112.317 and 112.3173.

243 (5) Any senior manager or executive director of the



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244 association who is employed on or after January 1, 2022,
245 regardless of the date of hire, who subsequently retires or
246 terminates employment is prohibited from representing another
247 person or entity before the association for 2 years after
248 retirement or termination of employment from the association.

249 Section 6. Paragraphs (a) and (c) of subsection (1),
250 paragraph (a) of subsection (2), and paragraph (i) of subsection
251 (4) of section 766.315, Florida Statutes, are amended, and
252 subsection (6) is added to that section, to read:

253 766.315 Florida Birth-Related Neurological Injury
254 Compensation Association; board of directors.—

255 (1) (a) The Florida Birth-Related Neurological Injury
256 Compensation Plan shall be governed by a board of seven ~~five~~
257 directors which shall be known as the Florida Birth-Related
258 Neurological Injury Compensation Association. The association is
259 not a state agency, board, or commission. Notwithstanding ~~the~~
260 ~~provision of~~ s. 15.03, the association is authorized to use the
261 state seal.

262 (c) The Chief Financial Officer shall appoint the directors
263 ~~shall be appointed by the Chief Financial Officer~~ as follows:

- 264 1. One citizen representative.
265 2. One representative of participating physicians.
266 3. One representative of hospitals.
267 4. One representative of casualty insurers.
268 5. One representative of physicians other than
269 participating physicians.

270 6. One parent or legal guardian representative of an
271 injured infant under the plan.

272 7. One representative of an advocacy organization for



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273 children with disabilities.

274 (2) (a) The Chief Financial Officer may select the
275 representative of the participating physicians from a list of at
276 least three names recommended by the American Congress of
277 Obstetricians and Gynecologists, District XII; the
278 representative of hospitals from a list of at least three names
279 recommended by the Florida Hospital Association; the
280 representative of casualty insurers from a list of at least
281 three names, one of which is recommended by the American
282 Insurance Association, one of which is recommended by the
283 Florida Insurance Council, and one of which is recommended by
284 the Property Casualty Insurers Association of America; and the
285 representative of physicians, other than participating
286 physicians, from a list of three names recommended by the
287 Florida Medical Association and a list of three names
288 recommended by the Florida Osteopathic Medical Association.
289 However, the Chief Financial Officer is not required to make an
290 appointment from among the nominees of the respective
291 associations. A participating physician who is named in a
292 pending petition for a claim may not be appointed to the board.
293 An appointed director who is a participating physician may not
294 vote on any board matter relating to a claim accepted for an
295 award for compensation if the physician was named in the
296 petition for the claim.

297 (4) The board of directors shall have the power to:

298 (i) Employ or retain such persons as are necessary to
299 perform the administrative and financial transactions and
300 responsibilities of the plan and to perform other necessary and
301 proper functions not prohibited by law.



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302 1. The board of directors shall employ an ombudsman who
303 will serve at the pleasure of, and must report directly to, the
304 board and who will act as an advocate for the parents and legal
305 guardians of children under the plan. The board must appoint or
306 remove the ombudsman by a majority vote with at least four
307 affirmative votes, with the board member who is the parent or
308 legal guardian representative of an injured child under the plan
309 and the board member who is a representative of an advocacy
310 organization for children with disabilities on the prevailing
311 side.

312 2. At a minimum, the person appointed as the ombudsman must
313 have at least 5 years of experience and employment in the field
314 of children with disabilities, which includes advocacy for
315 children with disabilities.

316 3. The ombudsman shall do all of the following:

317 a. Provide information and assistance, outreach, and
318 education to parents and legal guardians of children under the
319 plan regarding plan benefits; assist parents and legal guardians
320 in the resolution of benefit and payment disputes; and inform
321 parents and legal guardians regarding community, state, and
322 federal government resources.

323 b. Investigate complaints of parents or legal guardians of
324 children under the plan regarding the operation of the plan.

