

**Florida Birth-Related Neurological Injury Compensation Association (NICA)
The Importance of Notice
(1 Hour Web CME Program)**

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The Physician Insurers Association of America (PIAA) Cumulative Data Sharing Report from January 1, 1985 through December 31, 2002 reveals that brain damaged infants were the most expensive and prevalent condition reported. Brain damaged infants accounted for 1,634 paid claims out of 3,967 total claims, the most of any condition reported. In addition, brain damaged infants also had the highest indemnity payment with an average payment of \$501,647 per claim, of any condition reported to the PIAA. Juries have awarded large judgements where there was a severe disability, without strong evidence of causality of the damage to the infant. These cases are sympathy provoking due to the emotional aspect of an infant with such severe damages and the challenges the infant and parents will face.

The Florida Legislature enacted the Florida Birth-Related Neurological Injury Compensation Association (NICA) in 1988 as a result of a recommendation by an Academic Task Force created out of the Tort and Insurance Reform Act of 1986. (See Chapter 766.301-766.316, Florida Statutes). A major concern of that Task Force was a shortage of obstetrical services for the women of Florida. The Task Force recommended the Legislature implement a no-fault plan of compensation for catastrophic birth-related neurological injuries, such as a similar program the state of Virginia had enacted, and the Florida Legislature responded. NICA was enacted as a no-fault alternative to cover catastrophic birth-related neurological injuries. NICA covers birth-related injuries regardless of the “standard of care”. The Tort Reform bill of 2003, addressed NICA with further provisions.

NICA was designed to cover a very narrow range of injuries. In order for a claimant to be eligible to receive compensation under NICA there must be injury to the spinal cord or brain of a live infant. The infant must weigh at least 2,500 grams at birth for a single gestation or, in the case of a multiple gestation, a live infant must weigh at least 2,000 grams at birth. Oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital must cause the injury. The infant must be rendered permanently and substantially mentally and physically disabled. The majority of deliveries are potentially covered at birth. According to an article in a 1997 issue of the American Journal of Obstetrics and Gynecology, most obstetric practices average 8% premature births, 10% elective c-sections, and 1% fetal demise, approximately 80% of deliveries would be potentially covered by NICA.

There are certain cases not covered under NICA. If there were no labor, for example an emergent delivery due to trauma or severe illness, NICA would not cover. Birth weight less than the required weight and if the injury is not substantial, the claims will not be covered under NICA.

As of September 9, 2003, NICA had 780 physicians and 129 nurse-midwives participating in the program. NICA is funded by assessments. Every hospital in Florida pays \$50 per live birth and every physician pays \$250 per year. In order to be eligible to participate in NICA Practitioners must pay, or have paid on their behalf, the annual participation fee year of \$5,000 per year. Practitioners must inform patients of their participation by providing notice to the patient. NICA recommends providing the NICA brochure entitled “Peace of Mind”, as it meets the legal standard, and obtain a signed acknowledgement of receipt of the notice by the patient. You are responsible to maintain files documenting that timely notice was given to every patient, and notify NICA of a potential NICA covered birth.

If a NICA claim is accepted, care is paid for over the lifetime of the child. Care for children with permanent and substantial mental and physical disabilities over their lifetime is expensive. Compensation by NICA may be provided for actual expenses for necessary and reasonable care, services, drugs, equipment, facilities and travel, excluding expenses that can be compensated by state or federal government or by private insurers. In addition, an award not to exceed \$100,000 is paid to the parents. Funeral expenses are authorized up to \$1,500. Reasonable expenses for filing the claim, including attorneys fees are covered. According to Kenney Shipley, Executive Director, NICA, only 7% of the total claims payment through June 30, 2002 went to plaintiff attorney fees and costs, therefore a far greater percentage of resources from NICA go for the care of the child. As much as 40% of indemnity in the civil tort system typically goes to the plaintiffs attorneys, rather than the care of the infant.

The Tort Reform bill of 2003 provides that infants receiving compensation under NICA are eligible for Children's Medical Services. In addition, those children shall reimburse the Children's Medical Service program for the state's share of funding. It also provides that no civil action may be brought if claimant accepts award under NICA and a NICA award can not be made if claimant recovers under a settlement or civil action. The bill revised the records required to be provided by a claimant. It provides a death benefit, in lieu of funeral expenses. It authorizes that hospitals in certain areas may pay assessments on behalf of certain health care professionals.

