

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee on Appropriations

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BILL: CS/CS/SB 1786

INTRODUCER: Appropriations Committee; Health Policy Committee; and Senator Burgess and others

SUBJECT: Payments for Birth-related Neurological Injuries

DATE: April 21, 2021

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Johnson</u>	<u>Knudson</u>	<u>BI</u>	<b>Favorable</b>
2.	<u>Smith</u>	<u>Brown</u>	<u>HP</u>	<b>Fav/CS</b>
3.	<u>Davis</u>	<u>Sadberry</u>	<u>AP</u>	<b>Fav/CS</b>

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**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/CS/SB 1786 makes several changes to the Florida Birth-Related Neurological Injury Compensation Plan (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 health and best interests of birth-injured children.
- 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 on or after January 1, 2021, with the amount to be incrementally increased by three percent annually. This provision of the bill applies retroactively to claims filed before January 1, 2021.
- Increases the death benefit for an infant who sustained a neurological injury from \$10,000 to \$50,000.
- Increase the number of directors on the NICA's board from five to seven by adding a parent or legal guardian of a Plan participant and a representative of an advocacy organization for children with disabilities.
- Specifies that at least one director on the NICA's board is a woman.
- Provides that it is not the intent for the NICA to serve as payor of last resort and it is not the intent to shield physicians who engage in certain activities from filing legitimate claims of medical malpractice against such physicians.

- Extends the time for filing a claim from five years to eight years.
- Requires the Division of Medical Quality Assurance of the Department of Health to conduct a review of claims in which a physician is involved in multiple claims to determine whether the physician's conduct establishes a pattern or practice subject to disciplinary action.
- Requires the plan to reimburse parents or legal guardians of Plan participants for any service, drug, equipment, or treatment at a reasonable rate if they submit a letter of medical necessity from a provider.
- If the Plan determines that the service, drug, equipment, or treatment was not medically necessary, the Plan must ask the parent or legal guardian to provide a second letter of medical necessity from another provider.
- Authorizes the Plan to review and reimburse for experimental treatments using the same medical review process, and if a second letter is not provided, the plan is not required to provide reimbursement.
- Requires the Plan to reimburse private nursing staff or attendant care at a rate of at least equal to the greater of state or federal minimum hourly wage, regardless of setting.
- Requires the Plan to provide family support services, including mental health, for the immediate family members living with the child.
- Requires the Plan to provide quality of life reimbursement for entertainment and other activities that promote mental health of at least \$1,500 per year.
- Requires the Plan to reimburse without any limitations expenses for diapers, baby food, and formula.
- Increases the annual assessment for hospitals and nonparticipating and participating physicians.
- Provides an annual benefit of \$5,000 for parents and legal guardians of Plan participants for counseling.
- Provides reimbursement for transportation for all necessary trips for prescription refills.
- Creates code of ethics for specified staff and members of the board of directors.
- Requires the NICA to submit an annual report to the Governor, the President of the Senate, and the Speaker of the House of Representatives. The first annual report must include an actuarial analysis of the fiscal impacts of revising certain eligibility standards and benefits.
- Requires the Auditor General to conduct an audit of the NICA.
- Provides a sunset on December 31, 2026, of the NICA and the Plan, unless the Legislature reviews and reenacts the provisions by that date.

The NICA engaged an actuary to determine the viability and likely impact of increasing the parental award from \$100,000 to \$250,000. It was determined that the bill will have a negative fiscal impact on the Plan; however the actuary's report recommended increasing the parental award. 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 most likely insignificant.

Additional provisions in the bill increasing Plan services and compensations have a significant indeterminate fiscal impact. *See* Part V, Fiscal Impact Statement.

