STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KYSHA LAWTON and LEROY FRAZIER, as parents and natural guardians of KYARA FRAZIER, a minor,

Petitioners,

vs. Case No. 01-1215N

FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,

Respondent,

and

ST. ANTHONY'S HOSPITAL, INC., and BETH LIEBOWITZ, M.D.,

Intervenors.

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by Administrative Law Judge William J. Kendrick, held a final hearing in the above-styled case on February 19, 2002, in St. Petersburg, Florida, and on November 6, 2002, by telephone conference.

APPEARANCES

For Petitioners: William F. Blews, Esquire
William F. Blews, P.A.
600 First Avenue, North, Suite 307
Post Office Box 417
St. Petersburg, Florida 33701

For Respondent: B. Forest Hamilton, Esquire
Post Office Box 38454
Tallahassee, Florida 32315-8454

For Intervenor St. Anthony's Hospital, Inc.:

Kirk S. Davis, Esquire
Akerman, Senterfitt & Eidson, P.A.
Post Office Box 3273
Tampa, Florida 33601-3273

For Intervenor Beth Liebowitz, M.D.[1]:

William E. Hennen, Esquire
James G. Linquist, Esquire
Barr, Murman, Tonelli, Slother & Sleft
201 East Kennedy Boulevard, Suite 1700
Tampa, Florida 33602

STATEMENT OF THE ISSUES

1. Whether Kyara Frazier, a minor, suffered a "birth-related neurological injury," as defined by Section 766.302(2), Florida Statutes.

2. Whether the participating physician and hospital satisfied the notice provisions of the Florida Birth-Related Neurological Injury Compensation Plan (Plan), as prescribed by Section 766.316, Florida Statutes.

PRELIMINARY STATEMENT

In July 1999, Kyara Frazier, a minor, by her parents and natural guardians, Kysha Lawton and Leroy Frazier, and Kysha Lawton and Leroy Frazier, individually, filed a complaint against St. Anthony's Hospital, Inc.; Beth Liebowitz, M.D.; and Bay Gynecological Associates, P.A., a professional association

with which Dr. Liebowitz was affiliated, in the Circuit Court for the Sixth Judicial Circuit, in and for Pinellas County, Florida, alleging medical malpractice associated with the labor of Ms. Lawton and the delivery of Kyara.

Following amendment of the complaint, St. Anthony's Hospital, Dr. Liebowitz, and the professional association responded, and raised, inter alia, the defense of NICA exclusivity. Section 766.303(2), Florida Statutes. Petitioners replied, and averred that NICA exclusivity did not bar their civil action because the hospital and participating physician failed to comply with the notice provisions of the Plan.

In the wake of the amendments to Sections 766.301(1)(d) and 766.304, Florida Statutes (Supp. 1998), and the decision in O'Leary v. Florida Birth-Related Neurological Injury Compensation Association, 747 So. 2d 624 (Fla. 5th DCA 2000), St. Anthony's Hospital prevailed upon the court to abate the civil suit until it was resolved, by an administrative law judge, whether Kyara's injury was compensable under the Plan, and whether notice was given or excused. The court's order, dated September 13, 2000, provided, as follows:

> In 1996, the Florida Supreme Court held in Humana of Florida v. McKaughan, 668 So. 2d 974 (Fla. 1996) that NICA does not vest exclusive jurisdiction in an administrative officer to determine if an injury is covered by the plan. However, in 1998, the legislature amended § 766.304 and the

> statute now provides, in part, that "the administrative law judge has exclusive jurisdiction to determine whether a claim filed under the act is compensable. No civil action may be brought until the determinations under s. 766.309 have been made by the administrative law judge."
>
> In O'Leary v. Florida Birth-Related Neurological Injury Compensation Assoc., 25 Fla. L. Weekly D1234 (Fla. 5th DCA May 19, 2000), the Fifth District Court of Appeal held that the administrative law judge had exclusive jurisdiction to determine the applicability of NICA. Further, the administrative law judge had exclusive jurisdiction to determine whether notice of participation in NICA was required and provided. The court stated, "all questions of compensability, including those which arise regarding the adequacy of notice, are properly decided in the administrative forum."
>
> * * *
>
> ACCORDINGLY, it is hereby,
>
> ORDERED AND ADJUDGED:
>
> 1. This action shall be abated until such time as the issues of applicability of the Florida Birth-Related Neurological Compensation (NICA) to Plaintiffs' claims and the compensability of Plaintiffs' claims under NICA are fully and finally resolved by an Administrative Law Judge or in Appellate form.

On March 29, 2001, Kysha Lawton and Leroy Frazier, as parents and natural guardians of Kyara Frazier, a minor, filed a petition (claim) with the Division of Administrative Hearings

(DOAH), for compensation under the Florida Birth-Related Neurological Injury Compensation Plan.

DOAH served the Florida Birth-Related Neurological Injury Compensation Association (NICA) with a copy of the claim on March 30, 2001, and on June 6, 2001, NICA gave notice that, upon review of the claim, it had "determined that such claim is not a 'birth-related neurological injury' within the meaning of Section 766.302(2), Florida Statutes," and requested that "an order [be entered] setting a hearing in this cause on the issue of compensability." Following intervention by St. Anthony's Hospital and Dr. Liebowitz, as well as a number of continuances, a hearing was ultimately scheduled for February 19, 2002, to address the issue of compensability, as well as notice. Subsequently, on February 15, 2002, a pre-hearing conference was held and it was resolved that "[t]he issues of notice and compensability are bifurcated and . . . the hearing to be held on February 19, 2002, will be [to address] whether notice was accorded the patient as contemplated by Section 766.316, Florida Statutes." (Order of February 18, 2002.)

At hearing, Petitioners called Kysha Lawton and Sandra Blakeman, as witnesses, and Petitioners' Exhibit 1 (a Stipulation between Petitioners and Intervenor Beth Liebowitz, M.D.) and Exhibit 2 (St. Anthony's records for Kysha Lawton) were received into evidence.[2] Intervenor St. Anthony's Hospital

called Kim McFadden as a witness, and Intervenor's Exhibit 1 (St. Anthony's Clinstar Visit History), Exhibit 2 (affidavit of Kim McFadden), Exhibit 3 (Conditions of Treatment form, dated 12/16/96), Exhibit 4 (Advance Directive Status form), Exhibit 5 (Tuberculosis Screen form), and Exhibit 6 (Conditions of Treatment form, undated), were received into evidence. No other witnesses were called, and no further exhibits were offered.

The transcript of the hearing was filed March 6, 2002, and the parties were accorded 10 days from that date to file proposed orders; however, the record was not complete until copies of the records of St. Anthony's Hospital relating to Kysha Lawton's admission of December 16, 1996, were filed April 15, 2002, and received into evidence as Petitioners' Exhibit 2. Consequently, the requirement that an order be rendered within 30 days after the transcript has been filed was waived. See Rule 28-106.216(2), Florida Administrative Code. Petitioners and Intervenors elected to file such proposals, and they were duly considered.

