SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Date: March 4, 1998 Revised: 3/13/98

Subject: Medical Malpractice Insurance

	Analyst	Staff Director	Reference	Action
1.	Johnson	Deffenbaugh	BI	Fav/ 6 amendments
2.			JU	
3.				
4.				
5.				

I. Summary:

The Florida Birth-Related Neurological Injury Compensation Plan (NICA) was established to provide compensation, regardless of fault, for specific birth-related neurological injuries. Senate Bill 1070 expands the number of infants eligible for compensation by revising the definition of birth-related neurological injury from infants weighing at least 2,500 to at least 1,800 grams. The bill provides that the administrative law judge has exclusive jurisdiction to determine whether a claim filed under the Florida Birth-Related Neurological Injury Compensation Plan is compensable and prohibits a civil action from being brought until such a determination has been made. Notice requirements to obstetrical patients are revised to clarify that the hospitals with a participating physician on its staff and participating physicians must provide such notice prior to delivery. The hospital or the participating physician may elect to give the patient NICA's notice form and have the patient sign a form acknowledging receipt, which is deemed to be proof that the notice requirements have been met. Exceptions to the notice requirements are provided.

According to an actuary engaged by NICA, the estimated costs of adding infants with birth weights of 1,800 - 2,499 grams would increase NICA's annual funding needs in the range of $11.3 - $28.5 million per year.

The Banking and Insurance Committee adopted six amendments: 1) striking the provisions of the bill that lower the birth rate of covered infants; 2) providing that a determination that a claim is not compensable under NICA does not prohibit the claimant from pursuing other civil remedies; 3) allowing NICA to invest plan funds under the same limitations that apply to the State Board of Administration; 4) revising the notice requirements to provide that the signature of a patient acknowledging receipt of notice raises a rebuttable presumption that the notice requirements have been met; 5) requiring the Auditor General to study, with the assistance of a technical advisory group, the actuarial soundness of NICA, including an evaluation of lowering the birth rate to

specified levels; and 6) revising the effective date, including a retroactive application of the provisions regarding exclusive jurisdiction of administrative law judges to determine compensability of claims under NICA.

This bill substantially amends the following sections of the Florida Statutes: 766.301, 766.302, 766.304, and 766.316.

II. Present Situation:

The Tort and Insurance Reform Act of 1986 created the Academic Task Force for Review of the Insurance and Tort Systems. A major concern of the Task Force was the increasing unavailability of the obstetric services to the women of Florida. The significant increase in malpractice insurance premiums had caused many physicians to cease the practice of obstetrics, creating a shortage of professionals to provide care for expectant mothers. To combat this health care delivery crisis, the Task Force recommended that the Legislature implement a no-fault plan of compensation for catastrophic birth-related neurological injuries.

In response to the recommendations, the Legislature enacted the Florida Birth-Related Neurological Injury Compensation (NICA) Act in 1988. NICA provides compensation, regardless of fault, for specific birth-related neurological injuries. Participating hospitals and physicians are immune from medical malpractice for claims covered by NICA. A birth-related injury is defined in s. 766.302, F.S., to mean:

> an injury to the brain or spinal cord of a live infant weighing at least 2,500 grams at birth caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the in the course of labor, delivery, or resuscitation in the immediate postdelivery period in a 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.

All claims for compensation are made by filing a petition with the Division of Administrative Hearings. The division then forwards a copy of the petition to NICA and mails the notice to each physician and hospital named in the petition, the Division of Medical Quality Assurance and the medical advisory review panel provided for in s. 766.308, F.S.

The Division of Medical Quality Assurance is responsible for reviewing the information and determining whether it involved conduct by a physician licensed under chapter 459, F.S., that is subject to disciplinary action, in which case the provision of s. 455.225, F.S., will apply. The Department of Health and Rehabilitative Services (redesignated as the Department of Health in 1996) is responsible for investigating the claim, and if it determines that the injury resulted from, or was aggravated by, a breach of duty on the part of a hospital in violation of chapter 395, F.S., the department will take any such action consistent with its disciplinary authority as may be appropriate.