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

## II. Present Situation:

### Florida Birth-Related Neurological Injury Compensation Association

In 1988, the Legislature enacted the Florida Birth-Related Neurological Injury Compensation Plan<sup>1</sup> (Plan) to provide compensation, long-term medical care, and other services to persons with birth-related neurological injuries.<sup>2</sup> If an infant suffers such an injury, and the physician participates in the Florida Birth-Related Neurological Injury Compensation Association (NICA) and delivers obstetrical services in connection with the birth, then an administrative award for a compensable injury is the infant's sole and exclusive remedy for the injury, with exceptions.<sup>3</sup> Although the benefits paid under the Plan are limited, the Plan does not require the claimant to prove malpractice and provides a streamlined administrative hearing process to resolve the claim.<sup>4</sup>

A "birth-related neurological injury" is an injury to the brain or spinal cord of a live infant who weighs at least 2,500 grams for a single gestation or, in the case of a multiple gestation, a live infant who weighs at least 2,000 grams at birth caused by oxygen deprivation or by mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital.<sup>5</sup> Such an injury addressed by this statute renders the infant permanently and substantially mentally and physically impaired.<sup>6</sup>

The NICA is an independent association, and was created by the Legislature to manage the Plan. Although it is not a state agency, the NICA is subject to regulation and oversight by the Office of Insurance Regulation (OIR) and the Joint Legislative Auditing Committee. Directors on the NICA's board are appointed by the Chief Financial Officer for staggered terms of three years or until their successor is appointed, but there is no limit on the number of terms a director may serve.<sup>7</sup> The five-member board of directors of the Florida Birth-Related NICA administers the Plan.<sup>8</sup> The board of directors is composed of:

- One citizen representative;
- One representative of participating physicians;
- One representative of hospitals;
- One representative of casualty insurers; and
- One representative of physicians other than participating physicians.<sup>9</sup>

Duties of the NICA board of directors include:

- Administering the plan;

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<sup>1</sup> Section 766.303(1), F.S.

<sup>2</sup> Chapter 88-1, ss. 60-75, Laws of Fla., was enacted by the Legislature to stabilize and reduce malpractice insurance premiums for physicians practicing obstetrics. The intent of the Legislature is to provide compensation, on a no-fault basis, for a limited class of high costs catastrophic injuries, specifically birth-related neurological injuries, that result in unusually high costs for custodial care and rehabilitation. Section 766.301, F.S.

<sup>3</sup> Section 766.31(1), F.S.

<sup>4</sup> See *Florida Birth-Related Neurological Injury Compensation Ass'n v. McKaughan*, 668 So.2d 974, 977 (Fla. 1996).

<sup>5</sup> Section 766.302(2), F.S.

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

<sup>7</sup> Section 766.315, F.S., and ch. 88-1, s. 74, Laws of Fla.

<sup>8</sup> Sections 766.315(1) and (2), F.S.

<sup>9</sup> Section 766.315, F.S., and ch. 88-1, s. 74, Laws of Fla.

- Administering the funds collected on behalf of the plan;
- Reviewing and paying claims;
- Directing the investment and reinvestment of any surplus funds over losses and expenses, provided that any investment income generated thereby remains credited to the Plan;
- Reinsuring the risks of the Plan in whole or in part;
- Suing and being sued, appearing and defending, in all actions and proceedings in its name;
- Exercising all powers necessary or convenient to effect any or all of the purposes for which the Plan was created;
- Entering into such contracts as are necessary or proper to administer the Plan;
- Employing or retaining such persons as are necessary to perform the administrative and financial transactions and responsibilities of the Plan;
- Taking such legal action as may be necessary to avoid payment of improper claims; and
- Indemnifying any person acting on behalf of the Plan in an official capacity, provided that such person acted in good faith.<sup>10</sup>

Annually, the NICA must furnish audited financial reports to:

- Any Plan participant upon request;
- The OIR; and
- The Joint Legislative Auditing Committee.<sup>11</sup>

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.<sup>12</sup>

### **NICA Funding**

The funding for the Plan is derived from an initial appropriation of \$20 million by the Legislature at the time the Plan was created<sup>13</sup> and annual assessments paid by physicians and hospitals.<sup>14</sup> A participating physician is required to pay a \$5,000 fee each year for coverage which runs January 1 through December 31.<sup>15</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 of these categories, including resident physicians, retired physicians, government physicians, and facilities.<sup>16</sup> In 2019, NICA collected \$26,989,960 in hospital and physician assessments; in 2020, NICA collected \$27,000,000.<sup>17</sup>

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

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<sup>10</sup> Section 766.315(4), F.S.

<sup>11</sup> Section 766.315(5)(d), F.S.

<sup>12</sup> *Id.*

<sup>13</sup> Section 766.314(5)(b), F.S.

