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INSURANCE REGULATION
Docketed by: ke

OFFICE OF INSURANCE REGULATION

DAVID ALTMAIER
COMMISSIONER

IN THE MATTER OF:

CASE NO.: 288629-21

FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY
COMPENSATION ASSOCIATION

ORDER APPROVING AMENDMENTS TO PLAN OF OPERATION

The Florida Birth-Related Neurological Injury Compensation Association (NICA) submitted to the Office of Insurance Regulation (OFFICE) for review and approval, pursuant to and in compliance with Section 766.314, Florida Statutes, amendments to its Plan of Operation.

The OFFICE, having considered the information submitted by NICA and being otherwise fully advised in the premises finds that:

1. The OFFICE has jurisdiction over the parties and subject matter of these proceedings.
2. NICA has been established in accordance with the provisions of Section 766.315, Florida Statutes.
3. Pursuant to Section 766.314, Florida Statutes, NICA shall operate pursuant to a plan of operation approved by the OFFICE.
4. The amended plan of operation (Plan) of NICA is attached as Exhibit A.
5. The amendments to the plan are made in compliance with substantial statutory revisions to the NICA statute in 2021.

6. The amendments to the Plan include expansion of the Board from five to seven members, including a parent and a representative of an organization advocating for disabled children. Other changes include expanding the notice and agenda requirements for meetings, new ethics requirements for NICA employees, and substantial changes to the Claims Manual, including the rights of parents to administrative appeals. There are also significant changes to the eligibility for, nature of, and amount of benefits outlined, as well as assessment rates and methods for physicians and hospitals.

7. All of the amendments shall be incorporated by reference and not necessarily listed specifically in this Order.

WHEREFORE, in consideration of the foregoing and being otherwise duly advised in the premises, it is hereby ORDERED:

That all amendments to the Plan of Operation of NICA, the full Plan of which is attached to this Order with all amendments as Exhibit A, are hereby APPROVED.

DONE AND ORDERED this 7th day of September, 2022.



David Altmaier

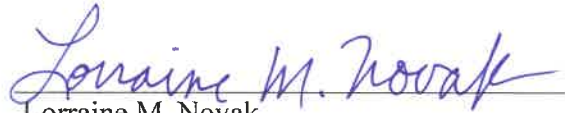
David Altmaier, Commissioner
Office of Insurance Regulation

NOTICE OF RIGHTS

Any party to these proceedings adversely affected by this Order is entitled to seek review of this Order pursuant to Section 120.68, Florida Statutes, and Rule 9.110, Fla.R.App.P. Review proceedings must be instituted by filing a petition or notice of appeal with the General Counsel of the Office of Insurance Regulation, acting as the Agency Clerk, at 612 Larson Building, Tallahassee, Florida 32399-4206, and a copy of the same with the appropriate district court of appeal, within thirty (30) days of rendition of this Order.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order Approving Amendments to Plan of Operations has been furnished by Certified Mail, Return Receipt Requested, to Jim DeBeaugrine, Interim Chair, NICA, P.O. Box 14567, Tallahassee, Florida 32317-4567, and by email at jdebeaugrine@nica.com, on this 7th day of September, 2022.



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THE FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PLAN

PLAN OF OPERATION

SECTION 1. PURPOSE

The Florida Birth-Related Neurological Injury Compensation Association (the “Association” and/or “NICA”) was established in accordance with the provisions of Section 766.315, Florida Statutes, as amended, to administer the Florida Birth-Related Neurological Injury Compensation Association Plan (the “Plan”) and the Plan of Operation established in Section 766.314, Florida Statutes, as amended.

The purpose of the Plan of Operation is to provide for the efficient administration of the Florida Birth-Related Neurological Injury Compensation Association and for the prompt processing of claims against any awards made on behalf of the Plan.

SECTION 2. DEFINITIONS

A. “Assessment Year” means the period from January 1st through December 31st of each calendar year.

B. “Association” means the Florida Birth-Related Neurological Injury Compensation Association established in Section 766.315, Florida Statutes, as amended, to administer the Florida Birth-Related Neurological Injury Compensation Plan and the Plan of Operation established in Section 766.314, Florida Statutes, as amended.

C. “Birth-Related Neurological Injury” means 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 mechanical injury occurring in the course of labor, delivery or resuscitation in the immediate post-delivery period in the hospital, which renders the infant permanently and substantially mentally and physically impaired. This definition shall apply to live births only and shall not include disability or death caused by genetic or congenital abnormality.

D. “Board” means the Board of Directors of the Florida Birth-Related Neurological Injury Compensation Association appointed by the Chief Financial Officer pursuant to Section 766.315 Florida Statutes, as amended.

E. “Brain” means that portion of the cerebro-spinal axis that is contained within the cavity of the cranium and that consists of five major parts including the cerebral hemispheres, cerebellum, brain stem, and midbrain.

