STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ELISA SALADRIGAS, on behalf of and as parent and natural guardian of JAVIER SALADRIGAS, a minor, Petitioner, vs. FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION, Respondent, and BAPTIST HOSPITAL OF MIAMI, INC., Intervenor.	)	Case No. 09-1581N

FINAL ORDER

Upon due notice, a final hearing was conducted by Ella Jane P. Davis, an Administrative Law Judge (ALJ) of the Division of Administrative Hearings (DOAH) on December 1 and 2, 2011, by video teleconference with sites in Miami and Tallahassee, Florida.

APPEARANCES

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For Respondent: Michael A. Kundid, Esquire
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For Intervenor: Scott Edward Solomon, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether Javier Saladrigas, a minor, qualifies for coverage under the Florida Birth-Related Neurological Injury Compensation Plan.

PRELIMINARY STATEMENT

On March 26, 2009, Petitioner, Elisa Saladrigas, on behalf of and as parent and natural guardian of Javier Saladrigas (Javier), a minor, filed a petition (claim) with DOAH.

DOAH served Florida Birth-Related Neurological Injury Compensation Association (NICA) on March 30, 2009; served Baptist Hospital of Miami, Inc., on March 31, 2009; and served Dr. Thomas Dimino on or about January 4, 2010. These were the only potential intervenors named in the petition/claim.

By a Petition to Intervene, filed April 14, 2009, Baptist Hospital of Miami, Inc., sought intervention and stated that it believed that Dr. Maria V. Lopez-Beecham was the participating physician who delivered obstetric services for Elisa and Javier Saladrigas.

Baptist Hospital of Miami, Inc., was granted Intervenor status by an Order entered April 22, 2009, but Petitioner did not move to amend the Petition to include Dr. Lopez-Beecham, and Dr. Lopez-Beecham was not served with a copy of the Petition. See § 766.305(2), Fla. Stat.

At final hearing by video-teleconference between Tallahassee and Miami, Florida, on December 1-2, 2011, Petitioner presented the oral testimony of Daniel Castellanos, M.D., Elisa Saladrigas, Ph.D., Nicholas Suite, M.D., and Kathleen Finneran. Respondent and Intervenors presented no oral testimony. ALJ Exhibit-1 (the Amended Joint Prehearing Stipulation); Joint Exhibits 1-24; Petitioner's Exhibit-1 (see TR-23), and Petitioner's Exhibits 2 and 3, were admitted in evidence.[1/]

A Transcript was filed on December 22, 2011. Following the granting of two unopposed motions for extensions of time in which to file proposed final orders, each party's proposal was filed by February 9, 2012. All proposals have been considered.

FINDINGS OF FACT

Threshold Facts

1. Notice has been waived and is not a contested issue herein. (Stipulated).

2. Elisa Saladrigas is the mother and natural guardian of Javier Saladrigas. (Stipulated). She holds a doctorate in

psychology, and sometimes will be referred-to herein as "Dr. Saladrigas."

3. Javier was born a live infant on December 14, 2006.

4. Javier weighed at least 2,500 grams at birth and was the product of a single gestation. (Stipulated).

5. Obstetrical services were delivered to Elisa Saladrigas in connection with the delivery of Javier Saladrigas by NICA-participating physicians in Baptist Hospital of Miami, Inc. (Baptist Hospital), which is a licensed hospital in Miami, Florida. (Stipulated).

The Timing of Javier's Injury

6. On the date of Javier's birth, Elisa Saladrigas was a 37-year-old G1 with an IVF pregnancy and history of hypothyroidism.

7. On December 14, 2006, at 3:16 p.m., Javier was delivered, full term at 38 weeks and four days gestation, with thick meconium-stained amniotic fluid, following a 15-1/2 hour labor. During labor, Javier's fetal monitor strips showed variable decelerations that progressed to severe decelerations with loss of heart rate variability.

8. Upon delivery, the umbilical cord was looped around Javier's neck. He was floppy, tachypnic (evidencing an increased rate of respiration), and grunting, with a weak respiratory effort and in respiratory distress. He required

"vigorous resuscitation" in the delivery room in the form of bag and mask ventilation, oxygen support, oral suctioning, gastric suctioning, tracheal suctioning, and vigorous tactile stimulation.

9. Subsequent to such resuscitation in the delivery room, Javier's Apgars were six at one minute, seven at five minutes, and nine at ten minutes. These scores are within normal limits.

10. At 3:57 p.m., still requiring oxygen support and exhibiting low oxygen saturations, with a working diagnosis of possible sepsis (later confirmed by testing as Group B streptococcus acquired from the mother during labor and/or delivery), hypoglycemia, and respiratory distress, Javier was transferred to Baptist Hospital's newborn nursery.

11. It is significant that Javier's respiratory distress continued even after he achieved acceptable Apgar scores, because case law provides that the statutory period for compensability may encompass an additional "extended period of time when a baby is delivered in a life threatening condition" only if "there are ongoing and continuous efforts of resuscitation," and that "both the incident of oxygen deprivation and the brain injury resulting from the oxygen deprivation must occur in this time period."[2/]

12. Newborn nursery examination notes indicate that at 4:30 p.m., Javier's overall status was "critical," with an

unstable respiratory rate and unstable blood pressure, and describe his condition as "pale and tachypnic in severe respiratory distress." Based upon the evidence as a whole, particularly by comparison of this entry to other notations made in the record at or about the same time, it is probable that these notes were dictated earlier than 4:30 p.m., and closer in time to Javier's physical admission to the newborn nursery and simply were not dictated or typed until 4:30 p.m.

