

# oppaga

# Special Report

January 2004



Report No. 04-04

## NICA Eligibility Requirements Could Be Expanded, But the Costs Would Increase Significantly

### *at a glance*

The Florida Birth-Related Neurological Injury Compensation Association pays the medically necessary expenses of children with specific birth-related neurological injuries. Academic research and stakeholders indicate mixed results regarding NICA's attainment of its statutory goals of lowering malpractice premiums for physicians practicing obstetrics and providing compensation, on a no-fault basis, for a limited class of catastrophic injuries.

To improve the program's ability to meet its statutory goals, NICA's eligibility requirements could be expanded. For example, the current birth weight requirement could be reduced from 2,500 to 2,000 grams, the requirement of mental and physical impairment could be changed to mental or physical impairment, and brachial plexus injuries could be covered. However, these options would increase annual costs between \$9.5 million and \$130.8 million. Expanding eligibility would require significant increases in hospital and participant fees and may require casualty insurers and exempt hospitals to begin contributing funds to the program.

### Scope

The 2003 Legislature directed the Office of Program Policy Analysis and Government Accountability (OPPAGA) to review the Florida Birth-Related Neurological Injury Compensation Association's (NICA) eligibility requirements. Specifically, Ch. 2003-416, *Laws of Florida*, directed OPPAGA to

- study the eligibility requirements for a birth to be covered under NICA and
- recommend whether the statutory criteria should be modified for a claim to qualify for referral to NICA under s 766.302, *Florida Statutes*.

### Background

The 1988 Legislature created the Florida Birth-Related Neurological Injury Compensation Association based on a recommendation from the Academic Task Force for Review of the Insurance and Tort Systems.<sup>1</sup> Rising malpractice insurance premiums and the resulting unavailability of obstetric services were primary concerns of the task force. The group's final report dealt exclusively with medical malpractice recommendations, including a recommendation for legislation allowing physicians and hospitals to participate in a no-fault plan limited to birth-related neurological injuries. The task force endorsed separate treatment for birth-related neurological injuries for two reasons: (1) tort claim costs in this area were particularly high and (2) a no-fault system limited to this area was feasible and would involve manageable costs.

<sup>1</sup> The Tort and Insurance Reform Act of 1986 created the task force to review Florida's tort and insurance systems and to make recommendations to the Legislature for appropriate action.

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Chapter 88-1, *Laws of Florida*, created NICA with the purpose of providing compensation, on a no-fault basis, for a specific class of “birth-related neurological injuries.” Section 766.302(2), *Florida Statutes*, defines a “birth-related neurological injury” as an injury to the brain or spinal cord of a live infant caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital. Such injury must render the infant permanently and substantially mentally and physically impaired. Injured infants must weigh at least 2,500 grams (5.5 pounds) at birth for a single gestation or at least 2,000 grams (4.4 pounds) at birth for a multiple gestation. Absent conduct by a participating doctor or midwife demonstrating bad faith or willful and wanton disregard of human rights, NICA is intended to provide the exclusive remedy for compensation in cases falling within this definition.

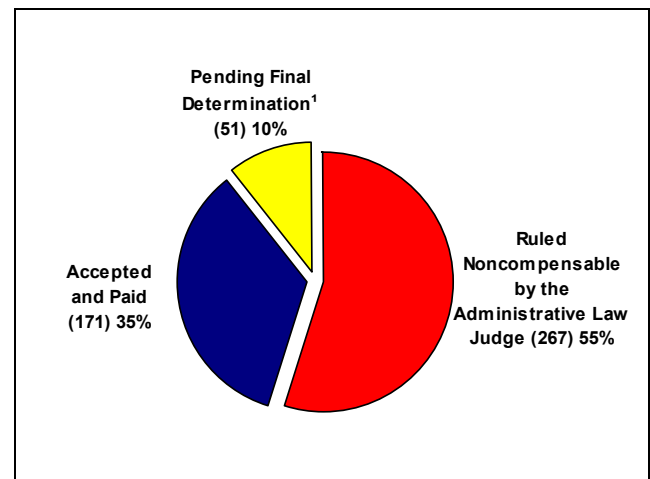
Infants that experience injuries determined to be within the statutorily mandated definition are entitled to compensation for all necessary and reasonable medical expenses, including training, residential and custodial care, special equipment, and facilities, but not including amounts paid or payable by private insurance or other sources. These expenses are paid over the lifetime of the child. Compensation also includes a one-time award to the infant’s parents or legal guardians not to exceed \$100,000 and a \$10,000 death benefit.<sup>2</sup> In addition, NICA will pay for some expenses associated with filing a claim, including reasonable attorney’s fees, although representation by an attorney is not required to file a claim.

All claims for compensation are filed with the Division of Administrative Hearings (DOAH) and are reviewed by NICA for compensability.<sup>3</sup> NICA collects relevant documentation relating to the claimant’s petition, conducts a medical records review, and facilitates the examination of the child by medical experts. After medical

experts have reviewed the infant’s medical records and other documentation, NICA determines whether a claim should be accepted or rejected and sends its determination to DOAH for approval. A DOAH administrative law judge determines the compensability of disputed claims after an evidentiary hearing. Once a claim is approved as payable by the DOAH administrative law judge, NICA begins paying program benefits.<sup>4</sup>

As of November 7, 2003, NICA had received 489 claims since its inception. As shown in Exhibit 1, 171 (35%) of those claims were accepted and paid, 267 (55%) were ruled non-compensable by the administrative law judge because they did not meet the statutory guidelines for coverage, and the remaining 51 claims (10%) are pending final determination. Of the accepted claims, 86 are active and continue to receive program services while 85 have been closed due to the child’s death.

### Exhibit 1 35% of Claims Filed with NICA Have Been Accepted



<sup>1</sup>Pending final determination category includes claims awaiting ruling from an Administrative Law Judge (17), on appeal (16), under evaluation for compensability (16), and abated or put on hold for later determination (2).

Source: Florida Birth-Related Neurological Injury Compensation Association.