F. “Claimant” means any person who files a claim pursuant to Section 766.305, Florida Statutes, as amended, for compensation for a birth-related neurological injury to an infant. A claim may be filed by any legal representative who files a claim on behalf of an injured infant;

and, in the case of a deceased infant, by an administrator, personal representative or other legal representative of the deceased infant.

G. "Administrative Law Judge" means an administrative law judge appointed by the Division of Administrative Hearings.

H. "Delivery" is the moment when the fetus is expelled from the vaginal canal or mechanically removed from the uterus.

I. "Division" means Division of Administrative Hearings of the Department of Management Services.

J. "Florida Birth-Related Neurological Injury Compensation Plan," hereinafter referred to as the "Plan," means the program administered by the Florida Birth-Related Neurological Injury Compensation Association established pursuant to Section 766.303, Florida Statutes, as amended, for the purpose of providing compensation, irrespective of fault, for birth-related neurological injury claims for births occurring on or after January 1, 1989.

K. "Hospital" means any hospital licensed in Florida pursuant to Chapter 395, Florida Statutes.

L. "Labor" generally means the process by which the fetus is expelled from the uterus through the vagina, beginning with the onset of regular uterine contractions (generally at 10-to-15-minute intervals) that increase in frequency and grow more painful with time, and that result in the progressive dilation or effacement or delivery of the infant and placenta.

M. "Participating Physician" means a physician licensed in Florida to practice medicine who practices obstetrics or performs obstetrical services either full time or part time, and who has paid, or was exempted from payment at the time of the injury, the assessment required for participation in the birth-related neurological injury compensation plan for the year in which the injury occurred. This term does not apply to any physician who practices medicine as an officer, employee, or agent of the Federal Government.

N. "Permanent and substantial mental and physical impairment" means a neurological injury caused by oxygen deprivation or mechanical injury during labor, delivery, or resuscitation in the immediate post-delivery period in a hospital that leaves the infant both mentally and physically impaired.

O. "Permanently" as used in the phrase "permanently and substantially mentally and physically impaired" means that it must be determined that the neurological injury will exist throughout the life of the affected infant within a reasonable degree of medical probability.

P. "Substantially" as used in the phrase "permanently and substantially mentally and physically impaired" denotes a "catastrophic" mental and physical injury, as opposed to one that might be described as "mild" or "moderate."

Q. "Spinal Cord" refers to the ovoid column of neural tissue extending caudally from the level of the medulla oblongata to the fourth sacral dermatome.

SECTION 3. ADMINISTRATION

A. Board of Directors

The Plan shall be governed by a Board of Directors that shall be known as the "Florida Birth-Related Neurological Injury Compensation Association." The directors serve without salary, but each director is entitled to receive reimbursement for actual and necessary expenses incurred in the performance of official duties as a director of the Plan, in accordance with Section 112.061, Florida Statutes.

The Board shall consist of seven (7) members selected and appointed by the Chief Financial Officer as mandated in section 766.315, Florida Statutes, as follows:

- One citizen representative who is not affiliated with any of the groups set forth below;
- One representative of the participating physicians whom the Chief Financial Officer may select from a list of at least three (3) names recommended to him by the American Congress of Obstetricians and Gynecologists, District XII. [Note: A participating physician who is named in a pending petition for a claim may not be appointed to the Board];
- One representative of hospitals selected by the Chief Financial Officer from a list of at least three (3) names recommended to him by the Florida Hospital Association;
- One representative of casualty insurers selected by the Chief Financial Officer from a list of at least three (3) names, one of whom is recommended by the American Insurance Association, one of whom is recommended by the Florida Insurance Council and one of whom is recommended by the Property Casualty Insurers Association of America;
- One representative of physicians other than participating physicians whom the Chief Financial Officer selects from a list of at least three (3) names recommended to him by the Florida Medical Association and at least three (3) names recommended to him by the Florida Osteopathic Medical Association;
- One parent or legal guardian representative of an injured infant under the Plan; and
- One representative of an advocacy organization for children with disabilities.

The Chief Financial Officer shall not be bound to accept any of the recommendations made by any of the groups referenced above relating to the appointment of Board members.

B. Terms

The members of the Board are appointed to serve three (3) year terms except that the initial appointments shall be staggered terms. A director may not serve for more than six (6) consecutive years.

The Governor or Chief Financial Officer may remove a director from office for misconduct, malfeasance, misfeasance, or neglect of duty in office. Vacancies on the Board are to be filled as specified in section 766.315, Florida Statutes. If any vacancy on the Board should arise, the Board shall notify the Chief Financial Officer. Where applicable, the Chief Financial Officer shall promptly notify the appropriate associations or persons identified in section 766.315, Florida Statutes that a position has been vacated, which in turn shall make recommendations to the Chief Financial Officer for filling the vacancy. The Chief Financial Officer shall not be bound to accept any or all of the recommendations made.