NICA has 45 days from the date of service of the completed claim in which to file a response to the petition and to submit relevant written information relating to the issue of whether the injury alleged is a birth-related neurological injury. Any claim which NICA determines to be compensable may be accepted for compensation, provided that the acceptance is approved by the administrative law judge to whom the claim for compensation is assigned.

The administrative law judge is required to set the date for a hearing no sooner than 60 days and no later than 120 days after the filing by the claimant. Pursuant to s. 766.309, F.S., the administrative law judge is charged with making the following determinations, based upon all available evidence:

- Whether the injury claimed a birth-related neurological injury;
- Whether obstetrical services were delivered by a participating physician in the course of labor, delivery, or resuscitation in the immediate postdelivery 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 postdelivery period in a hospital; and
- How much compensation, if any, is awardable.

A determination of the administrative law judge as to qualification of the claim for purposes of compensability under s. 766.309, F.S., or an award by the administrative law judge pursuant to s. 766.301, F.S., shall be conclusive and binding as to all questions of fact. Review of an order of an administrative law judge shall be by appeal to the District Court of Appeal.

Upon determining that an infant has sustained a birth-related neurological injury and that obstetrical services were delivered by a participating physician at the birth, the administrative law judge shall make an award providing compensation for:

- Actual expenses for medically necessary and reasonable medical and hospital, habilitative and training, residential, and custodial care, medically necessary drugs, special equipment,
- Periodical payments of an award (not to exceed $100,000) to the parents or legal guardians of the infant found to have sustained a birth-related neurological injury.
- Reasonable expenses incurred in connection with the filing of a claim under ss. 766.301-766.316, F.S.

Compensation to claimants is financed through annual assessments on hospitals and physicians, an appropriation from the Department of Insurance Regulatory Trust Fund, and a potential assessment on casualty carriers. An initial transfer of $20 million from the Department of Insurance Regulatory Trust Fund (Trust Fund) was also made to NICA in 1988. In addition, NICA purchases reinsurance, or excess coverage, to finance the risks of the program in whole or in part, as permitted under s. 766.315, F.S. Each non-governmental hospital licensed under chapter 395, F.S., is required to pay an annual assessment of $50 per infant delivered in the hospital during the prior calendar year (with some exceptions). All physicians licensed under

chapter 458, F.S., or chapter 459, other than participating physicians, are required to pay an annual assessment of $250. Participating physicians are required to pay an annual assessment of $5,000. Assessments generated approximately $18.5 million in 1997.

If the assessments are inadequate to maintain the plan on an actuarially sound basis, up to an additional $20 million is appropriated for transfer from the Trust Fund. If the assessments and the appropriations from the Trust Fund are not adequate to finance NICA on an actuarially sound basis, the department will assess, up to .25 percent of premium, on an annual basis, each entity licensed to issue casualty insurance, as defined in s. 624.605(1)(b), (k), and (q) F.S. All annual assessments will be determined on the basis of net direct premiums written for the prior year ending December 31 and casualty carriers are authorized to recover their initial and annual assessment through a surcharge on future policies. Lines of insurance subject to the assessment include: farmowners, homeowners, commercial multi-peril liability, medical malpractice, other liability, product liability, and aircraft.

If the department finds that NICA cannot be maintained on an actuarially sound basis based on the assessments and appropriations, the department is authorized to increase the assessments on hospitals and physicians on a proportional basis, as needed.

In the event that NICA's estimates of the accumulated costs of reported claims equals 80 percent current funds plus estimated assessments and contributions available within the next 12 months, NICA is prohibited from accepting new claims without express authority from the Legislature. However, claims for injuries occurring 18 months or more prior to the effective date of the suspension shall not be precluded.

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 s. 766.314, (4)(c), F.S., is required to provide notice to the obstetrical patients as to the limited no-fault alternative for birth-related neurological injuries. Such notice shall include an explanation of the patient's rights and limitations under NICA.