All physicians are subject to annual NICA assessments, but obstetricians and nurse-

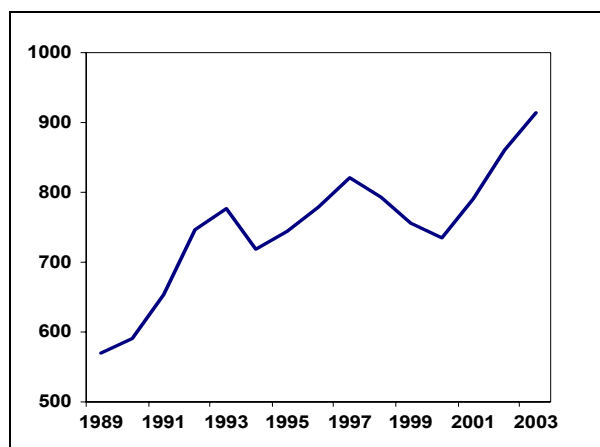
<sup>2</sup> Section 766.31(1)(b)2.c., *F.S.*, states that the \$100,000 payment may be made in a lump sum or via periodic payments.

<sup>3</sup> In order to be considered for compensation, a claim must be filed within five years after the infant’s date of birth.

<sup>4</sup> According to s.766.310(2), *F.S.*, the award shall require the immediate payment of expenses previously incurred and shall require that future expenses be paid as incurred.

midwives may choose to participate in NICA and receive program coverage for an additional fee (see Resources section for a detailed discussion of program funding).<sup>5</sup> As shown in Exhibit 2, the level of program participation has varied since the program's creation, with the general trend being an increase in the number of physicians and nurse midwives who chose NICA coverage. As of November 7, 2003, 785 physicians and 130 nurse-midwives participated in the program for calendar year 2003.

### Exhibit 2 Participation in NICA by Physicians and Nurse Midwives Has Increased Over Time



Source: Florida Birth-Related Neurological Injury Compensation Association.

Since NICA's inception, the Legislature has amended the statutes governing the program numerous times. Most recently, the 2003 Legislature made several changes to the program, including making infants who receive a NICA award eligible for Children's Medical Services (CMS) program health services and requiring NICA to provide reimbursement to CMS for services, limiting attorneys' fees for NICA claimants, and clarifying that if a claimant accepts a NICA award, no civil action may be

<sup>5</sup>According to s. 458.320, *F.S.*, physicians have three alternatives for protecting themselves against malpractice claims: (1) maintaining professional liability insurance of at least \$250,000 per incident and \$750,000 per annual aggregate; (2) establishing an escrow account consisting of cash or other assets in an amount of at least \$250,000; or (3) obtaining and maintaining an irrevocable, non-assignable, and non-transferable letter of credit in an amount of not less than \$250,000 per claim. NICA program participation supplements these alternatives.

initiated.<sup>6</sup> See Appendix A for detailed discussion of these and other significant legislative changes.

## Program Organization and Resources

NICA is an independent association governed by a board of five directors appointed by Florida's Chief Financial Officer. The board of directors includes one representative of each of the following groups: participating physicians; nonparticipating physicians; hospitals; casualty insurers; and the general public. NICA has eight employees, including an executive director, an accounting manager, two claims supervisors, and four administrative employees.

Although NICA is not a state agency, it is subject to regulation and oversight by the Florida Department of Financial Services, Office of Insurance Regulation, which must approve its plan of operation.<sup>7</sup> In addition, NICA must furnish annual audited financial reports to the Office of Insurance Regulation, which also conducts a biennial actuarial valuation of NICA's assets and liabilities.

Currently, the program is funded through a combination of state funds, assessments on physicians and hospitals, and participation fees. When the program was created in 1988, the Legislature made a one-time appropriation of \$20 million and set aside an additional \$20 million to be used if necessary to maintain the program on an actuarially sound basis; these funds were appropriated from the Insurance Commissioner's Regulatory Trust Fund. The second \$20 million installment has not needed to be transferred.

In addition to these funds, NICA receives annual assessments from participating and non-participating physicians, participating midwives,

<sup>6</sup> The Children's Medical Services program, which is administered by the Department of Health, provides a managed system of care for children with special healthcare needs. Children under age 21 whose serious or chronic physical or developmental conditions require extensive preventive and maintenance care are eligible for services.

<sup>7</sup> Section 766.314, *F.S.*

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and hospitals.<sup>8</sup> If the program is determined to be actuarially unsound, state law also permits assessments against casualty insurers of up to 0.25% of prior year net direct premiums written; this assessment has never been levied. Exhibit 3 shows the current assessment schedule.

**Exhibit 3  
NICA Is Funded by Hospitals and Participating and Non-Participating Healthcare Providers**

Assessed Entity	Assessment Amount
<b>Participants</b>	
Physicians	\$5,000
Midwives	2,500
<b>Non-Participating Physicians<sup>1</sup></b>	<b>\$250</b>
<b>Hospitals<sup>2</sup></b>	<b>\$50 per live birth</b>

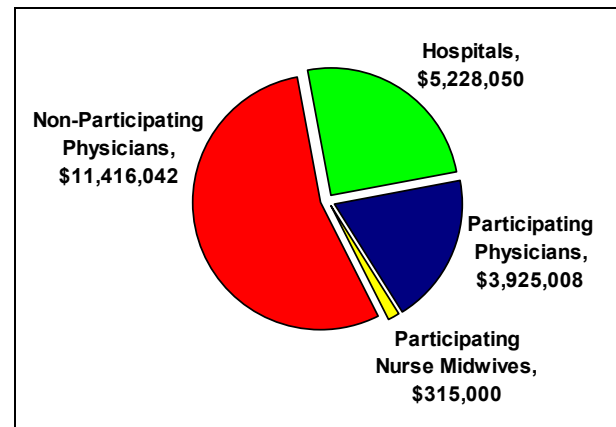
<sup>1</sup>Excludes several groups of physicians, including residents, assistant residents, and interns in an approved postgraduate training program and retired physicians who have withdrawn from practice but maintain an active license.

<sup>2</sup>Excludes hospitals that are owned or operated by the state or a county, special taxing district, or other political subdivision of the state.