C. Officers

The Chief Financial Officer shall select the Chair of the Board and the Board may appoint one of its members to serve as Vice Chair. Other officers, as deemed necessary, shall be elected by the Board from among its members. Any vacancy in the office of the Chair or Vice Chair shall be filled at the earliest convenient time after such vacancy occurs in the same manner as appointed. The Chair shall preside at all meetings and shall discharge such other duties incidental to the office as the Association may require.

D. Meetings

The Chair shall call all meetings of the Board. The Board shall meet as necessary. At any meeting of the Board, each Board member shall have one (1) vote. An appointed director who is a participating physician, however, may not vote on any board matter relating to a claim accepted for an award for compensation if the physician is named in the petition for the claim. *See also Section 1. K. - Code of Ethics below for other restrictions on member votes.*

The Board shall transact business or exercise any power of the Plan only upon the affirmative vote of at least four (4) Directors.

All meetings of the Board of Directors are subject to the requirements of section 286.011, Florida Statutes. The Board may adopt rules of procedure governing the conduct of its meetings as it deems necessary.

E. Meeting Agenda/Public Notice/Minutes

Except in the case of emergency meetings, NICA shall give notice of any Board meeting by publication of such notice on NICA's website not fewer than seven (7) days prior to the meeting. NICA shall prepare an agenda for the meeting in sufficient time to ensure that a copy of the agenda may be received at least 7 days before the meeting by any person who requests a hard copy. NICA may charge a reasonable cost for the hard copy of the agenda.

The agenda shall contain items to be considered in order of presentation and a telephone number for members of the public to participate telephonically at the board meeting. After the agenda has been made available, no changes shall be made except for good cause as determined by the Chair of the Board or his designee presiding over the meeting. A statement must be made

on the record regarding the finding of good cause to allow a change in the agenda. Notification of any such change must be provided at the earliest practicable time.

The agenda, along with any meeting materials available in electronic form, excluding confidential and exempt information, shall be published on NICA's website. Minutes shall be made of all meetings of the Board and shall be submitted for ratification by the Board at the next meeting following the meeting for which the minutes were made. Once approved, the minutes shall be posted on NICA's website.

F. Powers and Duties

The Board has the power to:

- Administer the Plan.
- 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, if any investment income generated thereby remains credited to the Plan.
- Reinsure the risks of the Plan in whole or in part.
- Sue and be sued, and appear and defend, in all actions and proceedings in its name to the same extent as a natural person. However, the Board does not waive sovereign immunity, except to the extent necessary to pay claims.
- Have and exercise all powers necessary or convenient to affect any or all 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 and to perform other necessary and proper functions not prohibited by law.
- Take such legal action as may be necessary to avoid payment of improper claims.
- Indemnify any employee, agent, member of the Board of Directors or alternate thereof, or person acting on behalf of the Plan in an official capacity for expenses, including attorney fees, judgments, fines, and amounts paid in settlement actually and reasonably incurred in connection with any action, suit, or proceeding including any appeal thereof arising out of such person's capacity to act on behalf of the Plan, if such person acted in good faith and in a manner he reasonably believed to be in, or not opposed to, the best interest of the Plan and the health and best interest of the child having birth-related neurological injuries, and if, with respect to any criminal action or proceeding, such person had reasonable cause to believe his conduct was lawful.

G. NICA Office(s)

The office space and physical facilities necessary to implement and maintain the Plan shall be located at such location within the State of Florida as the Board may designate. The mailing address for correspondence submitted incidental to this Plan is:

The Florida Birth-Related Neurological
Injury Compensation Association
2252 Killearn Center Blvd.
2nd Floor
Tallahassee, FL 32309

H. Service on the Plan

The agent designated to accept service on behalf of the Association is:

Executive Director
The Florida Birth-Related Neurological
Injury Compensation Association
2252 Killearn Center Blvd.
2nd Floor
Tallahassee, FL 32309

The Board may change the designation of its agent at any of its regularly scheduled meetings; however, such change in designation shall become effective only upon notification to the Florida Office of Insurance Regulation.

I. Executive Director

The Board will employ an Executive Director who shall serve as chief administrative staff person and shall be responsible for the day-to-day operation of the Association, as well as for such services and duties as shall be assigned by the Board. At all times, the Executive Director shall account to and serve at the pleasure of the Board. As a condition of employment for the positions of Executive Director or Deputy Director, the Board shall conduct a background investigation.

The Executive Director shall have the authority to fill staff positions authorized by the Association and to terminate any employee in accordance with policies established by the Association, except for the Deputy Director, who may be terminated only upon the affirmative vote of at least four (4) members of the Board. The Executive Director shall also have the authority to contract for such services as are necessary and authorized by the Board in furtherance of the Plan.

J. Claims Manual

The Executive Director will develop and maintain a claims procedures manual, which will include payment procedures, a benefit schedule, a dispute resolution system, and other procedures to assure timely and reasonable payment of claims. The Board will review and approve the claims procedures manual. The Board acknowledges that if parents and/or legal guardians dispute the amount of actual expenses reimbursed by NICA or NICA's denial of reimbursement, those parents and/or legal guardians may file a petition with the Division of Administrative Hearings to resolve such dispute.