<sup>14</sup> Section 766.314, F.S.

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

<sup>16</sup> *Id.*

<sup>17</sup> Turner Consulting, Inc., *Proposed Increase in Parental Award – Section 766.31 (1) (b) (1), Florida Statutes* (Jan. 14, 2020).

Plan on an actuarially sound basis, the OIR is authorized to transfer an additional amount up to \$20 million to the NICA from the Insurance Regulatory Trust Fund reserve.<sup>18</sup>

### **Benefits**

The Plan pays, on behalf of a qualifying infant, the following benefits:

- Actual expenses for medically necessary and reasonable care, services, drugs, equipment, facilities, and travel;<sup>19</sup>
- Periodic or lump-sum award, not to exceed \$100,000, to the infant's parents or guardians;<sup>20</sup>
- Death benefit of \$10,000 for the infant; and
- Reasonable expenses for filing the claim under the Plan, including attorney's fees.<sup>21</sup>

The administrative law judge (ALJ) must require the Plan to immediately pay expenses previously incurred and require that future expenses be paid as incurred.<sup>22</sup>

The \$100,000 cash award limit was established when the NICA statutory provisions were enacted in 1988. If the initial award of \$100,000 established for the first birth year of 1989 was adjusted for inflation, and assuming an annual increase of three percent, this would result in an indicated award of approximately \$250,000.<sup>23</sup>

### **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.<sup>24</sup> 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

### **Filing a Claim for Benefits**

A claim for compensation under the Plan must be filed within five years of the birth of the infant alleged to be injured.<sup>25</sup> First, the parents or guardians of the infant must file a petition with the Division of Administrative Hearings (DOAH).<sup>26</sup> Then, the DOAH serves a copy of the petition upon the NICA, the physician(s) and hospital named in the petition, the Division of Medical Quality Assurance, and the Agency for Health Care Administration.<sup>27</sup> Within 10 days of filing

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<sup>18</sup> Section 766.314(5)(b), F.S.

<sup>19</sup> The plan excludes coverage for expenses that are compensable by state or federal governments, or by private insurers. Section 766.31(1)(a), F.S.

<sup>20</sup> Often the award is paid out over time to assist the parents or guardians in making necessary modifications to living quarters to accommodate a disabled child.

<sup>21</sup> Section 766.31, F.S.

<sup>22</sup> Section 766.31(2), F.S.

<sup>23</sup> Turner Consulting, Inc., Consultants and Actuaries, *Proposed Increase in Parental Award-Section 766.31(b)(1), Florida Statutes*, (Jan. 14, 2020) (on file with the Senate Committee on Health Policy).

<sup>24</sup> Section 766.31(1)(a), F.S.

<sup>25</sup> Section 766.313, F.S.

<sup>26</sup> Section 766.305, F.S.

<sup>27</sup> Section 766.305(2), F.S.

the petition, the parents or guardian must provide to the NICA all medical records, assessments, evaluations and prognoses, documentation of expenses, and documentation of any private or governmental source of services, or reimbursement relative to the impairments.<sup>28</sup>

Within 45 days from the date of service of a complete claim, the NICA must file a response to the petition and submit relevant written information relating to the issue of whether the injury alleged is a birth-related neurological injury.<sup>29</sup> An ALJ from the DOAH will set a hearing on the claim to be conducted 60-120 days from the petition filing date.<sup>30</sup>

The issue of whether the claim for compensation is covered by the Plan is determined exclusively in an administrative proceeding.<sup>31</sup> The ALJ presiding over the hearing makes the following determinations:

- Whether the injury claimed is a birth-related neurological injury;
- Whether obstetrical services were delivered by a participating physician;
- How much compensation, if any, is awardable under s. 766.31, F.S.; and
- Whether, if raised by the claimant or other party, the factual determination regarding the notice requirement in s. 766.316, F.S.<sup>32</sup>

If the ALJ determines that an injury meets the definition of a birth-related neurological injury, compensation from the Plan is the exclusive legal remedy.<sup>33</sup> If the ALJ determines that, the injury alleged is not a birth-related neurological injury or that a participating physician did not deliver the obstetrical services, the ALJ will enter an order to that effect.<sup>34</sup> The ALJ may also bifurcate the proceeding and address compensability and notice first, and address an award, if any, in a separate proceeding.<sup>35</sup> If any party chooses to appeal the ALJ's order under s. 766.309, F.S., the appeal must be filed in the District Court of Appeal.<sup>36</sup>

### **Notice Requirement**

Section 766.316, F.S., requires any hospital with a participating physician on its staff and each participating physician under the Plan, to provide notice to an obstetrical patient as to the limited no-fault alternative for birth-related neurological injuries. The notice must:

- Be provided on forms furnished by the association; and
- Include a clear and concise explanation of a patient's rights and limitations under the plan.

