# HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 3 Florida Birth-Related Neurological Injury Compensation Plan
**SPONSOR(S):** Berfield; Goldstein
**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 542

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR |
|---|---|---|---|
| 1) Civil Justice Committee | 5 Y, 0 N | Kruse | Bond |
| 2) Health Care General Committee | | Ciccone | Brown-Barrios |
| 3) Finance & Tax Committee | | | |
| 4) Justice Council | | | |
| 5) | | | |

## SUMMARY ANALYSIS


The Florida Birth-Related Neurological Injury Compensation Plan (plan) is the alternative to medical malpractice claims for birth-related neurological injuries. The plan provides compensation and other services to persons with birth-related neurological injuries. The benefits are more restricted than the remedies that would be provided by tort law, but a claimant is not required to prove malpractice. One issue that arises in cases to determine whether a family is required to file for benefits under the plan is whether the mother was properly notified regarding the plan.

This bill provides that the Division of Administrative Hearings has the exclusive jurisdiction to decide whether the statutory notice provision has been met.

Additionally, the bill authorizes the Florida Birth-Related Neurological Injury Compensation Association (NICA), which administers the plan, to contract with the State Board of Administration to invest and reinvest plan funds. NICA currently has authority to invest plan funds, and the bill provides that the State Board of Administration is one of the entities with whom NICA may contract for this service.

This bill does not appear to have a fiscal impact on state or local governments.

This bill provides an effective date of upon becoming law.

## FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

This bill does not appear to implicate any of the House Principles.

B. EFFECT OF PROPOSED CHANGES:

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

The Florida Birth-Related Neurological Injury Compensation Plan (the "plan") was enacted by the Legislature in 1988.[1] Currently, Virginia is the only other state in the nation that has a no-fault coverage plan that is similar to Florida's plan.[2] The plan was created to provide compensation, long-term medical care, and other services to persons with birth-related neurological injuries. Although the benefits paid under the plan are more restricted than the remedies provided by tort law, the plan does not require the claimant to prove malpractice and provides a streamlined administrative hearing to resolve the claim.[3]

A "birth-related neurological injury" as defined in s. 766.302(2), F.S., is an injury to the brain or spinal cord of a live infant weighing at least 2,500 grams for a single gestation or, in the case of a multiple gestation, a live infant weighing 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 postdelivery period in a hospital. The injury must render the infant permanently and substantially mentally and physically impaired.

**Florida Birth-Related Neurological Injury Compensation Association (NICA)**

The entity charged with administering the plan is the Florida Birth-Related Neurological Injury Compensation Association (NICA or association). Under s. 766.315(4), F.S., NICA's duties include:

- Administering the plan;
- Administering the funds collected;
- Reviewing and paying claims;
- Directing the investment and reinvestment of any surplus funds over losses and expenses;
- 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; and
- Taking such legal action as may be necessary to avoid payment of improper claims.[4]

The funding for the plan is derived from an appropriation by the Legislature when the plan was created and annual fees paid by physicians and hospitals.[5]

The plan pays, on behalf of a qualifying infant:

- Necessary and reasonable care, services, drugs, equipment, facilities, and travel;[6]

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[1] Chapter 88-1, ss. 60-75, L.O.F., was enacted by the Legislature in an attempt to stabilize and reduce malpractice insurance premiums for physicians practicing obstetrics, according to the legislative findings and intent cited in s. 766.301(1)(c), F.S.
[2] Governor's Select Task Force on Healthcare Professional Liability Insurance, *Report and Recommendations*, p. 307 (2003).
[3] See *Florida Birth-Related Neurological Injury Compensation Ass'n v. McKaughan*, 668 So.2d 974, 977 (Fla. 1996).
[4] Section 766.315(4), F.S.
[5] Section 766.314, F.S., requires non-participating physicians to pay $250 per year, participating physicians to pay $5,000 per year, and hospitals to pay $50 per infant delivered during the prior year.
[6] Expenses that can be compensated by state or federal governments, or by private insurers, are not covered by the plan.

- One-time cash award, not to exceed $100,000, to the infant's parents or guardians;[7]
- Death benefit of $10,000 for the infant; and
- Reasonable expenses for filing the claim, including attorney's fees.

**Filing a Claim for Benefits**

A claim for benefits under the plan must be filed within five years of the birth of the infant alleged to be injured.[8] The parents or guardian of the infant files a petition with the Division of Administrative Hearings (DOAH). DOAH serves a copy of the petition upon NICA, the physician(s) and hospital named in the petition, and the Division of Medical Quality Assurance.[9] Within ten days of filing the petition, the parents or guardian must provide 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. An administrative law judge (ALJ) from DOAH will set a hearing on the claim to be conducted 60-120 days from the petition filing date.