325 c. Provide an annual report to the board regarding the
326 ombudsman's activities, the disposition of complaints, and any
327 recommendations to improve the operations of the plan,
328 resolution of disputes, and the delivery of benefits to
329 participants.

330 (6) On or before November 1, 2021, and by each November 1



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331 thereafter, the association shall submit an annual report to the
332 Governor, the President of the Senate, the Speaker of the House
333 of Representatives, and the Chief Financial Officer. The report
334 must include:

335 (a) The number of petitions filed for compensation with the
336 division, the number of claimants awarded compensation, the
337 number of claimants denied compensation, and the reasons for the
338 denial of compensation.

339 (b) The number and dollar amount of paid and denied
340 compensation for expenses by category and the reasons for any
341 denied compensation for expenses by category.

342 (c) The average turnaround time for paying or denying
343 compensation for expenses.

344 (d) Legislative recommendations to improve the program.

345 (e) A summary of any pending or resolved litigation during
346 the year which affects the plan.

347 (f) The amount of compensation paid to each association
348 employee or member or the board of directors.

349 (g) For the initial report due on or before November 1,
350 2021, an actuarial report conducted by an independent actuary
351 which provides an analysis of the estimated costs of
352 implementing the following changes to the plan:

353 1. Reducing the minimum birth weight eligibility for a
354 participant in the plan from 2,500 grams to 2,000 grams.

355 2. Revising the eligibility for participation in the plan
356 by providing that an infant must be permanently and
357 substantially mentally or physically impaired, rather than
358 permanently and substantially mentally and physically impaired.

359 3. Increasing the annual special benefit or quality of life



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360 benefit from \$500 to \$2,500 per calendar year.

361 Section 7. The Auditor General shall conduct a performance
362 audit of the association and plan to evaluate management's
363 performance in administering the laws, policies, and procedures
364 governing the operations of the association and plan in an
365 efficient and effective manner.

366 (1) The audit must include evaluations of all of the
367 following:

368 (a) The protocols used for the payment of expenses,
369 including standards for determining medical necessity and
370 reasonableness of requests for medical care, services, or other
371 benefits provided under the plan and the timeliness of the
372 payment of expenses.

373 (b) The effectiveness of the association's outreach to
374 inform parents and legal guardians of participants of available
375 benefits and any changes in benefits and processes to resolve
376 disputes regarding the payment of expenses internally.

377 (c) The efficacy of the current processes for the
378 procurement of goods and services.

379 (d) The internal controls of the plan and association.

380 (2) The Auditor General shall release the audit by January
381 15, 2022.

382 Section 8. The amendments made to s. 766.31(1)(d)1.a. and
383 2., Florida Statutes, by this act apply to all claims filed
384 under s. 766.305, Florida Statutes, for which an award was made
385 through entry of final order under s. 766.31(1), Florida
386 Statutes, on or after January 1, 2021.

387 Section 9. The Agency for Health Care Administration shall
388 review its Medicaid third-party liability functions and rights



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389 under s. 409.910, Florida Statutes, relative to the Florida
390 Birth-Related Neurological Injury Compensation Plan established
391 under s. 766.303, Florida Statutes, and must include in its
392 review the extent and value of the liabilities owed by the plan
393 as a third-party benefit provider. On or before November 1,
394 2021, the agency must submit to the President of the Senate, the
395 Speaker of the House of Representatives, and the Chief Financial
396 Officer a report of its findings regarding the extent and value
397 of the liabilities owed by the plan.

398 Section 10. This act shall take effect upon becoming a law.
399

400 ===== T I T L E A M E N D M E N T =====

401 And the title is amended as follows:

402 Delete everything before the enacting clause
403 and insert:

404 A bill to be entitled

405 An act relating to the Florida Birth-Related
406 Neurological Injury Compensation Plan; amending s.
407 766.303, F.S.; requiring the Florida Birth-Related
408 Neurological Injury Compensation Association to
409 administer the Florida Birth-Related Neurological
410 Injury Compensation Plan in a specified manner;
411 amending s. 766.305, F.S.; requiring that, if a
412 physician is involved in more than one filed claim,
413 the Division of Medical Quality Assurance of the
414 Department of Health review all such claims together
415 when making certain determinations; providing
416 applicability; amending s. 766.31, F.S.; revising
417 requirements for the award for compensation for claims