13. Due to Javier's on-going respiratory distress and other indicators, Neonatologist Paul Fassbach, M.D., transferred Javier from the newborn unit to Baptist Hospital's Neonatal Intensive Care Unit (NICU) for treatment of meconium aspiration syndrome (MAS). At 4:53 p.m., Javier was admitted to the NICU with worsening respiratory distress and poor oxygen saturations. He was given increased respiratory support, including positive pressure ventilation by NCPAP. Javier subsequently was diagnosed with septicemia by group B streptococci (Group B strep sepsis); respiratory distress; and severe MAS, confirmed by X-ray, showing diffuse pulmonary opacities throughout both lungs. MAS occurs when a baby inhales his own feces which have been expelled during labor and/or delivery. These feces are extremely corrosive to the baby's lungs.[3/]

14. Javier continued to desaturate, despite continuous resuscitative measures in the NICU, and at 8:52 p.m., he was

intubated and placed on a ventilator. Umbilical arterial and venous catheters were surgically inserted to enable closer monitoring of his metabolic and respiratory condition.

15. Javier was administered IV antibiotics for sepsis, glucose for hypoglycemia, nutritional support, dopamine, dobutamine, and epinephrine for low blood pressure, and surfactant medication to improve his lung function, but his condition continued to deteriorate.

16. At 7:21 a.m., on December 15, 2006, Javier suffered the first of two cardiac and respiratory arrests. At 9:04 a.m., December 15, 2006, he arrested a second time, while still being assisted for the first arrest. All of the testifying physicians who had an opinion on the subject agree that, more likely than not, Javier's subsequently-diagnosed brain injury occurred at or about the time of these two "codes" or that the brain injury began to evolve at that point in time and worsened thereafter. Resuscitation at the point of the cardiac arrests took about 40 minutes.

17. Umbilical artery cord blood gas is indicative of whether or not there has been oxygen deprivation at birth, but Javier's umbilical artery cord blood gas was never drawn. Rather, arterial blood gas drawn about four hours after birth, via a heel pinprick, showed a pH of 7.12, with a base excess of minus 12.8, which is acidotic and indicative of some degree of

acidosis. When the baby coded approximately 18 hours after birth, the pH was only 6.78, with a base excess of minus 21, which is profoundly acidotic. Together, the blood gases may be read to indicate progressive oxygen deprivation preceding the cardiac arrests.

18. Petitioner presented the testimony of Daniel Castellanos, M.D., a child and adult psychiatrist, who did not opine on timing and causality of Javier's brain injury, and of Nicholas Suite, M.D., a neurologist. Intervenor presented by deposition the testimony of Dr. William Rhine, a neonatologist. Respondent NICA presented the testimony by deposition of Dr. Charles Willis, a board-certified obstetrician, with special competence in maternal-fetal medicine, and of Dr. Michael Duchowny, a pediatric neurologist.[4/]

19. Neonatologist Rhine opined that hypoxia (a deficiency of oxygen reaching the tissues of the body, including the brain) resulted in the foregoing blood gas values, which were profoundly acidotic. Obstetrician Willis testified much the same. See infra.

20. The greater weight of the credible medical evidence as a whole, but most notably the testimony of Dr. Rhine, the only neonatologist to testify, Dr. Willis, Dr. Michael Duchowny, a board-certified pediatric neurologist retained by NICA, who performed a "hands-on" neurological examination of Javier on

July 15, 2009, and Dr. Nicholas Suite, a neurologist appearing for Petitioner, who examined Javier in September 2010, support a finding that simultaneously or concurrently with the two cardiac arrests in close succession, Javier suffered loss of oxygen to his brain, resulting in physical damage to his brain, which damage subsequently became visible on MRI.

21. That is not to say, however, that some brain damage due to loss of oxygen did not occur during labor and delivery and/or during resuscitation in the delivery room, because the various medical authorities concede that it takes only about six minutes for such brain damage to occur, killing brain tissue.

22. Most particularly, Dr. Duchowny's formal report to NICA read:

> . . . The records provide evidence of meconium aspiration syndrome and cardiac arrest. As they both occurred in the postnatal period, I believe they are the consequence of factors operating during labor and delivery.

23. Dr. Willis could not quantify the degree of respiratory distress at birth, and opined, without further explanation, that although there may have been some oxygen deprivation to the baby at birth, it did not appear sufficient to meet the HIE standards for hypoxic brain injury.

24. Dr. Willis could not determine from the cold medical records whether the baby had strep B pneumonia at birth, but he

acknowledged that there was as good a chance that the baby acquired strep B and MAS during labor and birth as prior thereto; that the baby had respiratory distress "at birth"; and that upon delivery, the baby immediately required some type of oxygen support. He further opined that if Javier did have strep B, then that could result in an inflammatory response in the lungs. The baby had respiratory distress at birth, which Dr. Willis thought was most likely caused by MAS, both irritating the lining of the lungs, and causing them to thicken and create mechanical obstruction of oxygen exchange in the lungs. He acknowledged that the baby's respiratory status deteriorated after the Apgars were recorded. He described the baby's condition on leaving the delivery room as only "improving somewhat."

25. Dr. Willis testified, in pertinent part, as follows:

* * *

> [Dr. Willis] A: . . . the baby went to the, left the delivery room, improving somewhat, but once the baby got to the nursery, began having more respiratory distress, and then was transferred to the neonatal intensive care nursery . . . about five or six hours after the baby was born that they had to intubate the baby because of worsening respiratory distress.

* * *

> [Mr. Wolk] Q: All right. And respiratory distress worsens in the immediate post delivery period even after the baby's

received supplemental oxygen and needed to be bagged. Also correct?

A: Correct.

Q: The respiratory distress continues worsening and the baby then needs to be intubated at five hours after birth?

A: Yes.

Q: Okay. This continuum of respiratory distress then continues. And I'm tracking the language on the first page of your report, Doctor.

A: Uh-huh.

Q: So about 18 hours after birth the baby codes in the NICU?

A: Correct.

Q: All right. All right. At this point would you -- do you have an opinion as to whether the cause of the code was related to group B--more related to group B stress [sic] or meconium aspiration, or a combination of the two?