On April 26, 2002, an Order was entered which resolved that the hospital and the participating physician failed to comply with the notice provisions of the Plan. The Order concluded:

> Having resolved that the notice provisions of the Plan were not satisfied, it is
>
> ORDERED that Petitioners are accorded 30 days from the date of this Order to elect,

> in writing, whether to waive notice and pursue a claim for Plan benefits or whether to pursue their civil remedies.

Thereafter, on May 8, 2002, the Fourth District Court of Appeal, State of Florida, issued its decision in Gugelmin v. Division of Administrative Hearings, 815 So. 2d 764 (Fla. 4th DCA 2002). In that opinion, the Court held, inter alia, that:

> . . . the ALJ exceeded his authority to determine compensability and notice issues by ruling on the impact of such determinations on . . . [the claimants' and the hospital's] rights and remedies . . . [,and] requiring . . . [the claimants] to elect between remedies . . . .

Based upon that decision, Intervenor St. Anthony's Hospital, on May 17, 2002, filed a Motion for Clarification and/or Reconsideration of Order dated April 26, 2002. A hearing was held on that motion on May 23, 2002, and on May 24, 2002, an Order was entered which vacated the Order of April 26, 2002, and provided that notice would be readdressed in a subsequent order when compensability was resolved.

On November 6, 2002, a hearing was held to resolve compensability. At that hearing, Petitioners' Exhibit 3 (the deposition of Robert F. Cullen, M.D., with Intervenor's deposition composite Exhibit 1) and Exhibit 4 (the deposition of Mary Pavan, M.D., with Intervenor's deposition exhibits 1 and 2) were received into evidence. Respondent's Exhibit 1 (the deposition of Michael Duchowny, M.D., with exhibits) and Exhibit

2 (the deposition of Donald Willis, M.D., with exhibits) were received into evidence. Finally, Joint Exhibit 1 (the medical records filed March 28, 2001, and noted as "Exhibit 1" to the claim for compensation) and Joint Exhibits 2A and 2B, two volumes (assessments, evaluations, and other records filed March 28, 2001, and noted as "Exhibit 2" to the claim for compensation) were received into evidence. No witnesses were called and no further exhibits were offered.

The transcript of the hearing was filed November 21, 2002, and the parties were initially accorded 10 days from that date to file proposed orders; however, at the request of Intervenor St. Anthony's Hospital, and without objection, the time for filing proposed orders was extended to December 6, 2002. Consequently, the requirement that an order be rendered within 30 days after the transcript has been filed was waived. <u>See</u> Rule 28-106.216(2), Florida Administrative Code. The parties elected to file such proposals, and they have been duly considered.[3]

FINDINGS OF FACT

Preliminary findings

1. Kysha Lawton and Leroy Frazier are the parents and natural guardians of Kyara Frazier, a minor. Kyara was born a live infant on December 16, 1996, at St. Anthony's Hospital, a

hospital located in St. Petersburg, Florida, and her birth weight exceeded 2,500 grams.

2. The physician providing obstetrical services at Kyara's birth was Beth Liebowitz, M.D., who, at all times material hereto, was a "participating physician" in the Florida Birth-Related Neurological Injury Compensation Plan, as defined by Section 766.302(7), Florida Statutes.

Kyara's birth and subsequent development

3. At or about 7:00 a.m., December 16, 1996, Ms. Lawton, with the fetus at term, presented to St. Anthony's Hospital, in labor. Following admission, vaginal examination revealed the cervix at 2 centimeters dilation, effacement at 90 percent, and the fetus at -3 station, and fetal monitoring revealed a reassuring fetal heart rate, with a baseline of 130 to 140 beats per minute.

4. From 10:30 a.m., when her labor was initially augmented with Pitocin, until 5:00 p.m., when she was evaluated by Dr. Liebowitz, the Labor and Delivery Flow Sheet reflects that Ms. Lawton's labor progress was slow, but steady, and fetal monitoring continued to reveal a reassuring fetal heart rate baseline of approximately 130 beats per minute. At that time, vaginal examination revealed the cervix at 6-7 centimeters dilation, effacement at 100 percent, and the fetus between station 0 and +1.[4]

5. Following examination, Dr. Liebowitz ordered an increase in Pitocin and shortly thereafter, at 5:08 p.m., a variable deceleration to 80-90 beats per minute, for 3 minutes, and at 6:21 p.m., a variable deceleration to 70 beats per minute, for approximately 3 minutes, was noted. Fetal heart rate was, however, noted as reassuring, with a baseline of 130-140 beats per minute, and long term variability present.

6. Dr. Liebowitz next examined Ms. Lawton at approximately 6:35 p.m. At the time, vaginal examination revealed the cervix at 8 centimeters, effacement at 100 percent, and the fetus at +2 station. Dr. Liebowitz ordered an increase in Pitocin.

7. Following the increase in Pitocin, several decelerations to the 90 beat per minute range were noted (between approximately 6:37 p.m., and 6:45 p.m.), and at approximately 6:55 p.m., a vacuum extractor was applied by Dr. Liebowitz. At or about that time, a variable deceleration to 60 beats per minute, for approximately 2 minutes, was noted. Following recovery, and as last recorded on the fetal monitor strips (at 7:00 p.m.), the fetal heart rate had dropped to 90 beats per minute.

8. On delivery of the infant's head, a nuchal cord x1 and a shoulder dystocia were noted. The nuchal cord was reduced, and at 7:05 p.m., Kyara was delivered, albeit with a fractured

right clavicle (associated with efforts employed to resolve the shoulder dystocia).

9. On delivery, Kyara was depressed (limp, without spontaneous respiration) and required resuscitation (positive pressure ventilation for 30-40 seconds), together with suctioning, before she pinked up and began spontaneous respirations. Apgar scores were recorded as 4 and 9, at one and five minutes, respectively.[5]

10. Following delivery, Kyara was transferred to the newborn nursery and on December 18, 1996, she and her mother were discharged. Notably, apart from the clavicular fracture, transient tachypnea of the newborn (TTN), which resolved, and a cephalohematoma,[6] Kyara's newborn assessments were normal, and without evidence of prenatal, perinatal or postnatal complications.

11. Following discharge, Kyara's development was without apparent complication until February 2, 1997, when, at 7 weeks of age, she evidenced signs of seizure activity and was admitted to St. Anthony's Hospital. At the time, the parents described their concerns, as follows:

> . . . The mother noted that the patient had an episode of upper and lower extremity twitching at 1130 hours while sleeping. This episode lasted approximately 10 seconds and then the baby cried and fell back to sleep. At approximately noon, the mother awoke the child and the baby fed well. The

> parents state that the child appeared normal. At approximately 1800 hours while in the prone position, the patient had a identical episode lasting of 10 seconds duration. The mother noted that the eyes were deviated to the left . . . .

At St. Anthony's, a similar episode was noted.