Source: Section 766.314, *F.S.*

In Fiscal Year 2002-03, NICA collected approximately \$20.9 million in assessments from participating physicians and midwives, non-participating physicians, and hospitals. (Exhibit 4 shows the distribution of this funding.) During the same period, the program incurred \$15.3 million for claims expenses and \$1.3 million in administrative fees.<sup>9</sup>

**Exhibit 4  
NICA Collected \$20.9 Million in Assessments in Fiscal Year 2002-03**



Source: Florida Birth-Related Neurological Injury Compensation Association.

To ensure that all current and anticipated claims can be paid while maintaining actuarial soundness, NICA establishes reserves using a model developed by an actuary (see Appendix B for a description of the model).<sup>10</sup> This model is based on the estimated costs of each accepted claim.<sup>11</sup> A consulting actuary evaluates the adequacy of the program’s reserves on a regular basis, and NICA annually submits these reserve evaluations to the Office of Insurance Regulation. The most recent NICA financial statements (covering the period ending June 30, 2003), showed total claims reserves of \$309 million, covering both known claims and estimated incurred but not yet reported claims (see Exhibit 5).<sup>12</sup> In addition to maintaining these reserves, the program seeks to limit its exposure to loss on any single claim and to

<sup>8</sup> Both participating and non-participating physicians are assessed based on the theory that NICA positively affects the malpractice insurance premiums of all Florida physicians by removing the most catastrophic cases from the tort system.

<sup>9</sup> Administrative fees include but are not limited to professional fees (e.g., actuarial, accounting, auditing, and legal), office expenses and salaries, and other associated costs.

<sup>10</sup> Section 766.314(8), *F.S.*, required NICA to report to the Legislature by February 1, 1991, its determination of the cost of maintaining the program on an actuarially sound basis. To fulfill this requirement, NICA commissioned an actuarial study with the accounting firm Coopers & Lybrand.

<sup>11</sup> The program uses a worksheet to set a reserve for each accepted claim, when sufficient information is available. The worksheet shows the expected care and annual cost of care at today’s prices. The expected number of years the individual may live is established with the aid of a consulting pediatric neurologist. The annual cost is multiplied by the life expectancy to determine the case reserves.

<sup>12</sup> According to s. 766.314(9)(c), *F.S.*, if the total of all current estimates to pay existing claims equals 80% of the funds on hand plus funds that will become available within 12 months, NICA is prohibited from accepting any new claims without express authority from the Legislature.

recover a portion of losses and loss adjustment expenses by purchasing reinsurance under an excess coverage contract.<sup>13</sup>

## Exhibit 5 NICA Has \$309 Million in Claims Reserves

ASSETS	
Investments	\$382,229,582
Receivable for securities sold	37,778,325
Other <sup>1</sup>	2,836,797
<b>Total</b>	<b>\$422,844,704</b>
LIABILITIES	
Claims reserves	\$309,000,000
Payable for securities purchased	74,149,458
Other <sup>2</sup>	123,619
<b>Total</b>	<b>\$383,273,077</b>
NET ASSETS	
	<b>\$39,571,627</b>

<sup>1</sup> Includes investment income receivable, assessments receivable, prepaid expenses, and property and equipment.

<sup>2</sup> Includes accrued investment fees and reimbursement and administrative costs.

Source: Florida Birth-Related Neurological Injury Compensation Association Fiscal Year 2002-03 Financial Statements.

## Findings

### *Academic research and stakeholder feedback indicate mixed results regarding NICA's attainment of statutory goals*

NICA was created to achieve two statutory goals—lowering malpractice premiums for physicians practicing obstetrics, and providing compensation, on a no-fault basis, for a limited class of catastrophic injuries. Academic research, along with feedback OPPAGA collected from key stakeholders, demonstrates mixed results regarding the program's achievement of these objectives.

Several studies on NICA have been published in recent years, examining issues such as the frequency and characteristics of claims, physician participation, claimant satisfaction with the no-fault process, and administrative costs. A 1998 study that focused on Florida and Virginia, the only two states with existing

no-fault birth-related injury compensation programs, surveyed obstetricians in both states to determine their level of satisfaction with their state's program.<sup>14</sup> Although more than half of the respondents were dissatisfied with no-fault insurance assessments, the study found that in both states, the annual assessment was more than offset by reductions in premiums for obstetricians' professional liability insurance.<sup>15</sup> In addition, a multi-year study, which examined both Florida's and Virginia's programs, concluded that these states' malpractice premiums have dropped relative to the nation at large.<sup>16</sup> Similarly, in 2001, the Florida House Committee on Health Promotion reported that obstetrical malpractice premiums for one insurance company had declined 27.7% since 1989 (the first full year of NICA operation).<sup>17</sup> It also noted that some medical malpractice insurers offer a discount on premiums for obstetricians who obtain NICA coverage.

Research indicates that NICA efficiently and equitably achieves its second statutory goal of distributing compensation to claimants for a limited class of catastrophic injuries. For example, one study, which examined the administrative performance of no-fault programs, determined that NICA cases were resolved in about two-thirds the time needed for tort cases. Further, NICA cases were resolved at substantially lower costs than required for tort cases, which have significantly higher lawyer fees and expenses. NICA's administrative expenses accounted for only 10.3% of total cost per case leaving almost 90% for benefit

<sup>14</sup> *The Influence of Obstetric No-Fault Compensation on Obstetricians' Practice Patterns*, Frank Sloan, Kathryn Whetton-Goldstein, and Gerald B. Hickson, September 1998. Structured surveys were conducted with 119 obstetricians, of whom 110 respondents were from Florida and 19 were from Virginia.

<sup>15</sup> A survey conducted of medical malpractice premiums revealed that the mean premium charged obstetricians in Florida declined from \$106,000 in 1989 to \$78,000 in 1992. In Virginia, the decrease was from a mean of \$36,000 in 1989 to \$25,000 in 1992.

<sup>16</sup> *No Fault for Medical Injury: Theory and Evidence*, R. Bovbjerg and F. Sloan, 1998.