This section of statute also provides that the notice does not need to be provided to a patient when the patient has an emergency medical condition or when notice is not practicable.

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<sup>28</sup> Section 766.305(3), F.S.

<sup>29</sup> Section 766.305(4), F.S.

<sup>30</sup> Section 766.307(1), F.S.

<sup>31</sup> Section 766.301(1)(d), F.S.

<sup>32</sup> Section 766.309(1), F.S.

<sup>33</sup> Section 766.303(2), F.S., only allows a civil action in place of a claim under the plan where there is clear and convincing evidence of bad faith or malicious purpose or willful and wanton disregard of human rights, safety, or property.

<sup>34</sup> Section 766.309(2), F.S.

<sup>35</sup> Section 766.309(4), F.S.

<sup>36</sup> Section 766.311(1), F.S.

## 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.<sup>37</sup> 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.<sup>38</sup> 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.<sup>39</sup>

A financial audit is an examination of financial statements to determine whether the financial statements conform to generally accepted accounting principles. Its purpose is also to determine whether operations are properly conducted in accordance with legal and regulatory requirements.<sup>40</sup> 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 administering assigned responsibilities in accordance with applicable laws, administrative rules, contracts, grant agreements, and other guidelines.<sup>41</sup>

### III. Effect of Proposed Changes:

**Section 1** amends s. 766.301, F.S., to specify that the Florida Birth-Related Neurological Injury Compensation Plan (Plan) is not intended to serve as the payor of last resort for claims arising out of birth-related neurological injuries. This section also provides that it is not the intent of the Legislature to shield physicians who engage in willful misconduct, gross negligence, or recklessness or to preclude individuals from filing legitimate claims of medical malpractice against such physicians.

**Section 2** 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 who have been accepted in the Plan. The NICA must strive to ensure all of their medical reasonable needs are being met.

**Section 3** amends s. 766.305, F.S., to require the Division of Medical Quality Assurance of the Department of Health to conduct a review of claims in which the physician is involved in multiple claims to determine whether the physician's conduct establishes a pattern or practice subject to disciplinary action.

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<sup>37</sup> Section 11.42(2), F.S.

<sup>38</sup> Sections 11.45(2)(d)-(f), F.S.

<sup>39</sup> Section 11.45(7)(b), F.S.

<sup>40</sup> Section 11.42(1)(d), F.S.

<sup>41</sup> Section 11.42(1)(i), F.S.

**Section 4** amends s. 766.31, F.S., to increase the limit for periodic payments or a lump-sum payment of an award from \$100,000 to \$250,000, beginning January 1, 2021. Each January 1 thereafter, the award limit is increased by three percent. This section provides parents or legal guardians who have received an award of \$100,000 or less prior to January 1, 2021, and have a child currently in the Plan, will receive a supplemental payment to achieve a total payout of \$250,000. The additional payment may be made in a lump sum or in periodic payments as designated by the parents or legal guardians. Section 4 also increases the death benefit from \$10,000 to \$50,000.

Once an administrative law judge (ALJ) determines a child is eligible under the Plan, additional Plan services under the bill include, at a minimum, compensation be provided for the following actual expenses:

- Diapers and baby formula for the infant from the time of birth and pureed baby food or other baby food for the infant at the appropriate age or developmental stage.
- An annual benefit of up to \$5,000 for immediate family members residing with the infant for psychotherapeutic services.
- Transportation reimbursement for all necessary trips to the pharmacy each month for prescription fills.

Section 4 requires the Plan, within 20 days after the receipt of a request for payment of expenses, to:

- Pay the expenses;
- Notify the parents or legal guardians, or their designee, that specific additional information or documentation is needed to evaluate the request; or
- Notify the parents or legal guardians, or their designee, that the request for payment of expenses is denied.