In recent years, NICA has been the subject of litigation regarding: (1) the notice requirements to patients and (2) determination by a circuit court as to whether a claim is covered by NICA.

In 1996, the Florida Supreme Court ruled in Florida Birth-Related Neurological Injury Compensation Association v. McKaughan, 668 So.2d 974, that administrative hearing officer (administrative law judges) do not have exclusive jurisdiction to determine whether a claim is covered by NICA in a case where the plaintiff in a medical malpractice action alleged in circuit court that the injury was not covered by NICA. In that case the claimants filed a malpractice suit in circuit court and the court referred the case to the Division of Administrative Hearings for a determination as to whether the infant suffered from an injury compensable under NICA. The administrative law judge held that the claimants had not filed a claim for compensation from NICA suitable for administrative resolution since they had alleged that their child did *not* meet the

statutory definition of an infant covered by NICA. Upon appeal to the district court and that court's certified question to the Supreme Court, the Supreme Court held that:

> . . . the administrative hearing officer correctly determined that he did not have jurisdiction under these circumstances to determine the nature of [the child's] injury. [cite omitted]. While there may be persons who erroneously assert that their claims fall outside this compensation plan, there is no clear indication that the legislature intended to prevent those persons from litigating their positions in court. (966 So.2d, at 978).

In Galen of Florida, Inc. v. Braniff, 696 So.2d 308, (Fla. 1997), the Florida Supreme Court held "that as a condition precedent in invoking the Florida Birth-Related Neurological Injury Compensation Plan as a patient's exclusive remedy, health care providers must, when practicable, give their obstetrical patients notice of their participation in the plan a reasonable time prior to delivery." Therefore, if notice is not provided to an obstetrical patient, then a civil action for malpractice would not be barred, even if the birth would otherwise be covered by NICA.

III. Effect of Proposed Changes:

Section 1. Amends s. 766.301, F.S., relating to legislative intent to provide that the issue of whether such claims are covered by this act must be determined exclusively in an administrative proceeding. See Section 3, below.

Section 2. Amends s. 766.302, F.S., relating to definitions, to lower the birth weight for eligibility for birth-related neurological injury from 2,500 to 1,800 grams. This change would provide compensation through NICA for more infants. (See Private Sector Section for further discussion of impact.)

Section 3. Amends s. 766.304, F.S., relating to administrative judge law determination of claims, to provide that the administrative law judge has exclusive jurisdiction to determine whether a claim filed under this act is compensable. No civil action may be brought until the determinations under 766.309, F.S., have been made by the administrative law judge. If the administrative law judge determines that the claimant is entitled to compensation from the association, no civil action may be brought or continued in violation of the exclusiveness of remedy provisions of s. 766.303, F.S. An action may not be brought under ss. 766.301 - 766.316, F.S., if the claimant recovers or final judgment is entered. This amendment is in response to the Florida Supreme Court decision in Florida Birth-Related Neurological Injury Compensation Association v. McKaughan, explained above.

Section 4. Amends s. 766.316, F.S., relating to notice to obstetrical patients of participation in NICA, to specify that such notice must be provided to the patient any time prior to delivery and authorizes the hospital or the participating physician to elect to give the patient the notice form and have the patient sign a form documenting receipt of the notice form. Signature of the patient acknowledging receipt of the notice form is proof that the notice requirements of this section have

been met. Notice need not be given to a patient when the patient has an emergency medical condition, as defined in s. 395.002 (8)(b), F.S., or when providing the notice is not practicable. This amendment is in response to the Florida Supreme Court decision in Galen of Florida, Inc. v. Braniff, explained above.

Section 5. This act takes effect July 1, 1998.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

By providing that signature of a patient acknowledging receipt of the notice form is *proof* that the notice requirements have been met may raise a constitutional question of due process if this creates an irrebuttable presumption that cannot, under any circumstances, be overcome by a claimant.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

See Private Sector Impact for the estimated impact of changes in the bill on the assessments on hospitals and physicians and casualty carriers.