<sup>17</sup> *A Review of the Legislative History and Financial Status of the Florida Birth-Related Neurological Injury Compensation Association*, House of Representatives, Council for Healthy Communities, Committee on Health Promotion, April 2001.

<sup>13</sup> Reinsurance is an agreement between insurance companies under which one accepts all or part of a risk or loss of the other. The purpose of reinsurance is to protect against all or part of the losses that may be incurred in the process of honoring claims.

payments, whereas nearly half (46.9%) of total tort costs go to administrative expenses.<sup>18</sup>

The research studies have concluded that the program has compensated fewer claimants than expected. For example, one study determined that NICA has captured only a portion of the cases it was intended to cover and that almost the same number of severe birth-related injury claimants receives malpractice payments of \$250,000 or more.<sup>19</sup> Another study noted that a substantial number of claims for the type of injuries described in NICA's statutes continue to go to the tort system.<sup>20</sup>

The studies identified several reasons, including restrictive compensability criteria and limited outreach to possible claimant populations, as contributing factors to NICA's small caseload and persistence of a tort remedy.<sup>21,22</sup> The studies have recommended expanding NICA's compensation criteria to improve claims compensation and the benefits of a no-fault system. The studies also have recommended developing a mechanism for seeking out eligible claimants as essential to reaching the target population. A larger caseload also could improve NICA's delivery of benefits to claimants and facilitate experience rating of assessments and risk management.

OPPAGA's feedback from key stakeholders also revealed mixed assessments of NICA's success at

meeting its statutory goals.<sup>23</sup> Specifically, almost half (47%) of the stakeholders asserted that NICA has not fulfilled its statutory goal of lowering malpractice premiums for physicians practicing obstetrics. About 20% reported that the program is achieving this intended goal, while the remaining 33% were unsure or did not express an opinion. Stakeholder opinions also were varied regarding NICA's fulfillment of its statutory goal of providing compensation, on a no-fault basis, to a limited class of catastrophic injuries. For example, 29% of stakeholders said that the program is not achieving this objective, while 33% indicated that this goal is being met; the remaining 38% reported uncertainty or did not express an opinion regarding this issue.

### ***NICA's eligibility requirements could be expanded, but costs will increase significantly***

Proposals have been made to expand NICA's eligibility requirements to improve the program's ability to meet its statutory goals. Our independent review of NICA's actuarial study concluded that such changes would result in significant increases in both program claims and related expenses.

The Governor's Select Task Force on Healthcare Professional Liability Insurance considered whether to expand NICA's claim criteria to include lower birth weights, allowing claims to be filed based on either mental or physical impairment rather than requiring both conditions, and it heard testimony supporting the inclusion of brachial plexus injuries for program coverage.<sup>24, 25</sup> The task force recommended that the Legislature study and

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<sup>18</sup> *Administrative Performance of "No-Fault" Compensation for Medical Injury*, R. Bovbjerg, F. Sloan, and P. Rankin, 1997.

<sup>19</sup> *The Jury Is Still In: Florida's Birth-Related Neurological Injury Compensation Plan After a Decade*, D. Studdert, L. Fritz and T. Brennan, June 2000.

<sup>20</sup> *The Road From Medical Injury to Claims Resolution: How No-Fault and Tort Differ*, F. Sloan, K. Whetton-Goldstein, S. Entman, E. Kulas, and E. Stout, 1997.

<sup>21</sup> *The Jury Is Still In: Florida's Birth-Related Neurological Injury Compensation Plan After a Decade*, D. Studdert, L. Fritz and T. Brennan, June 2000 and *Administrative Performance of "No-Fault" Compensation for Medical Injury*, R. Bovbjerg, F. Sloan, and P. Rankin, 1997.

<sup>22</sup> Our review also revealed that legal challenges associated with NICA's patient notification requirements have contributed to the persistence of tort cases. Specifically, attorneys have argued that proper notice of NICA participation was not provided to expectant mothers, rendering the cases ineligible for program coverage. While this issue is beyond the scope of the current review and was therefore not a primary focus of our fieldwork, NICA staff reported their continued efforts to educate doctors and hospitals about the importance of proper patient notification.

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<sup>23</sup> During the course of this review, OPPAGA received verbal and written feedback from 45 stakeholders, including NICA board members, participating and non-participating physicians, the Florida Obstetric and Gynecologic Society, the Florida Hospital Association, the Florida Medical Association, and the Academy of Florida Trial Lawyers.

<sup>24</sup> The brachial plexus is a network of nerves that control the muscles of the shoulder, arm, elbow, wrist, hand and fingers. Injury to these nerves can result in full to partial paralysis of one or both arms. Stretching, tearing, or other trauma can cause such injuries. Brachial plexus injuries most often occur during the birthing process.

<sup>25</sup> Executive Order No. 02-041 formed the task force in August 2002 to examine Florida's current crisis in the availability and affordability of medical malpractice insurance. The task force was directed to make recommendations for "protecting Floridians' access to high-quality and affordable healthcare."

consider these issues for broadening program eligibility.

Stakeholders who provided input to OPPAGA related to NICA eligibility expansion generally supported these changes. For example, 89% said that the birth weight requirement should be lowered, and 78% reported that the program should accept claims for children with either substantial mental or physical impairment. Moreover, 91% of the stakeholders indicated that NICA should provide coverage to children with brachial plexus injuries.

NICA commissioned an actuarial study to consider the fiscal impact of these changes in eligibility criteria, which OPPAGA had reviewed by an independent actuarial firm.<sup>26</sup> OPPAGA contracted with its actuary to examine the appropriateness of the assumptions and actuarial soundness of the methodologies used to develop cost estimates associated with expanding NICA eligibility requirements.<sup>27</sup> Overall, our actuary's independent review determined that the assumptions contained in the NICA report appear to be appropriate, based on actuarially sound methodologies, did not have material deviations from current actuarial standards, and produced results that would be in a range of reasonable results. See Appendix C for a summary of these review findings.