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418 under the plan; increasing the maximum amount that may
419 be awarded to the parents or legal guardians of an
420 infant found to have sustained a birth-related
421 neurological injury, as of a specified date; requiring
422 that the maximum award amount be increased by a
423 certain percentage annually; requiring the plan to
424 provide retroactive payments to certain parents or
425 legal guardians which are sufficient to bring the
426 total award to a specified amount; authorizing such
427 payments to be made in a lump sum or periodically;
428 increasing the amount of the death benefit that must
429 be awarded; requiring the plan to provide retroactive
430 payments to certain parents or legal guardians which
431 are sufficient to bring the total death benefit award
432 to a specified amount; authorizing such payments to be
433 made in a lump sum or periodically; requiring parents
434 and legal guardians to submit a certain letter of
435 medical necessity to request reimbursement for actual
436 expenses; requiring the plan to act on a request for
437 reimbursement of expenses within a specified
438 timeframe; requiring the plan to notify the parents or
439 legal guardians and the ombudsman if specific
440 additional information or documentation is needed;
441 requiring the plan to consult with the ombudsman
442 before denying a request; requiring the plan to
443 provide a detailed written explanation of the reason
444 for a denial; requiring the plan to request a second
445 letter of medical necessity if it denies a request on
446 certain grounds; providing requirements for the second



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447 letter of medical necessity; requiring the plan to
448 reimburse expenses if a second letter is provided;
449 providing that the plan is not required to reimburse
450 expenses if a second letter is not provided; requiring
451 parents or legal guardians, or their designee, to
452 submit any additional information or documentation
453 requested by the plan within a specified timeframe;
454 requiring the plan to pay or deny a request within a
455 specified timeframe; providing that failure to pay or
456 deny a request within a specified timeframe results in
457 an uncontestable obligation to reimburse the expenses;
458 amending s. 766.313, F.S.; revising the timeframe
459 within which birth-related neurological injury
460 compensation claims must be filed; creating s.
461 766.3145, F.S.; requiring association employees to
462 annually sign and submit a conflict-of-interest
463 statement as a condition of employment; requiring
464 prospective employees to sign and submit such
465 statement as a condition of employment; providing that
466 the executive director, the ombudsman, senior
467 managers, and the board of directors are subject to
468 specified provisions; prohibiting board members from
469 voting on measures under certain circumstances;
470 providing procedures and requirements for board
471 members who have a conflict of interest; prohibiting
472 employees and board members from accepting gifts or
473 expenditures from certain individuals; providing
474 penalties; prohibiting certain senior managers and
475 executive directors from representing persons or



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476 entities before the association for a specified
477 timeframe; amending s. 766.315, F.S.; revising
478 membership of the plan's board of directors;
479 prohibiting certain appointed directors from voting on
480 board matters relating to a claim if they were named
481 in the petition for the claim; requiring the board of
482 directors to employ an ombudsman for a specified
483 purpose; providing appointment and removal procedures
484 for the ombudsman; providing qualifications for and
485 duties of the ombudsman; requiring the association to
486 submit an annual report to the Governor, the
487 Legislature, and the Chief Financial Officer by a
488 specified date; providing requirements for the report;
489 requiring that the first report include a certain
490 actuarial report; providing requirements for the
491 actuarial report; requiring the Auditor General to
492 conduct a performance audit of the association and
493 plan; providing requirements for the audit; requiring
494 the Auditor General to release the audit by a
495 specified date; providing applicability; requiring the
496 Agency for Health Care Administration to conduct a
497 certain review of its Medicaid third-party liability
498 functions and rights with respect to the plan;
499 requiring the agency to submit a report of its
500 findings to the Legislature and the Chief Financial
501 Officer by a specified date; providing an effective
502 date.