B. Private Sector Impact:

According to an actuary engaged by NICA, the estimated costs of adding infants with birth weights of 1,800 - 2,499 grams would increase NICA's annual funding needs in the range of $11.3 - $28.5 million per year. The $20 million transfer from the Department of Insurance would meet the first year's funding needs, assuming an average of $20 million per year of additional costs. The department would be required to assess the full .25 percent assessment in the second year and each subsequent year against the casualty insurers. It is estimated that

the .25 percent assessment against carriers would generate $5.4 million, based on 1995 net direct written premium. In addition, the department would be required to increase assessments paid by hospitals and physicians by an estimated 78 percent.

The actuary assumed that 22 additional births in the range of the birth weight of 1,800 - 2,499 grams would be anticipated and used the current average cost per selected/accepted claim of approximately $1.3 million to establish the high range estimate of $28.5 million. The low range estimate of $11.3 million was determined by adjusting the high range estimate of $28.5 million by .40 percent of compensable claims filed with NICA (i.e., approximately nine additional claims based on an estimated 60 percent of births compensable not filed with NICA, based on NICA's claims history).

VII. Related Issues:

None.

VIII. Amendments:

#1 by Banking and Insurance:
Strikes the provisions of the bill (Section 2) which lower the birth weight for eligibility for birth-related neurological injury from 2,500 to 1,800 grams, and returns to the current law definition. This amendment removes the fiscal impact described above. (WITH TITLE AMENDMENT)

#2 by Banking and Insurance:
Specifies that if it is determined that a claim filed under NICA is not compensable, neither the doctrine of collateral estoppel or res judicata shall prohibit the claimant from pursuing any and all civil remedies available under common law and statutory law. However, sworn testimony and exhibits introduced into evidence in the prior determination may be admissible in subsequent actions as impeachment evidence. (WITH TITLE AMENDMENT)

#3 by Banking and Insurance:
Authorizes the NICA board to invest plan funds under the same limitations that apply to the State Board of Administration under s. 215.47. Currently, the NICA law requires that plan funds be invested in interest-bearing investments.

#4 by Banking and Insurance:
Strikes the notice provisions of the bill and, instead, provides that a hospital or participating physician may elect to have the patient sign a form acknowledging receipt of the notice form, which would raise a rebuttable presumption that the notice requirements of this section have been met. It also provides that notice need not be given when the patient has an emergency medical condition as defined in s. 395.002(8)(b), F.S., or when notice is not practicable. This amendment removes the constitutional issue raised by the bill, summarized above.

#5 by Banking and Insurance:

Requires the Auditor General to conduct a study of the actuarial soundness of NICA and other specified aspects of NICA funding, including an evaluation of the estimated annual cost to lower the birth weight to 2,000 grams or 1,000 grams. The Auditor General must contract with an actuarial consulting firm which has never conducted a previous actuarial analysis of NICA. To assist the Auditor General, a technical advisory group must be appointed by various professional and trade associations specified, including health care providers, insurers, and attorneys. The final report must be submitted to the Legislature by January 1, 1999. The amendment has a fiscal impact on the Office of the Auditor General, but no appropriation is made. The amendment does not entitle the technical advisory group to any compensation or reimbursement. (WITH TITLE AMENDMENT)

#6 by Banking and Insurance:
Amends the effective date to provide that the amendments to ss. 766.301 and 766.304, relating to the exclusive jurisdiction of an administrative law judge to determine whether a claim filed birth is compensable under NICA and the prohibition against bringing a civil action until such a determination has been made. These provisions would apply to claims filed on or after July 1, 1998, and to that extent shall apply retroactively, regardless of the date of birth.

The amendments to the notice provisions would take effect July 1, 1998, and apply only to causes of action accruing on or after such date. (WITH TITLE AMENDMENT)