K. Code of Ethics

Section 766.3145, Florida Statutes, sets forth the code of ethics applicable to NICA. Section 766.3145 is summarized below:

- On or before July 1 annually, NICA employees must sign and submit a statement attesting that they do not have a conflict of interest as defined in part III or chapter 112. As a condition of employment, all prospective employees must sign and submit to NICA a conflict-of-interest statement. The Executive Director shall develop a conflict-of-interest statement for use in fulfilling this mandate.
- Members of the Board of Directors, the Executive Director and senior managers are subject to the code of ethics under part III of chapter 112. For purposes of applying part III of chapter 112 to activities of the members of the Board of Directors, the Executive Director and senior managers, those persons are considered public officers or employees and NICA is considered their agency.
- Notwithstanding s. 112.3148, s. 112.3149 or any other law, a Board Member, the Executive Director, senior managers, and NICA employees shall 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, that has a contractual relationship with NICA or that is under consideration for a contract. An employee or Board Member who fails to comply with this requirement is subject to penalties as set forth in section 766.3145, Florida Statutes.
- A board member may not vote on any measure that would inure to his or her special private gain or loss and, notwithstanding s. 112.3143(2), may not vote on any measure he or she knows would inure to the special private gain or loss of any principal by whom he or she is retained or to the parent organization or subsidiary of a corporate principal by which he or she is retained, other than an agency as defined in section 112.312; 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, such member shall publicly state to the board the nature of his or her interest in the matter from which he or she is abstaining from voting and, within 15 days after the vote occurs, 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 shall incorporate the memorandum into the minutes. The forms adopted by the Florida Commission on Ethics, as may be amended from time to time, shall be utilized for purposes of filing the memorandum. Any Board Member who fails to comply with this requirement is subject to penalties as set forth in section 766.3145(4), Florida Statutes.

- NICA employees are not eligible to serve on NICA's Board of Directors while employed with the Association.

- Any Executive Director or senior manager of NICA who is employed on or after January 1, 2022, regardless of the date of hire, and who subsequently retires or terminates employment is prohibited from representing another person or entity before NICA for a period of two (2) years after such retirement or termination of employment from NICA.

SECTION 4. BENEFITS TO NICA FAMILIES

The benefits available under the Plan are set forth in section 766.31, Florida Statutes, and are paid pursuant to a NICA Award entered by an Administrative Law Judge at the Division of Administrative Hearings.

Annually, NICA shall furnish to each parent and legal guardian receiving benefits under the Plan, either by mail or electronically, a list of expenses compensable under the Plan. NICA shall also publish a report on its website by January 1, 2022, and every January 1 thereafter, addressing the following issues/topics:

- (a) The names and terms of each board member and executive staff member.
- (b) The amount of compensation paid to each association employee.
- (c) A summary of reimbursement disputes and resolutions.
- (d) A list of expenditures for attorney fees and lobbying fees.
- (e) Other expenses to oppose each plan claim. Any personal identifying information of the parent, legal guardian, or child involved in a claim must be removed from this list.

On or before November 1, 2021, and by each November 1 thereafter, the Association shall submit a report to the Governor, the President of the Senate, the Speaker of the House of Representatives, and the Chief Financial Officer. This report must include:

- (a) The number of petitions filed for compensation with the [Division of Administrative Hearings], the number of claimants awarded compensation, the number of claimants denied compensation, and the reasons for the denial of compensation.
- (b) 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.
- (c) The average turnaround time for paying or denying compensation for expenses.
- (d) Legislative recommendations to improve the program.
- (e) A summary of any pending or resolved litigation during the year that affects the plan.
- (f) The amount of compensation paid to each association employee or member of the Board of Directors.
- (g) For the initial report due by November 1, 2021, an actuarial report conducted by an independent actuary providing an analysis of the estimated costs of implementing the following changes to the plan:

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

- 2) Revising the eligibility for 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.
- 3) Increasing the annual special benefit or quality of life benefit from \$500 to \$2,500 per calendar year.

SECTION 5. ASSESSMENT OF PERSONS AND ENTITIES

A. Hospitals

Each hospital licensed under Chapter 395, Florida Statutes, must pay into the Association an annual assessment of \$50.00 per live-birth infant delivered at the hospital during the prior calendar year, as reported to the Agency for Health Care Administration, and adjusted by the proportional increase determined to be necessary by the Office of Insurance Regulation. The Association will assess hospitals for the assessment for the prior calendar no later than October 15 of each year. The Assessment must be paid by the hospital by December 1 of each year. See §766.314(4)(a), Fla. Stat.

A hospital owned or operated by the state or a county, special taxing district, or other political subdivision of the state is not required to pay the initial assessment or any annual assessment.