**Section 5** amends s. 766.313, F.S., to extend the time that birth-related neurological injury compensation claims must be filed from five years to eight years.

**Section 6** creates s. 766.3135, F.S., to specify the NICA is responsible for reimbursement of actual expenses for medically necessary and reasonable services for a child under the Plan. The Plan is not intended to serve as a payor of last resort and the NICA may not hold itself out as such.

Section 6 provides the following Plan services:

- Requires the Plan to reimburse parents or legal guardians of Plan participants for any service, drug, equipment, or treatment at a reasonable rate if they submit a letter of medical necessity from a provider.
- Authorizes the Plan to establish an independent review process to determine whether the provider's determination of medical necessity was reasonable.
  - If the plan determines that the service, drug, equipment, or treatment was not medically necessary, the Plan may ask the parent or legal guardian to provide a second letter of medical necessity from another provider. If such letter is provided, the Plan may not take further action.



- If a second letter is not provided, the Plan may debit the reimbursement from future reimbursements.
- Authorizes the Plan to review and reimburse for experimental treatments using the same medical review process as above, and if a second letter is not provided, the Plan is not required to provide reimbursement.
- Allows reimbursement for the following expenses:
  - Medical, dental, and hospital care;
  - Habilitative services and training;
  - Mental health services;
  - Music or art therapy;
  - Family residential or custodial care;
  - Private nursing services or attendant care must be provided at a rate at least equal to the state or federal minimum wage, whichever is greater, and must be reimbursed at the same rate regardless of the setting in which the services or care is provided;
  - Medically necessary drugs, special equipment, and facilities;
  - Family support services, including mental health, for the immediate family members living with the child;
  - Travel related to the child's care;
  - Entertainment and other promotion of the child's mental and emotional well-being of at least \$1,500 per year; and
  - Nutrition and hygiene needs of the child.
- Requires the Plan to provide transportation assistance for the life of the child. The Plan must provide a reliable method of transportation for the care of the child or reimburse the cost of upgrading an existing vehicle to accommodate the child's needs not to be limited based on the child's age or weight.
- Requires the Plan to provide ongoing housing assistance for the life of the child that includes, but is not limited to:
  - Payment assistance for rent and utilities to cover the cost of any increase due to the accommodation of the child's condition and medical needs;
  - Reimbursement of moving costs; and
  - Payment assistance for home construction up to \$100,000.
- Requires the Plan to establish an online network portal for parents and legal guardians of children under the Plan to support one another and exchange information and resources. Access to the online network must be provided at no cost to parents and legal guardians.

**Section 7** amends s. 766.314, F.S., beginning January 1, 2022, and annually thereafter, to increase the annual assessments to be paid to fund the Plan required from nonparticipating (currently \$250), and participating physicians (currently \$5,000) and hospitals (currently \$50 per infant delivered in the hospital) by three percent.

**Section 8** creates s. 766.3145, F.S., to establish a code of ethics for specified employees of the NICA and members of the board of directors. Specifically, on or before July 1 of each year, employees of the NICA must sign and submit a statement attesting that they do not have a conflict of interest. As a condition of employment, all prospective employees must sign and submit to the NICA a conflict of interest statement.

The executive director, the ombudsman, senior managers, and members of the board of directors are subject to part III of ch. 112, F.S., (Code of Ethics for Public Officers and Employees), including, but not limited to, the code of ethics and the public disclosure and reporting of financial interests requirements.

This section prohibits a board member from voting on any measure:

- That would inure to his or her special private gain or loss;
- That he or she knows would inure to the special private gain or loss of any principal, parent organization, subsidiary of a corporate principal, or by whom he or she is retained; or
- That he or she knows would inure to the special private gain or loss of a relative or business associate of the public officer.

Before the vote is taken, the board member must publicly state to the board the nature of his or her interest in the matter from which he or she is abstaining from voting. Within 15 days after the vote occurs, the board member is required to disclose the nature of his or her interest as a public record in a memorandum filed with the person responsible for recording the minutes of the meeting, who must incorporate the memorandum in the minutes.