A: You know, I don't know. I believe by that time you're probably getting in more to a neonatal expertise then [sic] a maternal fetal medicine. I mean, I feel comfortable with the immediate postdelivery period, but, you know, hours into the nursery, I would prefer the neonatologist comment about that.[5/]

Q: All right. We've got this continuing of worsening respiratory distress, starting with birth and then continuing to the code about 18 hours afterwards in the NICU, correct?

A: Yes.[6/]

Q: All right. Basically the summary in your report, baby requires CPR for 40 minutes and develops an anoxic brain injury from the code, correct?

A. That's my assumption, yes.

Q. When you say that's your assumption, what do you base that assumption on?

A: Well, you know, the baby had a -- an ultrasound of the head done on the 15th, the day after birth, which would be, you know, after the code, and at that time they showed a moderate amount of cerebral edema, and that's often what we see as the earliest ultrasound findings for hypoxic ischemic brain injury, so --

Q: So more likely than not the edema shown on the head ultrasound was the result of a hypoxic brain injury?

A: Right. And since the baby coded and required, you know, 40 minutes of CPR, it would certainly make sense that if there's, you know, brain injury, that it probably occurred, most of it, during that time. (Jt. Ex. 18, Willis Depo. pages 19-22)

* * *

[Mr. Solomon] Q: Okay. Would you agree with me that the passage of meconium and the meconium aspiration was an event which occurred sometime prior to the delivery of Javier . . . ?

* * *

A: . . . -- yes, it could occur at that time, but also you can get aspiration of meconium after the baby's born, when the baby takes the first few breaths as well.

Q: Okay so it either occurred just prior to delivery or in the immediate post delivery period, correct?

A: Correct. (Jt. Ex. 18, Willis Depo. pages 27-28)

* * *

Q: Okay. Is this child hypoglycemic at birth?

A: Yes. The baby did have hypoglycemia, had low platelet counts, had a lot of problems, actually.

Q: And all of these conditions would have existed at or around the time of birth, correct?

A: Yes. (Jt. Ex. 18, Willis Depo. page 29)

* * *

Q: I mean, did this child always require some type of respiratory support?

A: As far as I'm aware, yes.[7/] (Jt. Ex. 18, Willis Depo. pages 30-31)

26. After his two "heart attacks," see Finding of Fact 16, Javier was transferred to Miami Children's Hospital at 10:30 a.m., on December 15, 2006, in critical condition with unstable heart rate, respiratory rate, and blood pressure.

27. Javier's admitting diagnoses at Miami Children's Hospital included MAS, pulmonary hypertension, septic shock, hypertension, thrombocytopenia, and the need for continuous ventilator support.

28. Javier was placed on extracorporeal membrane oxygenation (ECMO) due to severe respiratory distress and sepsis. ECMO is the equivalent of a heart/lung bypass machine which breathes for the infant and oxygenates his blood. At this point, ECMO "stabilized" Javier, but that is because it breathed for him.

29. A brain ultrasound at Miami Children's Hospital at 1:33 p.m., on December 15, 2006, revealed "moderate diffuse brain edema." An EEG also showed abnormality. A brain ultrasound performed on January 9, 2007, was abnormal and showed signs of periventricular leukomalacia (PVL) within the brain's left frontal white matter, indicative of dead brain tissue. On February 14, 2007, a brain ultrasound showed a focal area of echogenicity in the white matter of Javier's brain. A CT scan of Javier's brain on April 3, 2007, showed permanent areas of calcification in the white matter of the left frontal lobe and an area of increased density in the white matter adjacent to the frontal horn of the left lateral ventricle.

30. Encephalopathy and leukomalacia (signs of permanent brain injury resulting from loss of oxygen) were diagnosed on April 4, 2007, by Dr. William F. Carroll, a neonatologist at Miami Children's Hospital. He noted that Javier was oxygen dependent and required oxygen via nasal cannula; was at risk for developmental delay and required long term follow-up with

physical, occupational, and speech therapies as well as frequent follow-up with the Early Intervention Team and multiple healthcare providers.

31. A CT scan on April 3, 2007, showed that the cerebral edema was largely resolved and that only a "tiny area of increased density in white matter of the right frontal lobe remained, and this tiny area might constitute an area of calcification." See Finding of Fact 36.

32. Javier remained at Miami Children's Hospital through April 24, 2007, when he was discharged by Dr. Manuel Campos, a neonatologist. When discharged, Javier had a doctor's authorization for "medically necessary" skilled nursing for 24 hours per day for one month, then 12 hours per day for two weeks. Thereafter, he transitioned into family care. The discharge diagnosis was thrombocytopenia, MAS, and pulmonary hypertension. Javier also had failed his hearing screening. However, a later test showed his hearing to be intact. See Finding of Fact 36.

33. An MRI was recommended for further evaluation but was not performed until four years later, when it showed physical brain damage to Javier's hippocampus. See Finding of Fact 43.

34. Although Petitioner and Intervenor have argued that oxygen deprivation to Javier's brain persisted through ECMO and further into the postnatal period, no finding regarding that

period is necessary, because the greater weight of the competent evidence supports a finding that the injury to Javier's brain occurred during resuscitation in the immediate postdelivery period in Baptist Hospital no later than when Javier "coded" due to the cardiac arrests, and that the brain injury from oxygen deprivation had occurred at least by that point in time.

Javier's Evaluations and Diagnoses

35. Israel Alfonso, M.D., Director of Neonatal Neurology at Miami Children's Hospital, followed Javier's progress for some time. His reports, stipulated in evidence, addressed Javier's situation on April 30, 2007, July 23, 2007, March 24, 2008, and March 23, 2009.