The actuarial analysis commissioned by NICA developed cost estimates for three eligibility modifications: (1) reduce birth weight requirement from 2,500 (5.5 pounds) to 2,000 grams (4.4 pounds); (2) change the requirement of mental and physical impairment to mental or physical impairment; and (3) cover brachial plexus injuries.<sup>28,29</sup> NICA's actuary emphasized

that the estimates are intended only for use in evaluating the relative additional cost associated with each alternative or combination of alternatives.

Exhibit 6 presents the estimated claims data for each of the proposed eligibility modifications and combinations discussed below.

**Reducing birth weight.** NICA's actuary determined that reducing the birth weight requirement to 2,000 grams would result in approximately 13 additional claims per year. This would yield additional annual claims expenses of between \$18.5 million and \$24.2 million.

There are advantages and disadvantages associated with reducing NICA's birth weight requirement. Providing NICA coverage to children with a minimum birth weight of 2,000 grams would increase the number of infants eligible for program services while helping to maintain the distinction between full- and pre-term births. If the birth weight requirement were lowered below 2,000 grams (for single gestation), infants would be considered pre-term. Pre-term infants are more likely to have medical conditions directly associated with their prematurity; distinguishing between these conditions and those that fall within NICA eligibility criteria would be difficult.

<sup>26</sup> *Report Prepared for Florida Birth-Related Neurological Injury Compensation Association, Review of Alternative Changes to Definition of "Birth Related Neurological Injury,"* Merlino & Turner, June 2003 and *Response to Request for Additional Actuarial Analysis of Changes to "Birth-Related Neurological Injury" Definition,* Merlino & Turner, November 2003.

<sup>27</sup> *Peer Review of 2003 Florida Birth-Related Neurological Injury Compensation Association Report,* Pinnacle Actuarial Resources, Inc., December 2003.

<sup>28</sup> The estimated losses are expressed at 2004 loss levels and are based upon 2003 NICA participation levels. The potential for the eligibility changes to create additional underwriting or management expenses was not considered in determining loss estimates. Estimates for the birth weight and mental or physical impairment modifications include consideration of anticipated

investment income and are provided based on interest rate assumptions of 3%, 4%, and 5% per annum. Since the proposed benefit included under the addition of brachial plexus injury claims is limited, the anticipated investment income will not be significant. Thus, the estimated losses related to brachial plexus injury claims do not include consideration of investment income.

<sup>29</sup> Initially, NICA's actuary estimated these loss estimates independently, meaning that the cost of implementing more than one modification at a time could not be determined. To address this concern, OPPAGA asked NICA to direct its actuary to develop loss estimates for four combinations: (1) reduction in birth weight requirement to at least 2000 grams plus mental or physical impairment plus brachial plexus injury; (2) reduction in birth weight requirement to at least 2000 grams plus mental or physical impairment; (3) reduction in birth weight requirement to at least 2000 grams plus brachial plexus injury; and (4) mental or physical impairment plus brachial plexus injury.

**Exhibit 6**  
**If Eligibility Requirements Are Expanded, Annual Claims Expenses Would Increase**  
**Between \$9.5 Million and \$130.8 Million**

Eligibility Change	Additional Claims <sup>1</sup>	Estimated Annual Expenses		
		5% Interest Assumption	4% Interest Assumption	3% Interest Assumption
Reduction in birth weight requirement to at least 2,000 grams	13	\$ 18.5 million	\$ 21.0 million	\$ 24.2 million
Mental <u>or</u> physical impairment	42	39.7 million	45.3 million	52.2 million
Reduction in birth weight requirement to at least 2,000 grams + mental <u>or</u> physical impairment + brachial plexus injury <sup>2</sup>	381	102.3 million	115.1 million	130.8 million
Reduction in birth weight requirement to at least 2,000 grams + mental <u>or</u> physical impairment	84	91.2 million	103.9 million	119.7 million
Reduction in birth weight requirement to at least 2,000 grams + brachial plexus injury <sup>3</sup>	310	29.6 million	32.2 million	35.4 million
Mental <u>or</u> physical impairment + brachial plexus injury <sup>4</sup>	339	50.9 million	56.4 million	63.3 million

Eligibility Change	Additional Claims	Estimated Annual Expense	
		Low End Estimate	High End Estimate
Brachial plexus injury: Variable benefit	254–339	\$ 9.5 million	\$12.7 million
Flat benefit		25.4 million	33.9 million

<sup>1</sup> Number of additional claims per year.

<sup>2</sup> Brachial plexus included as average of high and low end estimates for a maximum benefit of \$100,000.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

Source: OPPAGA analysis, *Report Prepared for Florida Birth-Related Neurological Injury Compensation Association, Review of Alternative Changes to Definition of “Birth Related Neurological Injury,”* Merlino & Turner, June 2003, and *Response to Request for Additional Actuarial Analysis of Changes to “Birth-Related Neurological Injury” Definition,* Merlino & Turner, November 2003.

The primary disadvantage associated with decreasing the birth weight requirement is the additional cost associated with the expected increase in claims. As noted earlier, lowering the birth weight would increase the number of infants eligible for services from NICA. Because NICA covers all medically necessary expenses over the lifetime of each child, an increase in the number of claims will subsequently increase program expenses for providing services to claimants.

**Covering mental or physical impairment.** According to NICA’s actuary, providing coverage to children with either substantial mental or physical impairment, rather than requiring both conditions, would result in approximately 42 additional claims each year. This would result in additional claims expenses of \$39.7 million to \$52.2 million per year.

Modifying NICA eligibility requirements to include children with either mental or physical impairment would be beneficial because it

would provide services to more children while removing a significant number of tort claims from the court system. Removing cases from the tort system would benefit physicians and medical malpractice insurers; both physician and insurer expenses would decrease if they had fewer malpractice suits to defend. However, stakeholders reported that expanding eligibility in this way would represent a significant departure from current eligibility criteria and that strict definitions of “substantial mental” and “substantial physical” impairment would have to be developed. In addition, as with other changes in eligibility, a primary disadvantage is increased cost.

**Including brachial plexus injuries.** To estimate expenses for inclusion of children with brachial plexus injuries, NICA’s actuary developed two benefit alternatives. The first alternative would cover actual medical and rehabilitation expenses subject to a minimum payment of \$25,000 and a maximum payment of \$100,000 per claimant.