12. Kyara was transferred to All Children's Hospital, where she was admitted at 10:30 p.m., February 2, 1997, for further evaluation. A CT brain scan was performed the same date and preliminarily reported as showing a "R[igh]t epidural old hematoma lesion parietal 2.5mm.+ 5-6mm. depth." The results of the scan were more formally reported, as follows:

> Findings: There is a biconvex lesion along the inner table of the right temporal calvarium. It measures approximately 6mm. thick and its base measures 2 to 2.5cm. Its outer margin is increased in its attenuation and is visible on bone windowing. Its more central density is lower and isointense with adjacent brain parenchyma. The adjacent calvarium appears intact on bone windowing. The brain attenuation pattern is normal. The ventricles are normal in their size, position and contour. No midline shift. The mastoid air cells are normally aerated and developed.
>
> IMPRESSION: 1. Small right parietotemporal epidural hematoma with partial healing.

13. On February 3, 1997, a skeletal survey was performed and compared with the CT scan. Pertinent to this case, the results of that survey were reported, as follows:

> Findings: There is a curvilinear calcification extending from and paralleling

> the outer table of the skull of the superior/posterior right parietal region most consistent with a calcified cephalohematoma. The calcified epidural hematoma seen on the prior CT brain is not visualized. There is no identifiable skull fracture. . .
>
> IMPRESSION: 1. Calcified cephalohematoma of the superior/posterior right parietal region.

14. Kyara was medicated with Phenobarbital, and discharged from All Children's Hospital on February 5, 1997, with an MRI of the brain scheduled for February 7, 1997. Discharge diagnosis was listed as:

> 1) Sepsis ruled out
> 2) Seizure - EEG . . . [Normal]
> 3) Small old epidural calcified hemorrhage consistent with vacuum extract[ion]

15. The MRI of the brain done on February 7, 1997, was compared with the CT scan done on February 2, 1997, and the skeletal survey done on February 3, 1997, and reported, as follows:

> Findings: Overlying the posterior right temporoparietal region, there is a small biconvexed collection, measuring approximately 3.0 x 0.4 cm. This collection is predominantly of very high signal on IR images, very high signal on PD images, moderately high signal on T2 images, and moderately high signal on GRE images. This collection was partially calcified on the prior CT. This collection almost certainly reflects a relatively old epidural or subdural hematoma. This collection is associated with mild compression of the adjacent brain.

> Overlying the superior-posterior right parietal region, there is a small-moderate outwardly convexed collection, measuring approximately 3.5 x 0.6 cm. This collection is of very high signal on IR images, of signal similar to brain on T1 images, a very high signal on PD/T2 images, and of signal similar to brain on GRE images. This collection is contiguous with the outer table of the skull and is calcified on the prior plain film exam of the skull. This collection represents a calcified cephalohematoma.
>
> Otherwise, the exam is unremarkable. Specifically, midline structures appear to be well formed. Myelination and gray/white differentiation is within normal limits. There is no identifiable mass or mass effect. There is no identifiable asymmetry in size or signal of the temporal lobes.
>
> IMPRESSION:
>
> 1. Small partially calcified epidural or subdural hematoma overlying the posterior right temporoparietal region, associated with slight compression of the adjacent brain.
>
> 2. Small to moderate calcified cephalohematoma of the superior-posterior right parietal region.

16. Following her discharge from All Children's Hospital, Kyara was followed by physicians (pediatric neurologists) associated with the Neurology Clinic. There, on April 15, 1997, Kyara presented for her first visit with Dr. Jose Ferreira. Dr. Ferreira reported the results of that visit, as follows:

> Since discharge from the hospital, she has had no recurrence of seizures. Her development continues to make progress. She is usually alert and playful, with good eye contact. She has been feeding well and sleeping well. There have been no concerns from a medical or neurological standpoint. She is being maintained on Phenobarbital, 4 cc b.i.d., which she has tolerated well.
>
> On examination today, her head circumference was 41.5 cm. There were no bruits on auscultation of the head, neck, and chest. The abdominal exam was benign. The extremities had no deformities or joint tenderness. She was alert and smiling with stimulation. She was maintaining eye contact and tracking. Her pupils were equal and reactive, but 4 mm. The funduscopic exam showed no retinal abnormalities. The face was symmetric, and the tongue was not enlarged. Motor exam showed no focal weakness. She had a strong grasp and symmetric movement of all extremities. The head control was appropriate for her age. She was able to step forward when held in standing position. The deep tendon reflexes were symmetric, and the plantar responses were flexor bilaterally.
>
> IMPRESSION:
>
> 1. A history of seizures, with a nonfocal neurologic examination.
>
> 2. There is no recurrence of seizures on the current dose of Phenobarbital.

17. Kyara was next seen by Dr. Ferreira on October 24, 1997, at which time he noted that, but for a seizure in May of 1997, she had been seizure-free. Neurological exam that day, like the prior exam, noted no neurologic abnormalities; however, when next seen by Dr. Ferreira, on March 3, 1998 (at 14 months

of age), she was noted to have "evidence of developmental delay, maximally involving speech and language . . . [,with] some developmental delay in her motor areas." At the time, Dr. Ferreira noted that:

> . . . She has not started saying any words. She has not started walking independently . . . . She is maintaining eye contact briefly . . . . She was not following commands . . . Her motor exam shows no focal weakness . . . .

18. Following Dr. Ferriera, Dr. Raymond Fernandez provided follow-up services (on 8 occasions) through the Neurology Clinic for Kyara, from July 31, 1998, through August 13, 1999, and Dr. James Johnson provided those services (on 2 occasions), from September 20, 1999, through December 10, 1999. During that period, Kyara's seizures persisted, and they have since proven intractable. As for her neurologic presentation, Kyara was noted as largely withdrawn, although on occasion appeared more socially interactive, and she did not speak. No focal neurological abnormalities were noted. Dr. Fernandez' impression was "neuro-behavioral syndrome with pervasive elements but not clearly within the autism spectrum. Mental retardation is also a possibility." Dr. Johnson's impression was "[p]ervasive developmental disorder."

19. Apart from the Neurology Clinic, Kyara was seen by Dr. Eric Tridas, a developmental pediatrician associated with

the CP/Developmental Clinic, for behavioral and developmental assessment. Kyara was seen by Dr. Tridas on four occasions, and in his report of a May 4, 1999, visit he noted the results of his examination and impressions, as follows:

> Neurological examination: Revealed an alert youngster who made inconsistent eye contact. Kyara was nonverbal throughout the examination. She was unable to follow simple commands. There was little intent of communication other than for an occasional grunt. Most of her sounds consisted of open vowels or grunting. She did not use any form of nonverbal communication (pointing, gesturing, etc). Relative to her social interaction, Kyara's eye contact was felt to be somewhat fleeting. While at times she would make eye contact with the examiner, she did not seem to show any interest in interacting other than for grabbing the stethoscope or the examiner's pen. She did not play with toys appropriately and showed no interest in items presented to her.
>
> * * *
>
> IMPRESSIONS:
>
> 1. Seizure disorder.
>
> 2. Global developmental delays. Symptoms: Kyara is clearly showing fairly extreme and significant delays, especially in the language area. There is little intent of communication and her receptive language abilities appear to be quite low.
>
> 3. Pervasive developmental disorder of childhood. Symptoms: Kyara seems to fit the diagnostic criteria for the pervasive developmental disorders, in particular infantile autism. That is, she is showing a severe qualitative impairment of communication, qualitative impairment of

> socialization and a restricted repertoire of activities. The delays in language and socialization appear to be the most prominent at this point. There is no indication of any self-injurious or self-stimulatory behavior, nor any significant aggression. It is possible that some of her autistic symptoms may be the product of her global developmental delays and significant impairment. However, clinically she meets the diagnostic criteria for autism.