This section requires the executive director, senior managers, and board members to file disclosures with the Commission on Ethics and the Office of Insurance Regulation. At least quarterly, the executive director or his or her designee must submit to the Commission on Ethics a list of names of the members of the board of directors and senior managers subject to the public disclosure requirements.

The bill provides that an employee or board member may not knowingly accept, directly or indirectly, any gift or expenditure from a person or entity, or an employee or representative of such person or entity, which has a contractual relationship with the NICA or is under consideration for a contract. An employee or board member who fails to comply is subject to penalties provided in ss. 112.317 and 3173, F.S.

Lastly, this section prohibits a senior manager or executive director of the NICA who is employed on or after January 1, 2022, regardless of the date of hire, who subsequently retires or terminates employment from representing another person or entity before the NICA for two years after retirement or termination.

**Section 9** amends s. 766.315, F.S., to increase the number of directors on the NICA's board from five to seven and requires that at least one member of the board is a woman. In addition, of the seven members, the Chief Financial Officer must appoint one parent or legal guardian representative of an injured infant under the Plan and one representative of an advocacy organization for children with disabilities. This section prohibits a participating physician who is named in a pending petition for a claim from being appointed to the board. Also, an appointed director who is a participating physician may not vote on any board matter relating to a claim accepted for an award for compensation if the physician was named in the petition for the claim.

This section requires the board of directors to employ an ombudsman who will serve at the pleasure of, and must report directly to, the board and who will act as an advocate for the parents and legal guardians of Plan participants. The ombudsman must be do the following:

- Provide information and assistance, outreach, and education to parents and legal guardians of plan participants regarding Plan benefits and community, state, and federal government resources.
- Investigate complaints of parents or legal guardians of Plan participants regarding the operation of the Plan.
- Provide an annual report to the board regarding the ombudsman's activities, the disposition of complaints, and any recommendations to improve the operations of the Plan and the delivery of benefits to participants.

Section 9 requires, on or before January 31, 2022, and annually thereafter, the NICA to submit an annual report to the Governor, the President of the Senate, and the Speaker of the House of Representatives. The report must include:

- The number of petitions filed for compensation with the Division of Administrative Hearings (DOAH), the number of claimants awarded compensation, the number of claimants 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 reason 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.

For the initial report due on or before January 31, 2022, the bill requires an actuarial report conducted by an independent actuary that provides an analysis of the estimated costs of revising certain eligibility standards and benefits. Specifically, the actuarial report must include the analysis of implementing the following changes to the Plan:

- Reducing the minimum birth weight eligibility for a participant in the Plan from 2,500 grams to 2,000;
- 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; and
- Increasing the annual special benefit or quality of life benefit from \$500 to \$2,500 per calendar year.

**Section 10** requires the Auditor General, by January 15, 2022, to conduct a performance audit of the NICA and the Plan to evaluate management performance in administering the laws, policies, and procedures governing the operations of the NICA and the Plan in an efficient and effective manner. The audit must include evaluations of the following:

- Protocols used for the payment of expenses, including standards for determining medical necessity and reasonableness or requests for medical care, services, or other benefits provided under the Plan and the timeliness of the payment of expenses.
- Effectiveness of the NICA's outreach to inform parents and legal guardians of participants of available benefits and any changes in benefits and processes to resolve disputes regarding the payment of expenses internally.
- Efficacy of the current processes for the procurement of goods and services.
- Internal controls of the Plan and the NICA.

**Section 11** provides that ss. 766.301 through 766.316, F.S., establishing the NICA and the Plan and related provisions will stand repealed on December 31, 2026, unless the Legislature reviews and reenacts the provisions by that date.

**Section 1** provides that the amendments made to s. 766.31, F.S., by this act apply to claims filed under s. 766.305, F.S., on or after January 1, 2021.