The second alternative would offer a flat benefit of \$100,000 to each claimant. Due to significant variation in brachial plexus incidence rates, NICA's actuary developed high and low end claims frequency estimates for each of the two benefit alternatives; the low end estimate is 254 claims while the high end estimate is 339 claims. Implementing the first alternative would result in annual claims expenses of between \$9.5 million and \$12.7 million, depending on claims frequency. The second alternative would result in annual estimated claims expenses of \$25.4 million to \$33.9 million.

Providing NICA coverage to children with brachial plexus injuries also has advantages and disadvantages. For example, stakeholders we spoke to reported that brachial plexus injuries are the basis of a growing number of medical malpractice claims. If such injuries were covered by NICA, they would be removed from the tort system, which would be beneficial to physicians and insurers. However, in order for these injuries to be effectively removed from the court system, the Legislature will have to include in the law findings of fact that NICA compensation for brachial plexus injuries serves an overpowering public necessity and provides a commensurate benefit to plaintiffs, and that no alternative or less onerous method of meeting the public necessity has been shown.<sup>30, 31</sup>

In addition, NICA's actuary noted that due to the large number of relatively minor brachial plexus injuries and the small volume of severe injuries, either of the benefit alternatives described above would likely result in the overcompensation of a large number of claimants and the failure to adequately compensate a small number of severely injured claimants. In addition, the payment of a fixed sum may encourage the reporting of minor cases, resulting in an increase in the number of claims in excess of the average incidence rates used to calculate costs.

<sup>30</sup> Kluger v. White, 281 So.2d 1 (Fla. 1973); University of Miami v. Echarte, 618 So.2d 189 (Fla. 1993).

<sup>31</sup> This disadvantage may also apply to reducing the eligible birth weight to 2,000 grams and covering mental or physical impairments. However, since birth weight and mental and physical impairment requirements already exist in law, changes to these eligibility criteria may not be an issue.

**Implementing all three eligibility modifications.** NICA's actuary estimated that implementing all three changes in eligibility criteria would result in 381 additional claims each year (the number of brachial plexus claims included is an average of the low and high end estimates). These additional claims would cost approximately \$102.3 million to \$130.8 million per year.

**Reducing birth weight and covering mental or physical impairment.** Modifying the current birth weight requirement and covering children with either mental or physical impairment would increase the number of NICA claims by approximately 84 per year. This would result in annual claims expenses of between \$91.2 million and \$119.7 million.

**Reducing birth weight and including brachial plexus injury.** If NICA's eligibility requirements were modified to include children with birth weights of a minimum of 2,000 grams and children with brachial plexus injuries, annual claims would increase by approximately 310 claims. This would cost an estimated \$29.6 million to \$35.4 million per year.

**Covering mental or physical impairment and including brachial plexus injury.** NICA's actuary determined that providing program coverage to children with either mental or physical impairment as well as to children with brachial plexus injury would increase annual claims by approximately 339 with a cost of between \$50.9 million and \$63.3 million.

While implementing all or any combination of the three modifications would provide coverage to significantly more children than currently receive program services, the primary disadvantage is increased cost. Each modification would add to the number of infants eligible for lifetime services from NICA, thereby markedly increasing program costs. However, these costs could be offset by reductions in medical malpractice premiums and decreases in expenses associated with resolving cases through the tort system.

Regardless of which eligibility modifications the Legislature chooses to adopt, one overarching issue must be considered—the uncertainty of the current estimates. Despite the methodological appropriateness and actuarial soundness of the

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analysis prepared by NICA's actuary, the analysis is uncertain, particularly due to the lack of historical data, the low frequency/high severity nature of program coverage, and the uncertain legislative and judicial conditions surrounding medical malpractice coverage in Florida. OPPAGA's actuary also noted that additional sensitivity testing of other key assumptions would have enhanced the certainty of the data and emphasized that cost estimates are subject to potential errors due to the fact that the ultimate liability for claims is subject to the outcome of events yet to occur (e.g., jury decisions and attitudes of claimants with respect to settlements).

If the Legislature chooses to modify NICA eligibility requirements, the program's funding structure would need to be changed to support the financial obligations associated with increased claims. As part of its eligibility modification study, NICA's actuary analyzed changes to hospital and participating physician and nurse midwife fees that would be necessary to support program expansion; increases in non-participating physician fees were not included because these doctors are not considered primary program benefactors. Assessment amounts were calculated for each of the four eligibility modification combinations at each of the three interest rates considered by the study.

Exhibit 7 demonstrates that expanding NICA eligibility would require significant increases in hospital and participant fees, with the greatest increase being associated with implementing all three modifications. Specifically, if all three eligibility changes were made and the assumed interest rate for investment income were 3%, physician assessments would need to be increased from \$5,000 to \$71,565 per year, midwife assessments would need to be raised from \$2,500 to \$35,782 per year, and hospital fees would need to be increased from \$50 to \$716 per live birth. Although NICA has not increased any of these assessments since its inception, this step would be necessary to fund the increased program costs derived by expanding eligibility. However, the expectation is that increases in hospital and participant fees could be offset by reductions in medical malpractice premiums and

decreases in expenses associated with resolving cases through the tort system.

In addition to increasing hospital and participating physician/nurse midwife fees, NICA's expansion could be funded by assessing casualty insurers. Specifically, s. 766.314(5)(c), *Florida Statutes*, provides that if required to maintain the plan on an actuarially sound basis, the Office of Insurance Regulation shall require each entity licensed to issue casualty insurance to pay NICA an annual assessment in an amount determined by the office; the assessment can be up to 0.25% of prior year net direct premiums written. This assessment has never been levied but is a viable option for generating additional resources needed to cover program costs. For example, if casualty insurers had been assessed 0.25% of net direct premiums written in 2000 (most recent data available), it would have generated \$6.2 million. Assessing casualty insurers is a reasonable alternative, because if NICA successfully keeps claims out of the tort system, insurer costs associated with defending these cases may decrease.