36. Dr. Alfonso's last narrative report, rendered when Javier was 27 months of age, describes a CT brain scan on April 3, 2007, showing a "[t]iny area of increased density in the white matter of the left frontal lobe that may represent an area of calcification," see Finding of Fact 31; a March 20, 2007, BAEP study, suggesting "normal precochlear and cochlear functions as well as normal conduction through both peripheral and central auditory pathways up to the level of the midbrain bilaterally"; a March 27, 2007, sacral ultrasound, showing a normal spinal cord; a VEEG study on January 22, 2007, represented as "Normal, . . . events non-epileptic in nature," and a January 15, 2007, normal EEG. His report further stated,

> ASSESSMENT:
>
> Neurological examination: minimal gross and fine motor developmental delay and hypotonia.
>
> IMPRESSION: static encephalopathy temporally related perinatal problems by history manifested by poor head growth (following a trend), minimal hypotonicity and feeding problems (improving). No craniofacial disproportion.

37. Translated from "doctor-speak," the foregoing means that the neurologist associated with Javier for the longest time in a clinical setting, as opposed to a setting for litigation, who also is the neurologist who has had the most "hands on" association to date with Javier, diagnosed him at 27 months, as having minimal gross and fine motor developmental delay; permanent but non-progressing and unchanging encephalopathy; minimal loss of muscle tone; poor head growth; and feeding problems.

38. Dr. Duchowny, NICA's pediatric neurologist, performed an independent medical examination of Javier on July 15, 2009, when Javier was about 31 months old. Deposed on April 12, 2010, Dr. Duchowny's ultimate opinion was that his examination of Javier did not reveal evidence of a substantial motor (physical) or mental impairment and consequently, Javier would not be compensable under the NICA statute.

39. That said, Dr. Duchowny acknowledged that Javier had Attention Deficit Hyperactivity Disorder (ADHD), hypertonia and some fine motor impairment and developmental delays. He also noted that Javier's head was in the third deviation too small for his body and that the fontenelles of his skull had closed, and that as a result, Javier's brain would not grow as Javier grows physically. Dr. Duchowny did not view microcephaly as a "physical impairment," but as a "physical finding on neurological examination," and testified that, in his view, "an impairment would be some problem that prevents one from doing things." However, he also conceded that probably 90 percent of microcephalics have a lower IQ than normocephalics; more often than not, as they age, the majority of microcephalics have other motor or developmental issues, compared with normocephalic children; and for the majority of microcephalic children, these motor or developmental issues are permanent.

40. Dr. Roberto F. Lopez-Alberola, Assistant Professor and Chief of the Section of Child Neurology, Pediatrics, at the University of Miami's Miller School of Medicine, wrote (in pertinent part) in a letter concerning his February 26, 2010, assessment of Javier, when Javier was approximately three-and-a-half years of age, that:

PHYSICAL EXAMINATION

VITAL SIGNS: . . . Head circumference of 46 cm, which is below the 2nd percentile.

GENERAL: Awake, alert, fidgety, and hyperactive, yet very sociable and playful, interactive both physically and verbally. Well nourished. No dysmorphic features.

HEENT: Microcephalic, atraumatic, pupils equally round and reactive to light and accommodation. Extraocular movements were full. Occasional eye blinking noted. No craniofacial asymmetry.

CARDIOVASCULAR: Irregular rate and rhythm.

RESPIRATORY: Clear to auscultation.

ABDOMEN: No hepatosplenomegaly, soft and depressible.

SKIN/EXTREMITIES: No rash or lesions. No joint deformity or limb asymmetry. No hypo or hyperpigmented skin areas.

NEUROLOGIC: Cranial nerves II through XII grossly intact.

SENSORY: <u>Romberg was negative.</u> Deep tendon reflexes symmetric.

MOTOR: Slightly decreased tone throughout. Fair muscle bulk. No evidence of wasting or atrophy. No pronator drift.

COORDINATION: No truncal titubation, however, decreased balance and coordination with slight dysmetria bilaterally.

GAIT: <u>No ataxia.</u>

ASSESSMENT:

In summary, Javier is a 3-year-old young boy with complicated birth history with known

> developmental delay, making strides, microcephaly, abnormal movements, which are consistent with simple motor tics. Interestingly today, <u>the patient's maternal grandfather accompanied mother and he also has a longstanding history of simple motor tics, which most likely then represent a familial trait. Nonetheless, the EEG which was ordered to rule out any epileptic activity, although these movements are not epileptic in nature, the EEG is not normal and does show epileptiform activity. . . . it is questionable whether the patient's microcephaly is acquired or if indeed was congenital</u>. In terms of the patient's simple motor tic disorder, I have explained to mother the natural history of tics and as long as the tics are not bothering the patient psychologically or emotionally or in any physical form that treatment would be deferred. In terms of the patient's developmental delays, the patient most certainly would benefit from continued therapies including occupational and physical therapy, as the patient's coordination and balance as well as muscle tone are still impaired. I have also recommended aqua therapy. In terms of the patient's behavioral issues, I have recommended behavioral therapy and at some point if the patient's hyperactivity were to become an issue interfering with his behavior and his academic progress, would then consider pharmacotherapy. . . . (emphasis added).

41. For purposes of assessing permanent impairments, the foregoing record appears to state that Javier's head is too small for his body, which may be a birth injury or congenital, and which is a condition that persisted at the date of final hearing, as also discussed by other physicians, including Respondent's expert neurologist, Dr. Duchowny, <u>see</u> Findings of

Fact 39-40, that Javier has tics, which are as likely to be congenital or hereditary as they are to be the result of brain injury, and that are not epileptic in nature; that Javier has symmetrical and working limbs, muscles, and joints; and that he is without ataxia, meaning that he has some ability to coordinate body movements. Ataxia is sometimes associated with walking or cerebral palsy. This record also states that Javier evidences dysmeteria (an abnormal condition typically characterized by overestimating or underestimating the range of motion needed to place the limbs correctly during voluntary movement); that some of his muscles are somewhat flaccid; that he is without Romberg's sign[8/]; and that his gait (walking) is within normal limits. However, the record also states that upon report by his mother, Javier has developmental delays.