In the report of his last examination on January 4, 2000, Dr. Tridas noted his impression as "[p]ervasive developmental disorder of childhood, not otherwise specified. Global developmental delays."

20. In addition to Dr. Tridas, Kyara was also evaluated by Dr. Mary Pavan, a developmental pediatrician and the Medical Supervisor of the Early Intervention Program (EIP). Dr. Pavan concluded, based on her examination of July 21, 1999, which will be discussed more fully infra, that although Kyara did exhibit autistic symptoms (global developmental delay and repetitive types of behavior) her presentation was most consistent with severe cognitive delays (mental retardation). Notably, Dr. Pavan also observed, "the two diagnoses -- mental retardation and autism -- are very close together, because extreme mental retardation can have autistic features. Similarly, autism can be associated with mental retardation . . . [they are not mutually exclusively,] you can have both or you can have one or the other."[7]

21. On June 26, 2000, another CT scan of the brain was done. That scan was read as normal, and the right epidural hematoma had resolved.

Coverage under the Plan

22. Pertinent to this case, coverage is afforded by the Plan for infants who suffer a "birth-related neurological injury," defined as an "injury to the brain . . . 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, which renders the infant permanently and substantially mentally and physically impaired." Section 766.302(2), Florida Statutes. See also Section 766.309, Florida Statutes.

23. Here, there is no dispute that Kyara is permanently and substantially mentally and physically impaired. Rather, what is disputed is whether the proof demonstrates, more likely than not, that Kyara's impairment resulted from an "injury to the brain . . . caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate post-delivery period," as opposed to some other etiology or at a time that predated or posted dated birth.

The cause of Kyara's impairment

24. To address the cause of Kyara's impairment, the parties offered medical records relating to Ms. Lawton's antepartum and intrapartum course, as well as Kyara's delivery and subsequent development. Petitioners also offered the deposition testimony of two physicians: Robert F. Cullen, M.D., and Mary Pavan, M.D.[8] In turn, Respondent offered the deposition testimony of two physicians: Michael Duchowny, M.D., and Donald Willis, M.D.

25. Dr. Willis (whose testimony was offered by Respondent) is a physician board-certified in obstetrics and gynecology, as well as maternal fetal medicine. Pertinent to this case, Dr. Willis reviewed the medical records related to Kyara's birth, including the fetal monitor strips, and was called upon to render his opinion as to whether they revealed any incident during labor and delivery that would be consistent with fetal compromise or injury. On this issue, Dr. Willis was of the opinion that, apart from the fractured clavicle, there was no evidence of a traumatic or hypoxic event that caused injury to Kyara.

26. In reaching such conclusion, Dr. Willis noted that, although there were decelerations, there was also good recovery, and that the fetal monitor strips were otherwise reassuring. Moreover, and consistent with his conclusions, Dr. Willis noted

that while Kyara's one-minute Apgar score was low her five-minute Apgar score was normal; her newborn assessments were normal; and her hospital course was uneventful.

27. Dr. Pavan (whose testimony was offered by Petitioners) is a physician board-certified in pediatrics, as well as neurodevelopmental disabilities who, as discussed supra, examined Kyara on July 21, 1999, and resolved that Kyara's presentation, as of that date, was most consistent with mental retardation. As for the cause of Kyara's delays, Dr. Pavan could identify no etiology that would account for Kyara's difficulties.

28. Regarding Kyara's history, and Dr. Pavan's inability to identify an etiology, Dr. Pavan offered the following observations:

> Q. Could you list for me the possible causes of developmental progression that's seen in Kyara's case or lack of developmental progression?
>
> * * *
>
> A. I should think it would have to be either abnormality in how the brain developed. I'm thinking about fetal development. It could be metabolic, it could be structural. There could be brain injury at any time before birth, during birth, after birth. There could be injury from seizures that were not controlled, could be infectious etiology. There could be a familial problem, but we have no history or that. It could be a metabolic abnormality.

Q. Anything else?

A. Um, not off the top of my head.

Q. Have you ruled out any of those here, such as when you went to look at the medical records from her birth as to whether there was any damage during the birthing process?

A. An MRI would help me to know if it's possible that there could have been injury during the birth process that would show up on the MRI.

Q. What would you be looking for?

A. An abnormality in myelination or in the structure. Kyara is, I don't know that we have another child that we have followed who has not made progress like Kyara has not made progress. And I don't understand it.

Q. Without the MRI?

A. Without the MRI --

Q. Based on just your review of the records, did you see that there was any --

A. No. There is some area, with the CT scan, there was some area of epidural hemorrhage that might be related, but she has so much more severe problems than I would expect from that finding.

* * *

Q. Okay. You noted on the CT scan that there was some epidural hematoma . . . [a focal injury]; is that right?

A. Right.

* * *

Q. And did you see any focal deficit in Kyara?

A. I saw no focal deficit with Kyara.

* * *

Q. In your review of that MRI report, does that assist you in determining any etiology of Kyara's condition?

A. It rules out some possibilities.

Q. What does it rule out?

A. It rules out that there was a significant developmental abnormality in the myelination pattern of the brain. And also on this date it rules out a brain injury. So this is very --

Q. Any in-brain injury?

A. No, any injury. It rules out a brain injury to the parenchyma of the brain.

Q. And so when you said that there was no brain injury to the parenchyma of the brain in Kyara Frazier's case that means what?

A. I probably shouldn't have said that because then later I saw that there was some compression of the adjacent brain. That would be a focal type of, a focal area that was affected.

Q. And Kyara's problems are not focally caused, correct?

A. That's correct.

* * *

Q. Go ahead.

> A. I do not think that a compression on the adjacent brain would cause the difficulty with learning and development that Kyara has.

29. Dr. Duchowny (whose testimony was offered by Respondent) practices pediatric neurology at Miami Children's Hospital, and is board-certified in pediatrics, pediatric neurology, and clinical neurophysiology. Dr. Duchowny examined Kyara on May 24, 2001, and was of the opinion that Kyara's presentation was most consistent with autism, a developmental abnormality (an abnormality acquired prior to birth, at the time the brain was forming). The results of Dr. Duchowny's evaluation, and opinions, may be summarized as follows:

> Q. If you would just briefly go through your written report and tell me what your findings were.
>
> A. At the time of my evaluation Kyara was a four and a half year old girl, and she had a known history of epilepsy. Her examination revealed that she had no expressive language, and had prominent cognitive delay and also had hypotonia meaning decreased tone of her muscles at rest with increased tone when she would go to do something.
>
> Her gait was unstable with her toes pointing down. And she additionally exhibited diminished deep tendon reflexes. Additionally it was evident that she did not have good social skills. That she had poor eye contact and did not relate well to strangers and this was present throughout the evaluation. I thought that her findings were most compatible with a severe form of childhood autism.