The issue of whether the claim for compensation is covered by the plan is determined exclusively in an administrative proceeding.[10] 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; and
- How much compensation, if any, is awardable under s. 766.31, F.S.[11]

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.[12] If the ALJ determines that the injury alleged is not a birth-related neurological injury or that the obstetrical services were not delivered by a participating physician, the ALJ will enter an order to that effect. The ALJ may also bifurcate the proceeding and address compensability and notice first, and address an award, if any, in a separate proceeding.[13] 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.[14]

**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 also provides that notice does not need to be provided to a patient when the patient has an emergency medical condition or when notice is not practicable. This section does not specifically address the effect of failure to provide notice to the obstetrical patient.

Courts have addressed the issue of who determines whether notice has been properly provided. Four of the five District Courts of Appeal have held that the ALJ has the exclusive jurisdiction to determine whether notice has been properly provided. However, in the Second District Court of Appeal, in

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[7] 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.
[8] Section 766.313, F.S.
[9] Only infants born in a hospital are covered by the plan.
[10] Section 766.301(1)(d), F.S.
[11] Section 766.309(1), F.S. The determination of notice is not explicitly provided for in this section.
[12] 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.
[13] Section 766.309(4), F.S.
[14] Section 766.311(1), F.S.

*Bayfront Medical Center, Inc. v. NICA*, 893 So. 2d 636 (Fla. 2nd DCA 2005), the court affirmed its approach that the ALJ's jurisdiction extends only to the determination of whether the child suffered a neurological injury that was compensable under the plan. The court recognized the conflict with the other district courts of appeal, but declined to recede from its holding and certified the conflict to the Florida Supreme Court.[15] In *Tabb v. Florida Birth-Related Neurological Injury Compensation Association*, 880 So. 2d 1253, 1256 (Fla. 1st DCA 2004), the First District Court of Appeal reasoned that "[i]n order to 'hear and determine' a claim, an ALJ must, almost of necessity, decide whether notice was given, because if no notice was given, the exclusivity provision of the statute does not apply." In addition, the court pointed to recent amendments to the statute that implicitly acknowledge the existing case law indicating that an ALJ has jurisdiction to determine whether notice was provided.

**Effect of Bill**

Notice

This bill amends s. 766.309(1), F.S., to provide that it is the exclusive jurisdiction of an administrative law judge of DOAH to determine whether the notice requirement in s. 766.316, F.S., has been met.

The bill also states that it is the intent of the Legislature that the amendment contained in this act clarifies that since July 1, 1998, the administrative law judge has had the exclusive jurisdiction to make factual determinations as to whether the notice requirements in s. 766.31, F.S., are satisfied.

Contracts for Investment

This bill also authorizes NICA, which administers the plan, to contract with the State Board of Administration[16] to invest and reinvest plan funds. NICA currently has the authority to invest plan funds, and this bill authorizes NICA to utilize the State Board of Administration to provide NICA an additional source for managing investments at no cost to the state.

C. SECTION DIRECTORY:

**Section 1.** Amends s. 766.309, F.S., to provide that an administrative law judge of DOAH has the exclusive jurisdiction to determine whether the notice requirement in s. 766.316, F.S., has been met.

**Section 2.** Provides that it is the intent of the Legislature that the amendment contained in this act clarifies that since July 1, 1998, an administrative law judge of DOAH has had the exclusive jurisdiction to make factual determinations as to whether the notice requirements in s. 766.31, F.S., are satisfied.

**Section 3.** Amends s. 766.315, F.S., to authorize the State Board of Administration to invest and reinvest funds for NICA.

**Section 4.** Provides an effective date of upon becoming a law.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.
2. Expenditures:

   None.

[15] *Bayfront* at 637, 638.
[16] The State Board of Administration (SBA) is the professional investment organization for Florida. The SBA manages 25 funds, comprising more than $130 billion in assets under management at the end of fiscal year 2004.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

## III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to take an action requiring the expenditure of funds, nor does it reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor does it reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Florida courts have found that the Legislature has the authority to apply law retroactively as long as the new law does not impair a vested right.[17] Courts have used a weighing process to decide whether to sustain the retroactive application of a statute that has three considerations: the strength of the public interest served by the statute, the extent to which the right affected is abrogated, and the nature of the right affected.[18] In this instance, the bill does not appear to impair a vested right of a claimant or defendant, but may rather seek to serve the public interest. The bill provides that an administrative law judge (ALJ) of DOAH has exclusive jurisdiction to determine if the notice requirements were met.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

## IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

None.

[17] *Dept. of Transportation v. Knowles*, 402 So. 2d 1155, 1157 (Fla. 1981). *Village of El Portal v. City of Miami Shores*, 362 So. 2d 275, 277 (Fla. 1978); *McCord v. Smith*, 43 So. 2d 704, 708-709 (Fla. 1949).
[18] Supra *Knowles* at 1158.