42. Dr. Suite, a neurologist, examined Javier on September 17, 2010, and testified on behalf of Petitioner. He rendered a report of his examination, which, together with his testimony, shows that Javier's affect was dull and slow; that he had no history of epileptic seizures; that he could relate some of his history; and that his head circumference is microcephalic. Contrary to a previous treating evaluation, see Finding of Fact 37, some limitation of Javier's lateral spine and range of hip movement was found. Contrary to a previous treating evaluation, see Finding of Fact 41, Dr. Suite found a

positive Romberg sign and abnormal gait. He also diagnosed developmental delay, attention deficit disorder, hypotonia, and behavioral difficulties.

43. On August 26, 2011, a brain MRI of Javier (age four years, eight months) was done at Miami Children's Hospital. It concluded:

> 1. Scattered foci of superatentorial signal abnormality, likely areas of gliosis or dysmyelination, the result of a remote insult.
> 2. Bilateral hippocampal atrophy, on the left with associated sclerosis.
> 3. Tiny physiologic pineal cyst and small choroidal fissure cyst.

44. Dr. Castellanos, a board-certified child and adolescent psychiatrist, examined Javier at Dr. Saladrigas' request on October 31, 2011. He diagnosed Javier at approximately five years old, with cerebral palsy, ADHD, problems fulfilling activities of daily living (ADLs), developmental problems related to personal hygiene, and intermittent memory deficits currently manifesting as Javier being unable to remember from day to day where his pull-ups are stored; that he is supposed to place his school gear in his "cubby"; and his being unable to remember where, within his school, his "cubby" is located.[9/]

45. Significantly, Dr. Castellanos predicted that Javier's brain will not continue to grow, but the complexity of academic

tasks required of him will increase and his ability to cope will diminish; he will become more frustrated; and in the future, he will be even less able to perform academically than at the present time. Ultimately, Dr. Castellanos deferred to psychologists for testing IQ and to teachers to determine what learning disabilities Javier may have.

The Extent of Javier's Mental and Physical Impairments

46. Under the NICA Plan, a "physical impairment" relates to impairment of the infant's "motor abnormalities" or "physical functions." "Mental impairment" also addresses functionality, as opposed to mere diagnosis. However, under NICA, the identification of a substantial mental impairment may include not only identifying significant cognitive deficiencies but can include, in a proper case, additional circumstances such as significant barriers to learning and social development.[10/]

47. As his parent, Javier's mother is better positioned than anyone else to observe Javier's day-to-day behavior.[11/] In this case, Dr. Saladrigas is a licensed clinical psychologist, and accordingly, despite the inherent natural bias of every parent, her observations and impressions of Javier's functioning are entitled to some greater weight than might ordinarily be accorded a lay-parent.[12/]

48. That said, Javier's mother's testimony contains internal contradictions. On the one hand, she testified that

she tested his IQ prior to his entering the academic year at St. Thomas Parish School in August 2010, at about age three, and found it to be in the normal range of IQ. On the other hand, she states that such testing does not have much validity until a child is six. She testified that Javier has never had an independent IQ test, but that he had IQ testing by Ketty Gonzalez, without any elaboration on what was determined. Under these circumstances, the undersigned is left with a perception of Javier's possessing a normal IQ at age three.

49. Javier has epileptiform signals on various brain examination, but he has never been diagnosed with epileptic seizures. His mother believes his tics and eye-rolling signal seizures, but no physician or test has confirmed this perception.

50. Javier is bilingual in Spanish and English, because his family speaks both languages. According to his mother, Javier started to speak first words "possibly" before he was one year old, and she considers that Javier met his normal developmental milestone in this regard and later with regard to when he first spoke in sentences.

51. In the past, Dr. Saladrigas has been diligent in seeking out and providing private occupational, speech, and physical therapies for Javier, but at the present time, he is in an Exceptional Student Education (ESE) class in the public

school system, which can provide all these therapies. Even now, his mother prefers to pay for occupational therapy in the private sector. She stated that at the present time, Javier's speech and the production of his speech is quite good, and his feeding problems have largely disappeared, so she has temporarily discontinued private speech therapy.

52. At the present time, Javier is physically able to walk without assistance; to use the bathroom by himself, although he wets the bed most nights; to run around the playground when he chooses to do so; and to swing on the swings without assistance. He requires neither braces nor a wheelchair for ambulation. His mother reported that he started walking at thirteen months, which she perceives is a normal age for that developmental milestone.

53. Dr. Castellanos observed that Javier talks a lot and is clumsy with his drawing. He has diagnosed Javier has having cerebral palsy, which is a physical or motor disability, arising in Javier's damaged brain, as opposed to a mental disability, but Dr. Castellanos agrees that Javier is very active and without physical problems ambulating.

54. Javier's mother also commented on Javier's "floppy" aspect, that is, his mild hypotonia or muscle weakness, but she admitted that there is not much Javier cannot now do from a gross motor standpoint. Nonetheless, she perceives a difference

in the quality of Javier's gross motor functions in comparison to those of her two-year-old son and her nephews of varying ages.

55. She described Javier's susceptibility to pneumonia due to his lung damage from MAS, for which he has had 10 hospitalizations. He has poor appetite and a general fraility as a result of the lung damage. She uses a nebulizer with him and a "Shake Vest" to break up the congestion in his lungs. He uses oxygen when he travels.

56. Next to his mother, Javier's teachers are probably best-suited to describe how Javier functions daily and how he learns.[13/]

57. Javier has been placed in a succession of five pre-schools where he has had little success and from which he was either asked to leave as a result of behavioral problems or was withdrawn by his mother because, according to her, the teachers in those schools, who were not ESE-qualified, "complained" about Javier's disruptive behaviors. Javier also had not been able to interact successfully with the other "normal" children in any of these locations.