Any infant born to a charity patient (as defined by rule of the Agency for Health Care Administration) or born to a patient for whom the hospital receives Medicaid reimbursement, if the sum of the annual charges for charity patients plus the annual Medicaid contractuals of the hospital exceeds ten percent (10%) of the total annual gross operating revenues of the hospital, should not be considered in calculating the amount of the required annual or increased assessment. The hospital is responsible for documenting the exclusion of any birth from the computation of the assessment and the Association shall be entitled to review the appropriateness of any excluded birth.

B. Non-Participating Physicians

All physicians licensed pursuant to Chapter 458 (Medical Practice) or Chapter 459 (Osteopathic Medicine), Florida Statutes, as of October 1 of each year shall be assessed by the Association the sum of \$250.00, which must be paid by the physicians no later than December 1 of each year.

Any non-participating physician who becomes licensed must pay into the Association an initial assessment of \$250.00 upon licensure; however, a physician who is either a resident physician, assistant resident physician, or intern in an approved post-graduate training program, as defined by the Board of Medicine or the Board of Osteopathic Medicine, by rule, is not required to pay an assessment. Section 766.314(4)(b)4., Florida Statutes, sets forth other limited circumstances in which the assessment is not applicable.

C. Participating Physicians

On or before December 1 of each year, each physician licensed pursuant to Chapter 458 or Chapter 459, Florida Statutes, who wishes to participate in the Plan for the following year and who otherwise qualifies as a participating physician under Section 766.301-766.316, Florida Statutes, as amended, must pay into the Association an assessment of \$5,000.

A physician may not participate as a participating physician and shall not be entitled to coverage under the Plan until actual payment of the required assessment has been physically received by the Association and credited to the Plan. Coverage begins when payment of the assessments is made to the Association. See §766.314(4)(c), Fla. Stat. If payment of the annual assessment by a physician is received by the Association by January 31 of any calendar year, the physician shall qualify as a participating physician for that entire calendar year. If the payment is received after January 31 of any calendar year, the physician shall qualify as a participating physician for that calendar year only from the date the payment was received by the Association.

Participating physicians also include any employee of the Board of Trustees of a state university who has paid the annual assessment required by statute for participation in the Plan and any certified nurse midwife supervised by such employee. See §766.314(4)(c), Fla. Stat.

Participating physicians also include any certified nurse midwife who has paid 50 percent of the physician annual assessment required by statute for participating in the Plan and who is supervised by a participating physician who has paid the annual assessment for participating in the Plan. Supervision for nurse midwives shall require that the supervising physician will be easily available and have a prearranged plan of treatment for specified patient problems that the supervised certified nurse midwife may carry out in the absence of any complicating features. See §766.314(4)(c), Fla. Stat.

D. Residents and Interns Deemed as Participating Physicians.

If the physician is either a resident physician, an assistant resident physician, or an intern in an approved post-graduate training program, as defined by the Board of Medicine or the Board of Osteopathic Medicine, by rule, and is supervised in accordance with program requirements established by the Accreditation Council for Graduate Medical Education by a physician who is participating in the Plan, such resident physician, assistant resident physician, or intern will be deemed by the Association to be a participating physician without the necessity for paying the assessment. See §766.314(4)(c), Fla. Stat.

E. Additional Assessments

The Office of Insurance Regulation, based on consideration of previous assessments and appropriations as described in Section 766.314, may determine that additional assessments are necessary in order to maintain the Plan on an actuarially sound basis. Additional assessments determined by the Office of Insurance Regulation to be necessary shall be on a proportional basis. See §766.314(7)(b), Fla. Stat.

If, upon the presentation of information related to the actuarial soundness of the Plan, the Board determines that the assessments collected pursuant to Section 766.314(4), Florida Statutes, as amended, and all other appropriations set forth and appropriated to the Plan pursuant to Section 766.314, Florida Statutes, as amended, are not sufficient to maintain the Plan on an actuarially sound basis, then the Board may recommend to the Chief Financial Officer that the assessments set forth at Section 766.314(5)(c), Florida Statutes, as amended, be implemented in the form of an annual assessment to be authorized and determined solely within the discretion of the Office of Insurance Regulation in accordance with Section 766.314(7)(a), Florida Statutes, as amended. Such assessment shall be determined in accordance with those administrative procedures generally utilized in the determination of insurance rate adjustments.

The Association shall notify the agency specified in section 766.314, Florida Statutes, of any change in the assessment rates so that it can make initial assessments on newly licensed physicians at the rate determined necessary by the Office of Insurance Regulation.

If the assessments paid by the physicians and hospitals and the initial legislative appropriations set forth in the NICA Statute are not sufficient to maintain the Plan on an actuarially sound basis, the Association shall be prepared to receive an additional amount of up to \$20 million from the Chief Financial Officer's Regulatory Trust Fund. See §766.314(5)(b), Fla. Stat.

F. Invoice/Payment

The Association will assess hospitals and participating and non-participating physicians for the assessment year no later than October 15 preceding the beginning of the assessment year. Assessments must be paid by December 1.