Additional funding for NICA expansion could also be generated by eliminating the current exemption that exists for some hospitals. Section 766.314(4)(a), *Florida Statutes*, exempts hospitals owned or operated by the state or a county, special taxing district, or other political subdivision of the state from paying NICA the \$50 per live birth fee.<sup>32</sup> If exempted hospitals had been required to pay this fee in 2001 (most recent data available), it would have generated approximately \$3.4 million. Assessing exempted hospitals would make the application of this fee more equitable.

To ensure that the program remains actuarially sound, all options for funding additional program costs should be considered before modifying NICA's eligibility requirements.

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<sup>32</sup> Revenue generated from exempted hospitals also could be used to reduce the amount by which hospital fees would need to increase to fund eligibility expansions.

**Exhibit 7**  
**If NICA Eligibility Is Expanded, Fees Would Need to Be Increased Significantly**

Eligibility Change	Fee								
	5% Interest Assumption			4% Interest Assumption			3% Interest Assumption		
	Physicians	Nurse Midwives	Hospitals	Physicians	Nurse Midwives	Hospitals	Physicians	Nurse Midwives	Hospitals
Reduction in birth weight requirement to at least 2,000 grams — Cost: \$18.5 million and \$24.2 million	\$ 9,457	\$ 4,258	\$ 94	\$10,781	\$ 4,855	\$107	\$12,415	\$ 5,590	\$123
Mental or physical impairment — Cost: \$39.7 million to \$52.2 million	20,368	9,171	202	23,222	10,456	231	26,740	12,041	266
Reduction in birth weight requirement to at least 2,000 grams + mental or physical impairment + brachial plexus injury — Cost: \$102.3 million to \$130.8 million	52,052	26,026	521	58,551	29,275	586	66,565	33,282	666
Reduction in birth weight requirement to at least 2,000 grams + mental or physical impairment — Cost: \$91.2 million and \$119.7 million	46,387	23,193	464	52,886	26,443	529	60,900	30,450	609
Reduction in birth weight requirement to at least 2,000 grams + brachial plexus injury — Cost: \$29.6 million to \$35.4 million	15,055	7,528	151	16,371	8,185	164	17,993	8,997	180
Mental or physical impairment + brachial plexus injury — Cost: \$50.9 million to \$63.3 million	25,890	12,945	259	28,724	14,362	287	32,218	16,109	322

Eligibility Change	Fee					
	Low-End Estimate			High-End Estimate		
	Physicians	Nurse-Midwives	Hospitals	Physicians	Nurse-Midwives	Hospitals
Brachial plexus injury, Variable benefit— Cost: \$9.5 million to \$12.7 million	\$ 4,890	\$ 2,202	\$ 49	\$ 6,520	\$ 2,936	\$ 65
Brachial plexus injury, Flat benefit — Cost: \$25.4 million to \$33.9 million	13,040	5,872	130	17,387	7,829	173

Source: OPPAGA analysis, *Report Prepared for Florida Birth-Related Neurological Injury Compensation Association, Review of Alternative Changes to Definition of "Birth Related Neurological Injury,"* Merlino & Turner, June 2003, and *Response to Request for Additional Actuarial Analysis of Changes to "Birth-Related Neurological Injury" Definition,* Merlino & Turner, November 2003.

## Conclusions

While there are several options for expanding NICA eligibility requirements, each option would increase the number of claims to be paid, thereby increasing program costs. The three options we examined would increase annual costs between \$9.5 million and \$130.8 million, depending upon the changes implemented and the interest rate assumption for investment income. Expanding eligibility would require significant increases in hospital and participant fees, and may require casualty insurers and exempt hospitals to begin contributing funds to the program. These increases would be expected to be offset by reductions in medical malpractice premiums and/or decreases in

expenses associated with resolving cases through the tort system. In addition, assessing all hospitals would make the application of the \$50 per live birth fee more equitable.

The Legislature may wish to consider beginning program expansion by implementing the eligibility change that is least costly and least likely to have its constitutionality challenged—reducing the birth weight requirement to 2,000 grams. If NICA eligibility were modified in this manner, annual estimated claims expenses would be between \$18.5 and \$24.2 million. This would require fees to be increased by as much as \$12,415 for physicians, \$5,590 for midwives, and \$123 for hospitals.<sup>33</sup> Once the impact of this

<sup>33</sup> Three percent assumed interest rate for all fee estimates.

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change was determined, the Legislature could then consider additional expansions. Staggered implementation of eligibility modifications would help to ensure that the program remains actuarially sound and continues to provide quality services, while avoiding extremely large increases in healthcare provider and hospital fees.

## Agency Response ---

In accordance with the provisions of s. 11.45(7)(d), *Florida Statutes*, a draft of our report was submitted to the executive director of the Florida Birth-Related Neurological Injury Association for review and response. The executive director's written response is included in Appendix D.

OPPAGA supports the Florida Legislature by providing evaluative research and objective analyses to promote government accountability and the efficient and effective use of public resources. This project was conducted in accordance with applicable evaluation standards. Copies of this report in print or alternate accessible format may be obtained by telephone (850/488-0021 or 800/531-2477), by FAX (850/487-3804), in person, or by mail (OPPAGA Report Production, Claude Pepper Building, Room 312, 111 W. Madison St., Tallahassee, FL 32399-1475).

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Gary R. VanLandingham, OPPAGA Interim Director

## Appendix A

# Key Legislation Governing NICA

The Florida Birth-Related Neurological Injury Compensation Association (NICA) was created in 1988 to provide compensation for a specified class of injuries occurring at birth. Since that time, the Florida Legislature has passed legislation modifying the provisions of this plan. Key legislation affecting NICA claims are summarized below.