**Section 13** provides that the bill is effective July 1, 2021.

#### **IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

To the extent the bill authorizes the increase of the annual assessments required to fund the Florida Birth-Related Neurological Injury Compensation Plan and such annual assessments are considered a “state tax or fee,” the requirements of Article VII, Section 19 of the Florida Constitution may apply. Under that section, a state tax or fee imposed, authorized, or raised must be contained in a separate bill that contains no other subject. A “fee” is defined by the Florida Constitution to mean “any charge or payment required by law, including any fee for service, fee or cost for licenses, and charge for service.”<sup>42</sup>

E. Other Constitutional Issues:

Once a bill becomes law, it is presumed to apply only prospectively. The presumption against retroactive application may be rebutted by clear evidence of legislative intent.<sup>43</sup> To determine if the terms of a statute and the purpose of the enactment indicate retroactive application, a court may consider the language, structure, purpose, and legislative history of the enactment.<sup>44</sup>

If the legislation clearly expresses an intent that the law should apply retroactively, then the second inquiry is whether retroactive application is constitutionally permissible.<sup>45</sup>

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<sup>42</sup> FLA. CONST. art. VII, s. 19(d)(1).

<sup>43</sup> *Florida Ins. Guar. Ass’n, Inc. v. Devon Neighborhood Ass’n, Inc.*, 67 So. 3d 187 (Fla. 2011).

<sup>44</sup> *Id.*

<sup>45</sup> *Menendez v. Progressive Exp. Ins. Co., Inc.*, 35 So. 3d 873 (Fla. 2010); *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55 (Fla. 1995).

Even when the Legislature has clearly expressed its intention that the statute be given a retroactive application, courts must refuse to do so if it impairs vested rights, creates new obligations, imposes new penalties,<sup>46</sup> or impairs an obligation of contract.<sup>47</sup> For example, ex post facto legislation, i.e., a law that expands criminal liability retroactively by either creating a new crime for past conduct or by increasing the penalty for past conduct, is forbidden by both the State Constitution and the United States Constitution. Statutes that do not alter vested rights, but relate only to remedies or procedure may be applied retroactively.<sup>48</sup>

## V. Fiscal Impact Statement:

### A. Tax/Fee Issues:

None.

### B. Private Sector Impact:

Increasing the cash payment limit from \$100,000 to \$250,000 and authorizing reimbursement of expenses not currently allowed would assist parents and legal guardians in meeting significant medical expenses and other necessary services and care of children with birth-related neurological injuries.

### C. Government Sector Impact:

#### **NICA Report<sup>49</sup>**

Florida Birth-Related Neurological Injury Compensation Association (NICA) engaged actuaries to evaluate the viability and likely impact of the proposed increase in parental award, which is authorized pursuant to s. 766.31(1)(b), F.S. The actuaries concluded that, if the payment were increased from \$100,000 to \$250,000, this would result in additional expected costs to the NICA of approximately \$2.70 million for the 2020 birth year. However, the actuaries noted:

[G]iven the current net assets of approximately \$393.2 million<sup>50</sup> plus the recent better than expected inflation levels, it is not likely this increase will significantly impact the overall financial position in the short-term. Given the erosion resulting from the impact of inflation on the parental award coupled with the current NICA financial position, we would recommend the proposed change from \$100,000 to \$250,000.

<sup>46</sup> *Id.*

<sup>47</sup> *Menendez v. Progressive Exp. Ins. Co., Inc.*, 35 So. 3d 873 (Fla. 2010).

<sup>48</sup> *Metropolitan Dade County v. Chase Federal Housing Corporation*, 737 So. 2d 494 (Fla. 1999).

<sup>49</sup> *Supra* note 15.

<sup>50</sup> Net assets were approximately \$426.5 million on June 30, 2020. Florida Birth-Related Neurological Injury Compensation Association, Financial Statements for years ended June 30, 2020 and 2019, pg. 5, available at <https://www.nica.com/downloads/2020%20NICA%20Audited%20Financial%20Statements.pdf> (last viewed Mar. 25, 2021).

The actuaries also noted that the NICA's financial position and the potential need for assessment level increases in the longer run would depend on actual investment results and inflation levels experienced over shorter term three to five year periods. The shortfall in assessments (i.e., without the additional investment income realized on the net assets and/or the better than expected inflation) and the indicated funding levels have in the past been offset by the better than expected realized the NICA investment returns and inflation rates. To the extent this favorable relationship continues, the actuaries contend that it is likely additional increases in assessment levels will not be required. Alternatively, the actuaries note that volatility in the prospective results or increases in benefit inflation levels may require assessment level increases at some point in the longer term.

Although the bill increases the cap or maximum amount of the one-time parental award from \$100,000 to \$250,000, the 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 the 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 most likely insignificant.