58. Dr. Saladrigas perceives Javier's socialization problems as related to hyperactivity; as not honoring the "personal space" boundaries required by other children; and as his withdrawal from interaction with other children when he is

not successful socializing with them or getting their undivided attention. Her perceptions in this regard were echoed by Kitty Finneran, associate head of St. Thomas Parish School.

59. Dr. Saladrigas placed Javier at St. Thomas Parish School's summer camp in June 2010, when he was three-and-a-half years old. She sought no special accommodation for him, and, in fact, withheld from school/camp staff some information regarding his difficulties in his prior pre-school environments, so that he would not be pre-judged.

60. Initially, in the first part of the June 2010, summer camp, experienced school staff viewed Javier as being in the normal range for his development, based upon their observation and conversation with him and his mother. After a period of observing how Javier interacted with other children at camp, they recognized that he had the types of behavioral, social, and learning problems testified-to by his mother and Ms. Finneran.

61. Kathleen Finneran is the associate head of St. Thomas Parish School. She has been associated with St. Thomas for 43 years and has been an administrator there for 17 years.

62. Ms. Finneran presided over the summer camp activities when Javier was enrolled there in June 2010 and over the school year that began in August 2010. She described Javier as having no focus; doing inappropriate things; invading others' personal space; being unable to grasp "why" he was forbidden to "stomp"

repeatedly on a teacher's foot, and persisting in such behavior despite being told not to do so. She described him as retreating to the swings from other playground play when he could not get other children to focus on playing with him or playing what he wanted them to play and as frightening them.

63. Javier's mother described Javier's home play then, and at the present time, as being almost exclusively on the swings or dressing up, pretending to be a fictional character, and running around the house in costume. She maintained that he could parallel play with toys, but could not play with toys interactively with his brother or cousins. She indicated that Javier's role-playing had carried over to his annoying other visitors at Disney World when the family had gone there in the summer of 2011. On that trip, Javier imitated the cartoon character actors by blowing kisses and asking other park attendees to dance with him.

64. Dr. Saladrigas, Ms. Finneran, and Dr. Castellanos commented on Javier's propensity to constantly sing to himself. His mother says he learns songs quickly.

65. In August 2010, Javier began his three-year-old pre-school program at St. Thomas. He was not able to function in a regular class with two teachers and 15 other children. One teacher had to be assigned to exclusively manage him.

Dr. Saladrigas was ultimately asked to remove Javier from St. Thomas Parish School, which she did.

66. Javier is currently enrolled in an "inclusive" ESE program in the public school system. His mother is credible in her assertion that he has not yet been classified as to type of ESE student at this early grade level. However, so far, he seems to be functioning adequately in an ESE "inclusionary" class of 50 percent ESE students and 50 percent mainstream students.

Analysis

67. It is the child's ability to function mentally which must control a determination of permanent and substantial mental impairment or lack thereof. Javier has been diagnosed with ADHD, developmental delays, dull affect, slow speech, problems with ADLs, and memory deficits. Although he has been unsuccessful to date in mainstream educational environments, such as St. Thomas Parish pre-school and camp and in what appear to be other very informal pre-school environments, there are no standardized IQ or other intellectual tests whereby his degree of mental impairment or ability to learn can be assessed. In a proper case, proof that a child cannot learn once he is placed in an accredited ESE class could support a finding of permanent and substantial mental impairment, but there is no such proof here, and NICA reasonably points out that Javier has made good

progress in private, one-on-one speech therapy, physical therapy, and occupational therapy.

68. Even so, there can be no serious debate that Javier's microcephalic head constitutes a permanent abnormal physical condition, and that his closed fontenelles mean that his head and his brain will not continue to grow, as he otherwise physically grows and matures, or that he will have limited intellectual functioning as a result. These factors, together with his failure to understand correction, his inability to remember physical things and locations, his inability to sequence tasks, and his failure to process memory, compel a finding that Javier has, indeed, sustained a "permanent and substantial mental impairment."

69. However, the evidence falls short of establishing that Javier has sustained a "permanent and substantial physical impairment."

70. Petitioner asserts that because all of Javier's mental impairments arise from the physical injury to his brain, which injury is visible on MRI within the hippocampus, then it must follow that he is permanently and substantially physically impaired, as well as permanently and substantially mentally impaired. This argument is not persuasive.

71. The language employed by the Legislature in enacting section 766.302(2), recognizes a distinction between "injury"

and "impairment." It provides compensation only for an "injury to the brain or spinal cord . . . caused by oxygen deprivation or mechanical injury . . . which renders an infant permanently and substantially mentally and physically impaired."
Because of the clear language selected by the enactors, "injury" and "impairment" cannot mean the same thing. By statutory context, the physical or mental "impairment" must come to pass because of the brain or spinal cord "injury." Moreover, "impairment" has, throughout the history of the Act, been equated with functional defect or loss of functionality.[14/]

72. Javier has lung damage and significant recurrent pneumonia, probably related to MAS and probably not related to his brain injury in the statutory period, but his lung problems have been considered as part of the sequelae of the brain injury which occurred in the statutory period. Even so, the treatments Javier has undergone and the maturation process seem to have lessened the physical problems with his lungs.

73. Javier has cerebral palsy and mild, generalized hypertonia (decreased muscle tone) directly related to his brain injury in the statutory period. Yet, he can perform all of the physical demands of daily living. He has gross control of his head and use of his hands, arms, and legs, with only some mild leg-shaking. His tics and the rolling back of his eyes may or may not be congenital, but they are intermittant. His fine

motor control development is stunted, but he is able to sit alone, stand alone, walk, run, swing, and play alone or with others.

74. Javier can see, hear, smell, and speak. There is no evidence he has an impaired sense of touch.

75. Javier met his early developmental milestones. There is no evidence suggesting that he cannot be trained to feed and groom himself, despite current personal hygiene issues. He is toilet trained, except at night, and his medical records show his amount and frequency of bedwettings do not amount to eurinesis.