Laws of Florida	Key Provisions
Chapter 88-1	<ul style="list-style-type: none"> <li>Created NICA with the purpose of providing compensation, on a no-fault basis, for a specific class of birth-related injuries.</li> </ul>
Chapter 93-251	<ul style="list-style-type: none"> <li>Reduced the statute of limitations from seven years to five years for filing a claim for compensation.</li> </ul>
Chapter 98-113	<ul style="list-style-type: none"> <li>Granted the administrative law judge exclusive jurisdiction to determine whether a claim filed under NICA is compensable.</li> <li>Prohibited civil action from being filed until this determination is made.</li> <li>Required the Auditor General to conduct an analysis of the reserve adequacy and funding rates in order to determine the actuarial soundness of the Florida Birth Related Neurological Injury compensation Plan.</li> </ul>
Chapter 2001-277	<ul style="list-style-type: none"> <li>Added coverage for cases of multiple gestation for live infants weighing at least 2,000 grams at birth.</li> <li>Authorized payment for funeral expenses not to exceed \$1,500.</li> </ul>
Chapter 2002-401	<ul style="list-style-type: none"> <li>Authorized families to recover expenses for the provision of professional residential or custodial care of a severely brain-injured child in a NICA action.</li> </ul>
Chapter 2003-258	<ul style="list-style-type: none"> <li>Expanded the definition of the term “infant delivered” for the purpose of payment of an initial assessment for each infant delivered in a hospital.</li> </ul>
Chapter 2003-416	<ul style="list-style-type: none"> <li>Added infants who receive an award from NICA to the Children’s Medical Services (CMS) program; requires NICA to provide reimbursement to CMS for services; and makes the reimbursement eligible for federal matching funds.</li> <li>Clarified that if a claimant accepts an award from NICA, no civil action may be brought. Also prohibits a claimant from receiving an award from NICA if the claimant recovers in a civil action.</li> <li>Required medical records and related information in a claim to be filed with NICA, instead of DOAH, and includes these records in current public records exemption.</li> <li>Limited claimant liability for expenses and attorneys’ fees.</li> <li>Created a \$10,000 death benefit for an infant and eliminates requirements to pay funeral expenses up to \$1,500.</li> <li>Authorized hospitals in a county of more than 1.1 million gross population as of January 1, 2003, to pay the NICA assessment fee for participating physicians and midwives.</li> </ul>

Source: OPPAGA review of state legislation.

## Appendix B

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# Description of Model Used to Ensure NICA Actuarial Soundness

Section 766.314(8), *Florida Statutes*, required NICA to report to the Legislature by February 1, 1991 its determination of the cost of maintaining the program on an actuarially sound basis. To fulfill this requirement, NICA commissioned an actuarial study with the accounting firm Coopers & Lybrand. The information below describes the methodology the firm used to complete its study.

1. Coopers & Lybrand developed two actuarial models based upon two different neurological impairment scores. The first model used an intelligence quotient (IQ) of 50 or below on the Stanford-Binet Intelligence Test and the second model employed an IQ inclusion level of 70 or below. The distinction between the two impairment models is that an IQ of 50 represents severe mental retardation and an IQ of 70 represents the standard definition of "mental retardation." The NICA statute requires that to be eligible for coverage, infants must be "substantially mentally and physically impaired." Therefore, Coopers & Lybrand concluded that the lower IQ impairment model appeared to more accurately reflect those neurological injuries intended to be covered by NICA.
2. The firm then estimated the number of future NICA claims based on records obtained from perinatal intensive care centers. From these medical records, the firm's actuaries determined the number of births in intensive care centers that would meet the qualifications for NICA coverage and then extrapolated from that number a percentage of all births that would qualify as birth-related neurological injuries under NICA. Using this approach, the firm determined that approximately 0.3% of total births would satisfy NICA claims requirements (at the 50 IQ level described above).
3. To determine the average cost per claim, Cooper & Lybrand's actuaries consulted with a rehabilitative specialist. The actuaries applied the information from this source to the lower IQ impairment model and determined that the average claim cost, reduced to present value, ranged from \$820,844 to \$1,449,956.

NICA utilizes the lower assumption in Cooper & Lybrand's actuarial report to establish its reserves for the payment of anticipated claims. According to NICA's independent auditor, Governmental Accounting Standards Board statements support this practice. NICA monitors its actuarial position closely; its consulting actuary reviews reserve data on a quarterly basis, and the program annually submits a statutorily mandated reserve evaluation to the Legislature.<sup>34</sup>

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<sup>34</sup> According to s. 766.314(8), *F.S.*, "the association shall report to the Legislature its determination as to the annual cost of maintaining the fund on an actuarially sound basis."

## *Appendix C*

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# Summary of Peer Review Findings

Based on its peer review of the Merlino & Turner report, supplemental analysis and supporting workpapers, Pinnacle Actuarial Resources, Inc., reported in January 2004 that

1. the assumptions contained in the report and exhibits appear to be appropriate for their use in the analysis;
2. the methodologies used to develop cost estimates associated with the proposed expansions in NICA eligibility appear to be actuarially sound;
3. there do not appear to be any material deviations from current actuarial standards;
4. the Merlino & Turner actuarial report produces results that would be in a range of reasonable results; and
5. the Mercer RFI analysis is reasonably documented in the actuarial report and workpapers.

While there are certain assumptions that could be supported with better documentation, particularly the severity assumptions regarding claims with physical or mental disability and the medical studies supporting the brachial plexus injury claims, these issues do not appear to materially impact the reasonableness of the assumptions they support. On balance, the methods and assumptions produce reasonable findings appropriate for the scope of the work described.

Source: *Peer Review of "Review of Alternative Changes to Definition of 'Birth Related Neurological Injury,'" Pinnacle Actuarial Resources, Inc., January 2004.*

*Appendix D*

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# Agency Response



January 27, 2004

Gary R. VanLandingham  
Interim Director  
OPPAGA  
111 West Madison Street  
Room 312  
Tallahassee, FL 32399

Dear Mr. VanLandingham:

Thank you for providing a copy of your draft report on NICA eligibility requirements. We have found no errors in the report, and I thank you and your staff for the courtesy and professionalism that you have shown in the course of the review.

Sincerely,

/s/  
Kenney Shipley,  
Executive Director

Cc: Phillis Oeters-Pena, Board Chair  
Arthur S. Clements, M.D.  
Joe Ann McClandon  
Richard Levitt, M.D.  
Tim North  
Wilbur Brewton, General Counsel

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