Additional provisions in the bill provide significant changes in the benefits offered in the Florida Birth-Related Neurological Injury Compensation Plan (Plan), which have an indeterminate significant fiscal impact and were not considered in the 2020 actuarial study. To the extent benefits exceed the assessments collected, and the appropriation of funds provided by ch. 88-277, s. 41, Laws of Florida, to the Plan from the Insurance Regulatory Trust Fund are insufficient to maintain the Plan on an actuarially sound basis, under current law the Office of Insurance Regulation is authorized to transfer an additional amount up to \$20 million to the NICA from the Insurance Regulatory Trust Fund reserve.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 766.301, 766.303, 766.305, 766.31, 766.313, 766.314, and 766.315.

This bill creates the following sections of the Florida Statutes: 766.3135 and 766.3145.

The bill creates undesignated sections of the Florida law.

**IX. Additional Information:**

- A. **Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS/CS by Appropriations on April 19, 2021:**

The committee substitute:

- Provides that it is not the intent for Birth-Related Neurological Injury Compensation Association (NICA) to serve as payor of last resort and it is not the intent to shield physicians who engage in certain activities from filing legitimate claims of medical malpractice against such physicians.
- Requires the NICA to administer the Birth-Related Neurological Injury Compensation Plan (Plan) in a manner that promotes the health and best interest of the Plan participants.
- Extends the time for filing a claim from five years to eight years.
- Requires the Division of Medical Quality Assurance of the Department of Health to conduct a review of claims in which a physician is involved in multiple claims to determine whether the physician's conduct establishes a pattern or practice subject to disciplinary action.
- Requires the Plan to reimburse parents or legal guardian of Plan participants for any service, drug, equipment, or treatment at a reasonable rate if they submit a letter of medical necessity from a provider.
- If the Plan determines that the service, drug, equipment or treatment was not medically necessary, the Plan must ask the parent or legal guardian to provide a second letter of medical necessity from another provider.
- Authorizes the Plan to review and reimburse for experimental treatments using the same medical review process, and if a second letter is not provided, the Plan is not required to provide reimbursement.
- Requires the Plan to reimburse private nursing staff or attendant care at a rate of at least equal to the greater of state or federal minimum hourly wage, regardless of setting.
- Requires the Plan to provide family support services, including mental health, for the immediate family members living with the child.
- Requires the Plan to provide quality of life reimbursement for entertainment and other activities that promote mental health of at least \$1,500 per year.
- Requires the Plan to provide transportation assistance for the care of the child or reimburse the cost of upgrading an existing vehicle to accommodate the child's needs.
- Requires the Plan to provide ongoing housing assistance for the child that includes, but is not limited to:
  - Payment assistance for rent and utilities to cover the cost of any increase due to the accommodation of the child's condition.
  - Reimbursement of moving costs.
  - Payment assistance for home construction up to \$100,000.
- Requires the Plan to reimburse without any limitations expenses for diapers, baby food, and formula.

- Increases the annual assessment for hospitals, nonparticipating and participating physicians.
- Provides an annual benefit of \$5,000 for parents and legal guardians of Plan participants for counseling.
- Provides reimbursement for transportation for all necessary trips for prescription refills.
- Creates code of ethics for specified staff and members of the board of directors.
- Increases board membership from five to seven members by adding a parent or legal guardian of a Plan participant and a representative of an advocacy organization for children with disabilities.
- Requires the NICA to submit an annual report to the Governor, the President of the Senate, and the Speaker of the House of Representatives. The first annual report must include an actuarial analysis of the fiscal impacts of revising certain eligibility standards and benefits.
- Requires the Auditor General to conduct an audit of the NICA.
- Provides a sunset on December 31, 2026, of the NICA and the Plan, unless the Legislature reviews and reenacts the provisions by that date.

**CS by Health Policy on March 24, 2021:**

The CS increases the death benefit for an infant from \$10,000 to \$50,000. An ALJ must award this death benefit if he or she determines that the infant died due to a birth-related neurological injury and obstetrical services were delivered by a physician participating in the plan at the time of birth. Like the changes made in the underlying bill, the increased death benefit under the CS would apply to claims filed on or after January 1, 2021.

**B. Amendments:**

None.