76. On its own, this scenario does not amount to permanent and substantial physical impairment. The record also does not support a finding that any or all of Javier's physical impairments present significant barriers to learning and social development.

CONCLUSIONS OF LAW

77. The Division of Administrative Hearings has jurisdiction of the parties and subject matter of this cause. §§ 766.301-766.316, Fla. Stat.

78. 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 after January 1, 1989. § 766.303(1), Fla. Stat.

79. 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. §§ 766.302(3), 766.303(2), and 766.305(1), Fla. Stat. 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 submit relevant written information relating to the issue of whether the injury is a birth-related neurological injury." § 766.305(4), Fla. Stat.

80. 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. § 766.305(7), Fla. Stat. If, on the other hand, NICA disputes the claim, as it has in the instant case, the dispute must be resolved by the assigned Administrative Law Judge in accordance with the provisions of chapter 120, Florida Statutes. §§ 766.304, 766.309, and 766.31, Fla. Stat.

81. In discharging this responsibility, the ALJ must make the following determinations based upon all 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. 766.302(2).
>
> (b) 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.

§ 766.309(1), Fla. Stat.

82. An award may be sustained only if the ALJ concludes that the "infant has sustained a birth-related neurological injury and that obstetrical services were delivered by a participating physician at birth." § 766.31(1), Fla. Stat.

83. Pertinent to this case, "birth-related neurological injury" is defined by section 766.302(2), to mean:

> Injury to the brain or spinal cord of a live infant weighing at least 2,500 grams for a single gestation or, in the case of a multiple gestation, a live infant weighing at least 2,000 grams at birth caused by oxygen deprivation or mechanical injury occurring in the course of labor, delivery, or resuscitation in the immediate

> postdelivery period in a hospital, which renders an 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.

84. Both the brain injury and the oxygen deprivation that renders the child permanently and substantially mentally and physically impaired must occur during the statutory period. See § 766.302(2), Fla. Stat. See also Bennett v. St. Vincent's Med. Ctr., Inc., 71 So. 3d 828 (Fla. 2011); Nagy v. Fla. Birth-Related Neurological Injury Comp. Ass'n, 813 So. 2d 155 (Fla. 4th DCA 2002). Cf. Orlando Reg. Healthcare Sys., Inc. v. Fla. Birth-Related Neurological Injury Comp. Ass'n, 997 So. 2d 426 (Fla. 5th DCA 2008).

85. The parties have stipulated that a physician participating in NICA delivered services in the statutory period, and given the evidence, it is not reasonably debatable that Javier suffered oxygen deprivation to his brain in the statutory period described in section 766.302(2). Still, the ALJ must address whether or not that oxygen deprivation has produced in Javier a permanent and substantial mental impairment and a permanent and substantial physical impairment, inasmuch as both are required to establish compensability. Fla. Birth-Related Neurological Injury Comp. Ass'n. v. Fla. Div. of Admin. Hearings, 686 So. 2d 1349, 1356 (Fla. 1997); Masterton v. Fla.

Birth-Related Neurological Injury Comp. Ass'n. Case 08-6032N (Fla. DOAH FO Jan. 29, 2010) (Corrected Final Order).

86. Herein, the proof fails to establish that the child, Javier, has been rendered both permanently and substantially mentally and physically impaired, so the rebuttable presumption found at section 766.309(1)(a) has not arisen.

87. As the proponent of the issue, the burden rested on Petitioner to demonstrate that Javier suffered a "birth-related neurological injury." § 766.309(1)(a), Fla. Stat. See also Balino v. Dep't of Health and Rehab. Servs., 348 So. 2d 349, 350 (Fla. 1st DCA 1997)("[T]he burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal.").

88. The proof clearly supported a finding of brain injury by oxygen deprivation during the statutory period, and further supported a finding that Javier has sustained a permanent and substantial mental impairment. However, the proof failed to support a conclusion that, more likely than not, Javier has a permanent and substantial physical impairment, irrespective of the timing or cause of any such impairment. Consequently, given the provisions of section 766.302(2), Javier does not qualify for coverage under the NICA Plan. See also §§ 766.309(1) and 766.31(1), Fla. Stat. Humana of Fla., 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, Fla. Birth-Related Neurological Injury Comp. Ass'n v. McKaughan, 668 So. 2d 974, 979 (Fla. 1996).

89. Sadly, it must be acknowledged that Javier is not "normal" in every respect, but the measure of an impairment under the Plan is not how a normal child behaves or competes, but rather, whether his mental and physical injuries are "substantial," a benchmark far below the norm.[15/]

90. The Legislature has expressed its intent in section 766.301(2), as follows:

> It is the intent of the Legislature to provide compensation, on a no-fault basis, for a limited class of catastrophic injuries that result in unusually high costs for custodial care and rehabilitation. This plan shall apply only to birth-related neurological injuries. (emphasis added).

91. Given the Legislature's intent to restrict no-fault coverage under the Plan to "a limited class of catastrophic injuries," it is concluded that the word "substantially," as used in the statutory phrase "permanently and substantially mentally and physically impaired," denotes a "catastrophic" mental and physical injury, as opposed to one that might be described as "mild" or "moderate."

92. Applying the foregoing standards to the facts of this case, it must be concluded that Javier is not permanently and substantially physically impaired, and that he therefore has not suffered a "birth-related neurological injury" as defined by statute.

CONCLUSION

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

ORDERED that the petition filed by Elisa Saladrigas, on behalf of and as parent and natural guardian of Javier Saladrigas, a minor, is dismissed with prejudice.

DONE AND ORDERED this 29th day of March, 2012, in Tallahassee, Leon County, Florida.

ELLA JANE P. DAVIS
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of March, 2012.