The Association has the responsibility for enforcing collection of such assessments by legal process in accordance with Section 766.314(6)(b)1., Florida Statutes. The Association shall notify the agency set forth in section 766.314(6), Florida Statutes, of all physicians who have not timely paid their assessments and who have an unsatisfied judgment against them. See §766.314(6)(b)2., Fla. Stat.

The Association shall notify the Agency for Health Care Administration of all hospitals that have not timely paid their assessments. The Agency for Health Care Administration has the responsibility for enforcing collection of such assessments. Notwithstanding any provision of law to the contrary, the failure of a hospital to pay such assessments is grounds for disciplinary action pursuant to Section 395.1065, Florida Statutes. See §766.314(6)(c), Fla. Stat.

SECTION 6. MANAGEMENT OF FUNDS

A. Funds of the State of Florida

Funds held on behalf of the Plan are funds of the State of Florida. All funds received and held by and on behalf of the Plan shall be invested by the Association in investments and securities described in Section 215.47, Florida Statutes, and shall be subject to the limitations on investments contained in that section. All income derived from such investments shall be credited to the Plan.

The State Board of Administration may invest and reinvest funds held on behalf of the Plan in accordance with the trust agreement approved by the Association and the State Board of Administration and within the provisions of Sections 215.44 - 215.53, Florida Statutes.

B. Funds Transfer

Upon written recommendation from the External Investment Consultant(s), the Executive Director and the Deputy Director are authorized to transfer funds from cash or other asset classes to rebalance the Plan back to the specific asset allocation policy authorized by the Board of Directors, to investment account managers with whom the Association has an existing Board of Directors-approved contract, without obtaining specific approval from the Board of Directors of the Association for each transfer.

C. Records, Withdrawals, and Bond

The Executive Director shall have the responsibility for assuring that accurate records are maintained of all funds received or held by and disbursed on behalf of the Plan and shall assure that an accurate and full account of all assets and liabilities of the Association is maintained.

Money may be withdrawn on account of the Plan only upon a voucher as authorized by the Association.

Each person who is employed by or contracted with the Association and any member of the Board of Directors who is authorized to receive deposits, issue vouchers, or withdraw or otherwise disburse any funds will post a blanket fidelity bond in an amount reasonably sufficient to protect Plan assets. The cost of such bond will be paid from the assets of the Plan.

D. Audits

At the end of each fiscal year, the Association will have an audit made of its financial records by an independent certified public accountant. The audited financial report will be available upon request to any Plan participant, to the Office of Insurance Regulation, and to the Joint Legislative Auditing Committee. The report will be prepared in accordance with accepted accounting procedures and will include such information as may be required by the Office of Insurance Regulation or the Joint Legislative Auditing Committee.

The Association shall cooperate with any audits deemed necessary at any time and conducted by either the Office of Insurance Regulation, or the Joint Legislative Auditing Committee, the Auditor General, or any other entity directed to audit NICA.

E. Fraud

The Executive Director shall notify the Florida Division of Insurance Fraud within 48 hours of any suspected fraud and/or compromise of public trust by an Association employee. If the instance occurs where the Executive Director is suspected of fraud and/or compromise of public

trust, then such suspicion shall be reported by the Chair of the Association Board of Directors within 48 hours of receiving notification of such suspected activity.

SECTION 7. CLAIMS AND PROCEDURES

A. Initial Claim for Compensation Under the Plan

1. Petition for Benefits

All claims for compensation under the Plan must be filed with the Division of Administrative Hearings (the "Division" and/or "DOAH"). The Association staff will, upon request, aid and assist any prospective claimant in filing a claim. Assistance in compiling a petition is available from Association staff. Pursuant to section 766.305, Florida Statutes, such petition must include the following information:

- The name and address of the legal representative and the basis for such representation of the injured infant.
- The name and address of the injured infant.
- The name and address of any physician providing obstetrical services who was present at the birth, and the name and address of the hospital at which the birth occurred.
- A description of the disability for which the claim is filed.
- The time and place the injury occurred.
- A brief statement of the facts and circumstances surrounding the injury giving rise to the claim.
- All available, relevant medical records relating to the birth-related neurological injury and identification of any unavailable records known to the claimant, and the reason for their unavailability.
- Appropriate assessments, evaluations, and prognosis and such records and documents as are reasonably necessary for the determination of the amount of compensation to be paid to, or on behalf of, the injured infant as the result of a birth-related neurological injury.
- Documentation of expenses and services incurred to date indicating any payments made for such expenses and services, and by whom such payments were made.
- Documentation of any applicable private or governmental source of services or reimbursement relative to the impairments.

A petition template is available on NICA website at NICA.com.

The claimant must furnish the Division as many copies of the petition for compensation as may be required for service upon the Association, any physician or hospital named in the petition, and the Division of Medical Quality Assurance.