* * *

> Q. Can you briefly . . . [describe] the symptoms or indicators of autism and which ones Kyara met?
>
> A. Autism is a developmental disorder characterized by limitations in a number of neurologic areas. Most significantly there is severe compromise of socialization skills wherein . . . the autistic individual does not interact in a socially appropriate manner. There is no feeling of interaction in a normal social sense and there is typically poor eye contact. Other things found in autism are language disturbance, cognitive delay, seizures in the hyper portion of affected individuals and motor difficulties in terms of tone, reflexes, and coordination . . . . [T]hose features . . . are . . . virtually all present in Kyara.

Dr. Duchowny did not, however, notice "repetitive motor stereotype which is often seen in children with autism."

30. With regard to the MRI report of February 7, 1997, Dr. Duchowny offered the following salient observations:

> . . . [T]he impression from the MRI is that there was a small partially calcified hematoma in the right posterior temporoparietal region with a superimposed calcified cephalohematoma. And in contrast the remainder of the brain was normal.
>
> * * *
>
> Q. Did Kyara exhibit any lasting effects from those two incidents?
>
> A. I don't believe so, no.
>
> * * *

Q. . . . [A]re there indications that you would find in a child who had suffered a hematoma that had caused neurological injury that are not existent in Kyara's case?

A. If Kyara had acquired a significant hematoma at birth which caused neurological injury you would expect to see destruction or atrophy of underlying brain tissue. You would expect to see unilateral spasticity and asymmetric findings based on the presence of the hematoma on one side of the brain, but not the other. Instead the entire hemispheres of Kyara are essentially intact. There are no significant asymmetries and the types of deficits which she exhibits are typical of children with developmental problems rather than brain damage due to trauma or hypoxia.

* * *

Q. Doctor, let me ask you to take a look at . . . the MRI report and look at the last sentence if you would, the paragraph with reference to findings, and would you tell us what that says with reference to compression?

A. "This collection is associated with mild compression of the adjacent brain."

Q. Now what is the effect of having compression on the brain from that hematoma?

A. Well, none because in the next paragraph it stated that there is no identifiable mass or mass effect, so obviously there is no displacement of brain. And I am not sure that there really is compression. I think there may be an altered configuration, but obviously it's without significance.

* *

Q. . . . What would you expect to see in Kyara or in a child who was suffering from

hematoma that did result in significant brain compression and how does that differ from Kyara?

A. There would have to be mass effect acutely, meaning displacement of brain and ultimately there would be destruction of brain tissue, neither of which were in evidence with Kyara.

31. Dr. Cullen (whose testimony was offered by Petitioners) is a physician board-certified in pediatrics who, like Dr. Duchowny, practices pediatric neurology at Miami Children's Hospital. Dr. Cullen examined Kyara on July 17, 2002, and in his opinion, Kyara's presentation is most consistent with mental retardation. The results of Dr. Cullen's evaluation of Kyara and his opinions may be summarized as follows:

> NEUROLOGICALLY, she was alert. She would vocalize, but did not use any specific language. Eye contact with the examiner, one-on-one, was good with toys. Everything that we gave her, she would automatically go and put it in her mouth. I did not really get her to follow any commands. She would constantly suck on her thumb or finger or take the toy given her. She did not appreciate how to use the small tape measure . . . . Her extraocular eye movements were full, but she still had alternating exotropia. I could not see the discs. She had reasonable visual fields, although she picked up the right temporal field a little bit quicker than the left. Corneal was decreased on the left compared to the right. There was some weakness of the left orbicularis oculi. She had adequate auditory responses, a good gag, good palatal

> and pharyngeal movements. Her tongue did remain midline.
>
> MOTOR EXAMINATION had shown adequate muscle tone and bulk. There was a question of some atrophy of the distal left forearm. Strength showed some weakness on the left. Grasp was a bit decreased when being pulled up to a sitting position. On reaching for objects, she did not appear to have a good pincer grasp and used more of her whole hand. When walking, her gait was unsteady. She did tend to toe-walk, and more on the left than on the right with a slight limp on the left. No seizure activity was observed.
>
> IN SUMMATION, Kyara is a 5 and 7/12-year-old young lady who is indeed mentally retarded. She has a seizure disorder that is to date intractable. She has some mild left-sided findings, mainly a left facial weakness, decreased corneal, some delay in peripheral field acknowledgment on the left and an up-going toe on the left and some weakness on the left. She has a deficit in expressive and receptive language. She also has an acquired microcephaly . . . . She does not really fit into the category of PDD or Autism . . . .

32. As for the cause of Kyara's delays, Dr. Cullen concurs with Dr. Willis that there is no evidence that Kyara suffered a hypoxic insult during labor and delivery. Rather, Dr. Cullen was of the opinion that her delays resulted from a trauma induced brain injury occasioned by the use of the vacuum extractor during delivery. That injury, Dr. Cullen opined, is on a "cellular level," and not demonstrable by CT scan or MRI. Dr. Cullen explained his conclusion, as follows:

> . . . I think there . . . [was] some intrapartum compromise of fetal reserve which, while itself didn't produce brain injury, sets her up or makes her more susceptible, if you will, to the traumatic application of the vacuum extractor, . . . which resulted in compression of brain tissue and hemorrhage.
>
> * * *
>
> . . . The traumatic injury then set off a whole series of events . . . [, including] compromise of autonomic regulation of cerebral blood flow [,]. . . vascocon-striction [,] and release [,] because of the hypoxia and ischemia [,] of chemical compounds to further injure the brain.
>
> * * *
>
> . . . From then on the chemical changes are enforce[] producing . . . the injury . . . . Something at 8:00, 9:00, 10:00, noon, that kind of thing. (Petitioners' Exhibit 3, pages 6, 20, 54, 64, 92, and 93)

33. According to Dr. Cullen, Kyara's brain injury is global in nature, although more to the right side of the brain than the left, and is demonstrable by the fact that:

> . . . she has gone on now and shown the mental retardation. She has gone on and showed a seizure. She has gone on and showed a left hemiparesis. She has also gone on and shown a deficit in expressive/receptive language. She also developed an acquired microcephaly.

34. The medical records, as well as the testimony of the physicians offered by the parties, have been reviewed and weighed. So considered, it must be resolved that the proof does

not permit a conclusion to be drawn, with the requisite degree of confidence, that Kyara's neurologic impairment resulted from an injury to the brain caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation, as opposed to some other etiology.