ENDNOTES

1/ There is some confusion on the "Index of Exhibits" page of the Transcript, but the body of the Transcript is clear as to the items admitted in evidence. ALJ Exhibit 1, the Amended Joint Prehearing Stipulation, is attached to Volume I of the Transcript. Exhibit P-1 (photographs) was admitted at TR-23 and the two DVDs of Dr. William Rhine's deposition were both inadvertently designated as "Joint Exhibit 21" and as "Joint Exhibit 24." (There was no videotape of Dr. Rhine's deposition.) The transcript of Dr. Rhine's deposition is designated "Joint Exhibit 20."

2/ The Florida Supreme Court has ruled, ". . . [W]e hold that in order for a 'birth-related neurological injury' to occur, the injury to the brain caused by oxygen deprivation, which renders the infant permanently and substantially impaired, must occur during labor, delivery or resuscitation in the immediate postdelivery period. That period does not encompass an additional 'extended period of time when a baby is delivered in a life-threatening condition' unless there are ongoing and continuous efforts of resuscitation. Both the incident of oxygen deprivation and the brain injury resulting from the oxygen deprivation must occur in this time period." Bennett v. St. Vincent's Med. Ctr., Inc., 71 So. 3d 828, 847 (Fla. 2011).

3/ Although Respondent NICA suggests obliquely in its proposed final order that Javier's situation is not compensable because of the MAS and strep B, this case bears an extremely close resemblance to the situation found compensable in Orlando Medical Healthcare System, Inc. v. Florida Birth-Related Neurological Injury Compensation Association, 997 So. 2d 426 (Fla. 5th DCA 2008). That case also involved MAS and resulting oxygen deprivation first to the lungs, and consequently to the brain. It is not lost on the undersigned that Dr. William Rhine gave testimony in that case remarkably similar to the testimony he has given in the instant case. See infra. The baby in that case received NICA compensation, and the decision was commented upon favorably in Bennett, above, n.2.

4/ It is noted that Dr. Rhine's and Dr. Willis' testimony concerning causation and timing, was grounded solely upon the cold medical records. None of the expert witnesses were treating physicians and all became involved in the case after the claim was filed.

5/ Obviously, Dr. Willis had some reservations as to whether or not the "immediate postdelivery period" extended to this point.

6/ However, Dr. Willis acknowledged early that there had been a continuous and extended resuscitation in the immediate postdelivery period.

7/ Ultimately, Dr. Willis acknowledged continuous and uninterrupted resuscitation efforts and several points within that continuous resuscitative period when oxygen deprivation probably occurred.

8/ Presence of a "Romberg's sign" would signal an inability to maintain balance while standing with feet together.

9/ Some of this information is obviously of the type "filtered" by Javier's mother. Also, at one point, Dr. Castellanos testified that he had consulted Javier's teacher (TR-57) and at another stated he had not contacted any of Javier's teachers. (TR-86) The undersigned takes this portion of his testimony to simply mean that the Connors Parental Rating Scale which Dr. Castellanos testified that he used to elicit information from Javier's mother, as part of his evaluation of Javier, also double-filtered the mother's understanding of what Javier's teachers had told her about Javier. See Findings of Fact 57-67.

10/ "Under the Plan, a 'birth-related neurological injury' is an injury to the brain or spinal cord of an infant caused by oxygen deprivation or mechanical injury during labor or delivery, which renders the infant both 'permanently and substantially mentally and physically impaired.' § 766.302(2), Fla. Stat. (2005). . . . [T]he ALJ was required to determine whether Sierra's [the child's] brain injury was the likely cause of her current impairments and whether Sierra is substantially and permanently physically and mentally impaired." Matteini v. Fla. Birth-Related Neurological, 946 So. 2d 1092, 1094 (Fla. 5th DCA 2006).

"Under the Plan, a 'physical impairment' relates to the infant's impairment of his 'motor abnormalities or physical functions,' which, along with the brain injury, significantly affects the infant's mental capabilities so that the infant will not be able to translate his cognitive capabilities into adequate learning or social development in a normal manner." Id. at 1095. See Fla. Birth-Related Neurological Injury Comp. Ass'n v. Fla Div. of Admin. Hearings, 686 So. 2d 1349, 1356 (Fla. 1997).

See Adventist Health Sys./Sunbelt, Inc. v. Fla. Birth-Related Neurological Injury Comp. Ass'n, 865 So. 2d 561 (Fla. 5th DCA 2004), explaining that under the Plan, the identification of a "substantial mental impairment" may include not only significant cognitive deficiencies but can include, in a proper case, additional circumstances such as significant barriers to learning and social development.

11/ Adventist Health Sys./Sunbelt, Inc. v. Fla. Birth-Related Neurological Injury Comp. Ass'n, above, n.11.

12/ McNally v. Fla. Birth-Related Neurological Injury Comp. Ass'n, Case 09-5623N (Fla. DOAH March 12, 2012)(Final Order).

13/ Adventist Health Sys./Sunbelt, Inc. v. Fla. Birth-Related Neurological Injury Comp. Ass'n, above, nn.11 and 12.

14/ In Matteini v. Fla. Birth-Related Neurological, n.11, the court held that existence of permanent brain injury or damage alone, without demonstrating both permanent and substantial mental and physical impairment, was not sufficient to demonstrate that the infant suffered a birth-related neurological injury as defined in section 766.302(2).

15/ See McNally v. Fla. Birth-Related Neurological Injury Comp. Ass'n.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

Review of a final order of an administrative law judge shall be by appeal to the District Court of Appeal pursuant to section 766.311(1), Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy, accompanied by filing fees prescribed by law, with the clerk of the appropriate District Court of Appeal. See § 766.311(1), Fla. Stat., and Fla. Birth-Related Neurological Injury Comp. Ass'n v. Carreras, 598 So. 2d 299 (Fla. 1st DCA 1992).