2. Filing Fee and Service of the Petition

A \$15.00 filing fee paid to the order of the Division of Administrative Hearings must accompany the petition. However, where need is demonstrated to the Executive Director, apart

from assistance in compiling a completed claim, the Executive Director may authorize the payment of the \$15.00 filing fee on behalf of the prospective claimant.

DOAH is responsible for serving NICA and other requisite entities with the Petition, including the physician and/or hospital named in the Petition and the Division of Medical Quality Assurance of the Agency for Health Care Administration.

3. NICA Proceeding at DOAH

After the Petition is filed with DOAH, an Administrative Law Judge will be assigned to the Claim. The Administrative Law Judge has the exclusive jurisdiction to determine whether a claim is compensable under the Plan.

The Association has forty-five (45) days from the date of service of a completed claim in which to file a response and to submit relevant written information relative to NICA's preliminary determination as to whether the claim is compensable under the Plan based on its review of the records, threshold statutory requirements and the opinions of its medical experts.

Once NICA submits its Response, the Administrative Law Judge assigned to the NICA proceeding will proceed with scheduling the claim for hearing, if necessary to determine whether a claim is compensable. The date for a hearing will be set by the Division, typically after input from the parties but no sooner than sixty (60) days and no later than one hundred twenty (120) days after the petition in compliance with Section 766.305, Florida Statutes, has been filed. All affected parties will be notified by DOAH of the time and place of the hearing. The hearing should be held in the county where the injury occurred unless otherwise agreed to by all affected parties and authorized by the Division. The hearing may also be held by remote means, such as video teleconference.

The parties to the hearing will include the claimant and the Association. Additionally, the health care providers involved in the birth are often granted leave to intervene as parties to the action.

4. Determination of the Compensability of a Claim

Upon the completion of the hearing and based upon all available evidence, the Administrative Law Judge must make the following determinations:

- Whether the injury claimed is a birth-related neurological injury.
 - (a) A rebuttal presumption that the injury alleged is a birth-related neurological injury exists where it has been demonstrated to the satisfaction of the Administrative Law Judge that the infant has sustained a brain or spinal cord injury caused by oxygen deprivation or mechanical injury and the infant was thereby permanently and substantially mentally and physically impaired.

(b) If either party disagrees with such presumption, that party has the burden of proving that the injury alleged is not a birth-related neurological injury.

- Whether obstetrical services were performed by a participating physician during labor, delivery or resuscitation in the immediate post-delivery period in a hospital, or by a certified nurse midwife in a teaching hospital supervised by a participating physician, in the course of labor, delivery or resuscitation in the immediate post-delivery period in a hospital.
- How much compensation, if any, is awardable.

If the Administrative Law Judge determines that the injury alleged is not a birth-related neurological injury or that obstetrical services were not delivered by a participating physician at the birth, an order shall be entered, and a copy sent immediately to the involved parties by registered or certified mail.

5. NICA Award

Section 766.31, Florida Statutes, provides that, upon determining that an infant has sustained a birth-related neurological injury and obstetrical services were delivered by a participating physician at the birth, the Administrative Law Judge shall make an award providing compensation for the following items relative to such injury:

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

1. A total annual benefit of up to \$10,000 for immediate family members who reside with the infant, for psychotherapeutic services obtained from providers licensed under chapter 490 or chapter 491.
2. For the life of the child, providing parents or legal guardians with a reliable method of transportation for the care of the child or reimbursing the cost of upgrading an existing vehicle to accommodate the child's needs when it becomes medically necessary for wheelchair transportation. The mode of transportation must take into account the special accommodations required for the specific child. The plan may not limit such transportation assistance based on the child's age or weight. The plan must replace any vans purchased by the plan every 7 years or 150,000 miles, whichever comes first.
3. Housing assistance of up to \$100,000 for the life of the child, including home construction and modification costs.

(b) However, the following expenses are not subject to compensation:

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

2. Expenses for items or services that the infant has received, or is contractually entitled to receive, from any prepaid health plan, health maintenance organization, or other private insuring entity.
3. Expenses for which the infant has received reimbursement, or for which the infant is entitled to receive reimbursement, under the laws of any state or the Federal Government, except to the extent such exclusion may be prohibited by federal law.
4. Expenses for which the infant has received reimbursement, or for which the infant is contractually entitled to receive reimbursement, pursuant to the provisions of any health or sickness insurance policy or other private insurance program.

(c) Expenses included under paragraph (a) are limited to reasonable charges prevailing in the same community for similar treatment of injured persons, when such treatment is paid for by the injured person. The parents or legal guardians receiving benefits under the plan may file a petition with the Division of Administrative Hearings to dispute the amount of actual expenses reimbursed or a denial of reimbursement.

(d) 1. a. Periodic payments of an award to the parents or legal guardians of the infant found to have sustained a birth-related neurological injury, which award may not exceed \$100,000. However, at the discretion of the administrative law judge, such award may be made in a lump sum. Effective January 1, 2021, the award may not exceed \$250,000, and each January 1 thereafter, the maximum award authorized under this paragraph shall increase by 3 percent.