NICA provided statistics that demonstrate through September 9, 2003, NICA has received 489 claims and their disposition is as follows:

- 171 claims accepted and paid
- 16 claims under evaluation for compensability
- 267 claims ruled non-compensable by the Administrative Law Judge
- 17 claims awaiting ruling by the Administrative Law Judge
- 16 claims on appeal
- 2 claims abated

Kenny Shipley, Executive Director of NICA stated the "most (frequent) barrier to recovery is failure to give notice". Notification by both the physician and the hospital must be given, documented, and acknowledged by the expectant parent in a timely manner, except for certain emergent deliveries. As a Practitioner you need to have knowledge of the procedure used to give notice to your patients by your office staff and the hospitals you deliver in, to ensure compliance with the requirements of the statute. Proof of notice must meet the evidentiary standard, the NICA brochure for notice meets that legal standard, according to Ms. Shipley.

In order to prove notice was given, your office should set up a written procedure to follow. The procedure should include a checklist placed in each patient medical record to assist with the process. NICA provides a suggested acknowledgement form that each participating physician and hospital can utilize to obtain written acknowledgement by the patient that she received the NICA brochure, "Peace of Mind For an Unexpected Problem", available at www.NICA.com. The name of every practitioner in your office who delivers should be written on the brochure, not only the obstetrician of record for the patient.

If the suggested acknowledgement form is not used, some form of written acknowledgement of receipt of the NICA brochure should be obtained from the patient. Any written acknowledgement form should be dated and signed by the patient. Retain the signed written acknowledgement of receipt in the patient file

as evidence of compliance with the notice requirement. In addition, NICA suggests that a notation be made in the patient's medical record that the brochure was given and whether a written receipt was obtained. As a precaution, three months prior to EDC have an administrator or nurse audit the file to determine if notice was given. If not, the office administrator should take the necessary precautions to ensure notice is given timely and the proper documentation is on file.

NICA strongly recommends written, signed notice and patient medical record notation. If a patient refuses to sign, note the refusal, date, time and have the staff members initial and identify who gave the patient the brochure.

To ensure compliance with the procedure assign oversight responsibility to one person. Do a quality audit periodically to ensure compliance with the procedure, and that the procedure is still working.

NICA suggested checklist for notice, available from NICA

- Procedure clearly established (written procedure preferred) for the delivery of NICA brochure at intake or first opportunity. All delivering practitioners' names written on the brochure.
- Brochure given at intake or at first patient contact.
- Patient file clearly documented with date and time notice given, and by whom.
- Acknowledgement form signed by patient and dated. Note which staff member gave notice and staff member signature.
- 3 months prior to delivery patient chart audited for notice and documentation. If notice not documented, send to patient by certified mail and retain receipt.

Medical record documentation is important so the information is preserved in the event a claim is filed with NICA. The following steps should be taken to ensure that the medical records are readily accessible and complete in case a claim is filed. Make sure that all events surrounding the labor, delivery, and the immediate post-resuscitation period are clearly documented in the patient's file. Make sure all medical records are gathered in one place. Make an extra copy of the medical records to ensure copies will be readily accessible if requested. Retain all medical records in such a manner that all staff are knowledgeable as to the location of the records so that the records will be readily available if a claim is filed with NICA. This is especially important if there is a high employee turnover rate since a NICA claim is not usually filed until two or three years after the delivery of the infant.

NICA suggested checklist for medical records, available from NICA

- Call NICA and advise of a possible claim at (850) 488-8191.
- Events surrounding labor, delivery and the immediate post-resuscitation period are clearly documented in the chart.
- All medical records are in one place.
- Extra copy made for easy access.
- Location of records clearly labeled and staff knows where they are.
- Affidavit from person who delivered notice explaining procedure followed and all events surrounding the provision of notice.



You can obtain brochures free of charge from NICA. They are available in English, Spanish, Vietnamese, Creole, Bosnian and Arabic. In addition, if you have a need for a brochure in another language, NICA will have it translated, if possible. Posters, checklists, and notice acknowledgements are also available free of charge. Contact NICA at 800-398-2129 or www.NICA.com. Every time you give notice and document you are potentially taking a claim away from the civil tort system in Florida.

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