35. In reaching such conclusion, it is noted that Kyara's course pre-delivery and post-delivery was inconsistent with a hypoxic or traumatically induced brain injury having occurred during labor, delivery, or resuscitation. First, fetal monitoring during labor and delivery does not support a conclusion that Kyara suffered an intrapartum event or events that led to hypoxic induced or trauma induced brain injury. Moreover, while Kyara did require resuscitative measures at birth, she was quickly stabilized, and her hospital course was without evidence of perinatal or postnatal complications. Finally, neither the CT scans nor MRI reveal evidence of brain damage.[9]

36. In resolving that the proof does not demonstrate, more likely than not, that Kyara suffered a brain injury during birth, it is also observed that Kyara's presentation is complex, and that historically she has evidenced findings consistent with autism and mental retardation. If clearly autistic, there is little dispute that Kyara's impairments are most likely developmentally based. Moreover, if clearly mentally retarded,

there are innumerable explanations for her presentation, including developmental abnormality; injury before birth, during birth, and after birth; and injury from uncontrolled seizures. That Kyara's presentation is complex does not simplify the matter. However, while it cannot be resolved, based on this record, whether Kyara is autistic, mentally retarded, or both, it may be resolved that her presentation is consistent or, stated otherwise, not inconsistent with a developmentally-based injury.

The dispute regarding notice

37. At the time of Kyara's birth, Section 766.316, Florida Statutes (1995), prescribed the notice requirements, as follows:

> Each hospital with a participating physician on its staff and each participating physician . . . shall provide notice to the obstetrical patients thereof as to the limited no-fault alternative for birth-related neurological injuries. Such notice shall be provided on forms furnished by the association and shall include a clear and concise explanation of a patient's rights and limitations under the plan.

38. Responding to Section 766.16, NICA developed a brochure titled "Peace of Mind for an Unexpected Problem" (the NICA brochure) to comply with the statutory mandate, and distributed the brochure to participating physicians and hospitals so they could furnish the brochure to their obstetrical patients.

Findings related to the participating physician and notice

39. Ms. Lawton received her prenatal care at Bay Gynecological Associates, P.A. (Bay Gynecological), an office maintained for the practice of obstetrics and gynecology by Beth Liebowitz, M.D., and George Foster, M.D., in St. Petersburg, Florida.

40. At the time of Ms. Lawton's initial visit (April 29, 1996), it was the customary practice of Bay Gynecological to provide all new obstetrical patients with a copy of the NICA brochure, and to have the patient sign a form acknowledging receipt of the brochure (the NICA form); however, no such form is contained within the file of Ms. Lawton and Ms. Lawton denies having received a NICA brochure. Consequently, it must be resolved whether, notwithstanding the absence of a signed form acknowledging receipt of the brochure, as well as Ms. Lawton's denial, the proof was sufficiently compelling to allow one to conclude that, more likely than not, Ms. Lawton was provided a NICA brochure on her initial visit.

41. The proof regarding Bay Gynecological's customary practice was brief (comprising less than four pages of the transcript), and limited to the testimony of Sandra Blakeman, a former employee of Bay Gynecological. Pertinent to her employment at Bay Gynecological and the issue of notice, Ms. Blakeman offered the following testimony:

DIRECT EXAMINATION

BY MR. BLEWS:

Q. . . . In 1996 what were your responsibilities . . . [at Bay Gynecological]?

A. I saw the OB patients. I brought them back, did their vital signs, drew their blood, took them to the doctor's office.

Q. In 1996 was a patient there named Kysha Lawton?

A. That's my understanding there was.

Q. Yes. And you have reviewed her file from Bay Gynecological there; is that correct?

A. Yes.

Q. Was it the policy of Bay Gynecological at the time of 1996 to have a form signed acknowledging that the patient had received the Peace of Mind booklet regarding the NICA provisions?

A. Yes.

Q. When you reviewed that file was there any form in there for Kysha Lawton?

A. No, there was not.

Q. Do you remember Kysha Lawton?

A. No, I don't.

Q. And you were the person responsible for giving notice to the patients of NICA; is that correct?

A. Yes.

Q. And so you have no memory of her and no knowledge of whether any form was or was not signed?

A. No, I do not. There is an entire packet of papers that are missing from her chart.

* * *

CROSS-EXAMINATION

BY MR. HENNEN:

Q. Ms. Blakeman, during the years you worked for that P.A. was it your responsibility throughout that time to insure [sic] that these papers were -- or to attempt to insure [sic] these papers were signed?

A. Yes.

Q. Okay. And were they given, to the best of your knowledge, to every patient who came in in an obstetrical fashion?

A. Yes, I gave them to the patients in the lab before they saw the doctor for the first time.

Q. Okay.

A. And the papers were all signed and put in the chart.

* * *

Q. Were the papers that were signed, including the acknowledgment of the NICA form, affixed inside the chart or were they stuck in there loosely?

A. They were put in there loosely and affixed later.

42. There are two possible explanations for the absence of a NICA form in the physician's records. First, that such a form was never presented to Ms. Lawton. If that were the case, then established practice was not followed, and it would be speculative to presume, based on such practice, that Ms. Lawton was provided a NICA brochure. See e.g., Watson v. Freeman Decorating, Co., 455 So. 2d 1097, 1099 (Fla. 1st DCA 1984)("There is a general presumption that the ordinary course of business has been followed absent a showing to the contrary.") A second, and also plausible explanation, given the office routine, is that for some reason the NICA form was misplaced. In that case, it would be reasonable to conclude that, consistent with established routine, Ms. Lawton was provided a NICA brochure.

43. Here, Intervenors contend that, notwithstanding the absence of a signed form acknowledging receipt of the NICA brochure, the customary practice of Bay Gynecological to provide a NICA brochure to all new obstetrical patients should be accepted as compelling proof that Ms. Lawton was provided a brochure on her initial visit. As an explanation for the absence of the form, Intervenors note that "Ms. Blakeman testified that an entire packet of papers was missing from Kysha Lawton's chart," which they contend "may be attributed to the papers being placed loosely within the chart as opposed to

having never been provided to Ms. Lawton at all."
(St. Anthony's proposed order, filed March 18, 2002, at paragraph 16 and Dr. Liebowitz's proposed order, filed March 18, 2002, at paragraph 16.) Essentially, Intervenors contend the form was lost, as opposed to never having existed.

44. Given the proof, or lack thereof, the explanation Intervenors offered for the absent form was not persuasive. First, there was no proof, apart from the NICA form, as to what documents were or should have been generated on Ms. Lawton's initial visit, and no testimony describing the character of the documents contained in the "entire packet of papers" ostensibly missing from Ms. Lawton's file. Consequently, there being no demonstrated correlation between the documents usually generated on the initial visit and the missing packet of papers, it would not be reasonable to infer that it was the initial documentation (including the NICA form) that was lost, or that the loss occurred between the time the papers were placed loosely in the file and the later time, when they were routinely affixed. Second, it is unlikely that patient records, detached from a patient's file, would go unnoticed in a physician's office, and not be returned to the file. Therefore, given the absence of a signed NICA form, or a reasonable explanation for its absence, the proof failed to demonstrate, more likely than not, that Bay Gynecological's customary practice was followed on Ms. Lawton's

initial visit or that she was otherwise provided notice on behalf of the participating physician.