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

2. a. Death benefit for the infant in an amount of \$50,000.

b. Parents or legal guardians who received an award pursuant to this section, and whose child died since the inception of the program, must receive a retroactive payment in an amount sufficient to bring the total award paid to the parents or legal guardians pursuant to sub-subparagraph a. to \$50,000. This additional payment may be made in a lump sum or in periodic payments as designated by the parents or legal guardians and must be paid by July 1, 2021.

(e) Reasonable expenses incurred in connection with the filing of a claim under ss. 766.301-766.316, including reasonable attorney's fees, which shall be subject to the approval and award of the administrative law judge. In determining an award for attorney's fees, the administrative law judge shall consider the following factors:

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly.
2. The fee customarily charged in the locality for similar legal services.
3. The time limitations imposed by the claimant or the circumstances.

4. The nature and length of the professional relationship with the claimant.
5. The experience, reputation, and ability of the lawyer or lawyers performing services.
6. The contingency or certainty of a fee.

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

The order of award is required to include the immediate payment of expenses previously incurred and shall require that the future expenses be paid as incurred.

Review of an order by the Administrative Law Judge is by appeal to the District Court of Appeal filed in accordance with the Florida Rules of Appellate Procedure, and sections 120.68 and 766.311, Florida Statutes. In the case of an appeal of an award by the Administrative Law Judge, the appeal operates as a suspension of the award. The Association shall not be required to make payment of the award involved in the appeal until the questions at issue have been fully determined.

6. Exclusiveness of Remedy and Notice

Pursuant to section 766.303, Florida Statutes, the rights and remedies granted by the Plan on account of a birth-related neurological injury exclude all other rights and remedies of such infant, his personal representative, parents, dependents, and next of kin, at common law or otherwise, against any person or entity directly involved with the labor, delivery, or immediate post-delivery resuscitation during which such injury occurred, arising out of or related to a medical malpractice claim with respect to such injury; except that a civil action is not foreclosed where there is clear and convincing evidence of bad faith or malicious purpose or willful and wanton disregard of human rights, safety, or property, provided that such suit is filed prior to and in lieu of payment of an award under Sections 766.301 - 766.316, Florida Statutes, as amended. Such suit must be filed before the award of the Division becomes conclusive and binding as provided for in section 766.311, Florida Statutes, as amended.

Pursuant to section 766.316, Florida Statutes, each hospital with a participating physician on its staff and each participating physician, other than residents, assistant residents, and interns deemed to be participating physicians under section 766.314(4)(c), Florida Statutes, under the Plan, shall provide notice to obstetrical patients as to the limited no-fault alternative for birth-related neurological injuries.

The Association shall prepare and furnish to all hospitals and participating physicians forms containing a clear and concise explanation of a patient's rights and limitations under the Plan for distribution to all patients.

7. NICA Statute of Limitations Relating to Initial Determination of Compensability

Pursuant to the NICA Statute, the statute of limitations with respect to any civil action that may be brought by, or on behalf of, an injured infant, where such injury alleged arose out of, or is related to, a birth-related neurological injury, is tolled by the filing of a claim in accordance with sections 766.301 - 766.316, Florida Statutes, as amended, as set forth in the Plan. The time during which the claim is pending or is on appeal is not to be computed as part of the period within such civil action may be brought.

Any claim for compensation filed more than five (5) years after the birth of an infant alleged to have a birth-related neurological injury is barred from receipt of an Award under the Plan.

8. Review of Disputes Regarding Benefit Requests

Once a child is accepted into the Plan, the Association shall review and accept or deny requests for payment for the medically necessary and reasonable actual expenses outlined in Section 766.31, Florida Statutes, pursuant to the process outline in the claims procedures manual developed by NICA pursuant to Section J., above. If the dispute cannot be resolved through that process, section 766.31(1)(c), Florida Statutes, provides that: "The parents or legal guardians receiving benefits under the Plan may file a petition with the Division of Administrative Hearings to dispute the amount of actual expenses reimbursed or a denial of a reimbursement."

9. Enforcement of Awards

The Administration Law Judge has full authority to enforce his or her awards and to protect himself or herself from any deception or lack of cooperation in reaching his or her determination as to an award. His or her authority includes the power to petition the circuit court for an order of contempt. A party may, if circumstances warrant, petition the circuit court for enforcement of a final award by the Administrative Law Judge.

SECTION 8. AMENDMENTS

Amendments to this Plan of Operation may be made by the directors of the Plan, subject to the approval of the Office of Insurance Regulation of the Financial Services Commission.

SECTION 9. CONSTRUCTION

This Plan of Operation shall be construed to conform to the provisions of sections 766.301-766.316, Florida Statutes. Any inconsistency between this Plan of Operation and Florida law shall be resolved in favor of Florida law.