Findings related to the hospital and notice

45. As for St. Anthony's Hospital and the notice issue, the proof demonstrates that prior to Ms. Lawton's admission on December 16, 1996, St. Anthony's established a practice whereby the patient financial representative would meet with obstetrical patients, such as Ms. Lawton (who were pre-registered and admitted directly to the maternity floor) following admission, and give the patient NICA notice. In practice, when an expectant mother, such as Ms. Lawton, presented to the maternity floor, financial services would be notified. Thereafter, a financial representative would come to the patient's room to obtain a signed Condition of Treatment form, which included four provisions that, if applicable, required the patient's initials. Among those provisions was one acknowledging receipt of NICA notice. During that meeting, the patient would also be provided an admission packet that included a Patient Bill of rights; Medicare Notice; Advance Directive Information; an Information booklet containing important telephone numbers; and a copy of the NICA brochure.

46. Here, with regard to Ms. Lawton's admission to St. Anthony's Hospital on December 16, 1996, the proof demonstrates that, consistent with the hospital's practice,

Kim McFadden (then known as Kim Crawford), the financial representative on duty, met with Ms. Lawton. At the time, it was Ms. McFadden's practice to present the Conditions of Treatment form to the patient on a clipboard with the back of the form (Page 2) up. That portion of the form was the one that required the patient to initial certain provisions, as applicable, and to acknowledge her understanding of the provisions of the form by affixing her signature. It was also Ms. McFadden's practice to point to where on the form the patient was to initial or sign.

47. Pertinent to this case, the back of the form provided, as follows:

CONDITIONS OF TREATMENT (continued) Page 2
SPECIAL INFORMATION AND AUTHORIZATIONS
(Please pay close attention)

9. INITIAL Authorization to Release Information . . . .

10. INITIAL I acknowledge receipt of the "Important Message from Medicare" prior to or at the time of admission. (For any questions, please call PRO, 1-800-634-6280 or Utilization Management at the Hospital.[)]

11. INITIAL I acknowledge receipt of the "Important Message from CHAMPUS/VA" prior to or at the time of admission. (For any questions, please call PRO, 1-800-634-6280 or Utilization Management at the Hospital.[)]

12. Private Room Request - If a private room is desired, the undersigned understands that the extra charge for the private room is the responsibility of the undersigned. The hospital cannot guarantee receipt of a private room and if at the time of admission a private room is not available the undersigned will not be charged for the requested private room.

Private room request: _____ YES _____ NO

Obstetrical Patients Only

13. INITIAL I acknowledge receipt of Peace of Mind Brochure, Florida Statute § 766.301, prior to or at the time of admission.

THE UNDERSIGNED CERTIFIES THAT THE INFORMATION ON THE FRONT AND BACK OF THIS SHEET HAS BEEN READ AND IS UNDERSTOOD. THE UNDERSIGNED IS THE PATIENT OR IS DULY AUTHORIZED BY THE PATIENT AS THE PATIENT'S REPRESENTATIVE TO EXECUTE THIS DOCUMENT AND ACCEPT ITS TERMS.

DATE _______ PATIENT NAME/CHILD_____________

____
Signature of Patient or Patient's Duly Authorized Representative

Notably, the form presented to Ms. Lawton had a check or slash mark next to Item 9, as well as the patient signature line, and the only item initialed on the form signed by Ms. Lawton was Item 9, relating to Authorization to Release Information.

48. Given Ms. McFadden's practice of pointing to where on the form the patient was to initial or sign, as well as the presence of a check or slash mark next to the only items

initialed or signed by Ms. Lawton, it is reasonable to infer, since Ms. Lawton did not initial, that the provision relating to the NICA brochure (Item 13) was not brought to Ms. Lawton's attention.[10] Consequently, with respect to Ms. Lawton, the customary practice was not followed. Therefore, the proof failed to demonstrate that the hospital provided notice (the NICA brochure), as required by the Plan.

CONCLUSIONS OF LAW

49. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. Section 766.301, et seq., Florida Statutes.

50. The Florida Birth-Related Neurological Injury Compensation Plan was established by the Legislature "for the purpose of providing compensation, irrespective of fault, for birth-related neurological injury claims" relating to births occurring on or after January 1, 1989. Section 766.303(1), Florida Statutes.

51. The injured "infant, her or his personal representative, parents, dependents, and next of kin" may seek compensation under the Plan by filing a claim for compensation with the Division of Administrative Hearings. Sections 766.302(3), 766.303(2), 766.305(1), and 766.313, Florida Statutes. The Florida Birth-Related Neurological Injury Compensation Association, which administers the Plan, has "45

days from the date of service of a complete claim . . . in which to file a response to the petition and to submit relevant written information relating to the issue of whether the injury is a birth-related neurological injury." Section 766.305(3), Florida Statutes.

52. If NICA determines that the injury alleged in a claim is a compensable birth-related neurological injury, it may award compensation to the claimant, provided that the award is approved by the administrative law judge to whom the claim has been assigned. Section 766.305(6), Florida Statutes. If, however, NICA disputes the claim, as it has in the instant case, the dispute must be resolved by the administrative law judge in accordance with the provisions of Chapter 120, Florida Statutes. Sections 766.304, 766.309, and 766.31, Florida Statutes.

53. In discharging this responsibility, the administrative law judge must make the following determination based upon the available evidence:

> (a) Whether the injury claimed is a birth-related neurological injury. If the claimant has 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 that the infant was thereby rendered permanently and substantially mentally and physically impaired, a rebuttable presumption shall arise that the injury is a birth-related neurological injury as defined in s. 766.303(2).

> (b) Whether obstetrical services were delivered by a participating physician in the course of 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.

Section 766.309(1), Florida Statutes. An award may be sustained only if the administrative law judge concludes that the "infant has sustained a birth-related neurological injury and that obstetrical services were delivered by a participating physician at the birth." Section 766.31(1), Florida Statutes.

54. Pertinent to this case, "birth-related neurological injury" is defined by Section 766.302(2), Florida Statutes, to mean:

> . . . 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 immediate post-delivery 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.

55. As the claimants, the burden rested on Petitioners to demonstrate that Kyara suffered a "birth-related neurological injury." Section 766.309(1)(a), Florida Statutes. See also

Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349, 350 (Fla. 1st DCA 1977)("[T]he burden of proof, apart from statute, is on the party asserting the affirmative issue before an administrative tribunal.")

56. Here, the proof failed to support the conclusion that, more likely than not, Kyara's neurologic impairments resulted from an "injury to the brain . . . caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation." Consequently, the record developed in this case failed to demonstrate that Kyara suffered a "birth-related neurological injury," within the meaning of Section 766.302(2), Florida Statutes, and the claim is not compensable. Sections 766.302(2), 766.309(1), and 766.31(1), Florida Statutes. See also Humana of Florida, Inc. v. McKaughan, 652 So. 2d 852, 859 (Fla. 5th DCA 1995)("[B]ecause the Plan . . . is a statutory substitute for common law rights and liabilities, it should be strictly construed to include only those subjects clearly embraced within its terms."), approved Florida Birth-Related Neurological Injury Compensation Association v. McKaughan, 668 So. 2d 974, 979 (Fla. 1996).

57. With regard to the notice issue, the burden rested on the health care providers to demonstrate, more likely than not, that the notice provisions of the Plan were satisfied. See Galen of Florida, Inc. v. Braniff, 696 So. 2d 308, 311 (Fla.

1997)("[T]he assertion of NICA exclusivity is an affirmative defense.") See also Balino v. Department of Health and Rehabilitative Services, supra. Here, for reasons noted in the Findings of Fact, the hospital and the participating physician failed to offer compelling proof that they complied with the notice provisions of the Plan.

58. Where, as here, the administrative law judge determines that " . . . the injury alleged is not a birth-related neurological injury . . . he [is required to] enter an order [to such effect] and . . . cause a copy of such order to be sent immediately to the parties by registered or certified mail." Section 766.309(2), Florida Statutes. Such an order constitutes final agency action subject to appellate court review. Section 766.311(1), Florida Statutes.

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that the petition for compensation filed by Kysha Lawton and Leroy Frazier, as parents and natural guardians of Kyara Frazier, a minor, is dismissed with prejudice.

DONE AND ORDERED this 8th day of January, 2003, in Tallahassee, Leon County, Florida.

WILLIAM J. KENDRICK
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of January, 2003.

ENDNOTES

1/ Mr. Hennen appeared on behalf of Dr. Liebowitz at the February 19, 2002, hearing, and Mr. Linquist appeared on the doctor's behalf at the November 6, 2002, hearing.

2/ With the parties' agreement, the records of St. Anthony's Hospital relating to the admission of Kysha Lawton on December 16, 1996, were copied, and the copies (filed with DOAH on April 15, 2002) received into evidence as Petitioners' Exhibit 2.

3/ Petitioners, Intervenor St. Anthony's Hospital, and Respondent submitted proposed final orders. Intervenor Beth Liebowitz, M.D., filed a notice wherein she adopted the proposed final order filed by Intervenor St. Anthony's Hospital.

4/ The Labor and Delivery Flow Sheet reflects the fetus between station 0 and +1, but the Nursing Record notes the fetus at -2 station. The nurse's note is most likely erroneous because that would reflect a regression from the vaginal examination done at 3:15 p.m., which noted the fetus at 0 station. Such discrepancy is not, however, important to the resolution of this case.

5/ The Apgar scores assigned to Kyara are a numerical expression of the condition of a newborn infant, and reflect the

sum points gained on assessment of heart rate, respiratory effort, muscle tone, reflex irritability, and color, with each category being assigned a score ranging from the lowest score of 0 through a maximum score of 2. As noted, at one minute, Kyara's Apgar score totaled 4, with heart rate being graded at 2, respiratory effort and reflex irritability being graded at 1 each and muscle tone and color being graded at 0. At five minutes, Kyara's Apgar score totaled 9, with heart rate, muscle tone, reflex irritability, and color being graded at 2 each, and respiratory effort being graded at 1.

6/ A "cephalohematoma," also called "cephalhematoma," is "a subperiosteal hemorrhage limited to the surface of one cranial bone, a usually benign condition seen frequently in the newborn as a result of bone trauma." Dorland's Illustrated Medical Dictionary, Twenty-Sixth Edition.

7/ Dr. Pavan explained the differences between severe developmental delay (mental retardation) and pervasive developmental disorder (autism), as follows:

> . . . Pervasive developmental disorder is in the family of autism. Most children and adults with autism have what we call atypical, a different kind of development. A child developmental delay would have mental retardation . . . . So a child who has delayed development, if the child doesn't catch-up is going to end up with mental retardation. People with mental retardation relate normally to other people. They talk when they're intellectually ready to talk, they walk, they can learn to take care of themselves. They act just like we do, except they can't do the higher intellectual functions that we can do . . . Autism is an abnormal type of [social] development where the person doesn't make eye contact, doesn't learn to imitate, doesn't do social kinds of things that we expect, like greeting people, saying hello, saying goodbye when you leave. We, children learn a great deal about imitating others. And when children have autism they don't do that imitation. The second part of autism is that they don't develop language normally. So a child with autism is likely

> to do repetitive kinds of ya-ya, ya-ya, da-da, da-da, ba-ba, ba-ba kinds of sounds. They don't make any sense . . . . The delayed language is a major problem because it's not just language expression it's also understanding language. So a child with autism may not stop when their name is called. They may just keep doing what they're doing. They may not respond to stop or no, and have to be taught a lot of separate steps so that they can learn. The third part -- so we've got problems with social interaction, we have delayed language, the third one and the last one is that children with autism tend to have lots of repetitive types of movements . . . . So when . . . [we are] talking about pervasive developmental disorder, . . . [we are] talking about a child who's much more complex than a child who just has mental retardation.

8/ Dr. Pavan's deposition, Petitioners' Exhibit 4, also includes (as deposition Exhibit 1) a copy of a prior deposition, taken May 22, 2000.

9/ In resolving that the proof failed to demonstrate, more likely than not, that Kyara suffered brain injury during her birth, the opinions of Dr. Cullen have not been overlooked; however, when his opinions are compared with those of the other physicians whose testimony was offered, as well as Kyara's medical history (which, following delivery, did not reveal evidence of perinatal or postnatal complications; following CT scans and MRI imaging did not reveal evidence of brain damage; following multiple examinations did not reveal evidence of focal injury; and following multiple examinations revealed that Kyara did present with elements consistent with, although not always clearly within, the autistic spectrum), Dr. Cullen's testimony was less than compelling.

10/ It is commonly known that marks, such as a check or "x", are placed on documents where the preparer wants the other party to sign or initial.

COPIES FURNISHED:
(By certified mail)

William F. Blews, Esquire
William F. Blews, P.A.
600 First Avenue, North, Suite 307
Post Office Box 417
St. Petersburg, Florida 33701

Kirk S. Davis, Esquire
Christopher P. Calkin, Esquire
Akerman, Senterfitt & Eidson, P.A.
Post Office Box 3273
Tampa, Florida 33601-3273

Kenney Shipley, Executive Director
Florida Birth-Related Neurological
Injury Compensation Association
1435 Piedmont Drive, East, Suite 101
Post Office Box 14567
Tallahassee, Florida 32317-4567

B. Forest Hamilton, Esquire
Post Office Box 38454
Tallahassee, Florida 32315-8454

James G. Linquist, Esquire
Barr, Murman, Tonelli, Slother & Sleft
201 East Kennedy Boulevard, Suite 1700
Tampa, Florida 33602

St. Anthony's Hospital
1200 - 7th Avenue, North
St. Petersburg, Florida 33705

Beth L. Liebowitz, M.D.
1685 Tamiami Trail
Murdoch, Florida 33938

Ms. Charlene Willoughby
Agency for Health Care Administration
Consumer Services Unit
Post Office Box 14000
Tallahassee, Florida 32308

Mark Casteel, General Counsel
Department of Insurance
The Capitol, Lower Level 26
Tallahassee, Florida 32399-0300

NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this final order is entitled to judicial review pursuant to Sections 120.68 and 766.311, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original of a notice of appeal with the Agency Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the appropriate District Court of Appeal. See Section 766.311, Florida Statutes, and Florida Birth-Related Neurological Injury Compensation Association v. Carreras, 598 So. 2d 299 (Fla. 1st DCA 1992). The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.