STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NINOSHKA RIVERA, as parent and natural guardian of KEVIN TERRON-OTERO, a minor,	)	
Petitioner,	)	
vs.	)	Case No. 11-4320N
FLORIDA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION ASSOCIATION,	)	
Respondent,	)	
and	)	
EZER OJEDA, M.D., ANGELINA PERA, M.D., PEDIATRIX MEDICAL GROUP OF FLORIDA, INC., OSCEOLA REGIONAL MEDICAL CENTER, LANCE MAKI, M.D., TANYA MEDINA, M.D., AND J. RAPHA MEDICAL, P.A.,	)	
Intervenors.	)	

FINAL ORDER ON COMPENSABILITY AND NOTICE

Pursuant to notice, a final hearing was held in this case on July 30, 2012, in Orlando, Florida, before Susan Belyeu Kirkland, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUES

The issues in this case are: (1) For the purposes of determining compensability, whether the injury claimed is a birth-related neurological injury and whether obstetrical services were delivered by a participating physician in the course of labor, delivery, or resuscitation in the immediate post-delivery period in the hospital; and (2) Whether notice was accorded the patient, as contemplated by section 766.316, Florida Statutes, or whether the failure to give notice was excused because the patient had an emergency medical condition, as defined in section 395.002(8)(b), Florida Statutes, or the giving of notice was not practicable.

PRELIMINARY STATEMENT

On August 22, 2011, Petitioner, Ninoshka Rivera (Ms. Rivera), on behalf of and as parent and natural guardian of Kevin Terron-Otero (Kevin), a minor, filed a Petition for Benefits under Protest Pursuant to Florida Statute Section 766.301 et seq. (Petition) with the Division of Administrative Hearings (DOAH). Ms. Rivera alleged that Kevin did not sustain injuries that are compensable under the Neurological Birth-

Related Injury Compensation Plan (NICA Plan) and that Ms. Rivera was not provided with proper pre-delivery notice by the hospital and obstetricians pursuant to section 766.316.

The case was originally assigned to Administrative Law Judge Ella Jane P. Davis, but due to the retirement of Administrative Law Judge Davis, the case was reassigned to Administrative Law Judge Susan Belyeu Kirkland.

The Petition alleged that Ezer A. Ojeda, M.D., provided obstetric services at the birth of Kevin, and that Kevin was born at Osceola Regional Medical Center (Osceola) in Kissimmee, Florida. DOAH served the Birth-Related Neurological Injury Compensation Association (Association), Dr. Ojeda, and Osceola Regional Medical Center with copies of the Petition.

On September 1, 2011, Dr. Ojeda filed a petition for leave to intervene, which was granted by Order dated September 21, 2011. On September 27, 2011, Angelina Pera, M.D., and Pediatrix Medical Group of Florida, Inc. (Pediatrix), filed a petition for leave to intervene, which was granted by Order dated October 21, 2011. On March 20, 2012, Osceola filed a petition to intervene, which was granted by Order dated March 21, 2012. On March 26, 2012, Lance Maki, M.D., filed a petition to intervene, which was granted by Order dated March 27, 2012. On June 27, 2012, Tanya Medina, M.D., and J. Rapha Medical, P.A., filed a petition to intervene, which was granted by Order dated July 17, 2012.

At the final hearing, Petitioner called the following witnesses: Jeanette Rivera; Ninoshka Rivera; Robert Cullen, Jr., M.D., and Berto Lopez, M.D. Intervenor, Osceola, called Sari Falcon as its witness. Neither Respondent nor the remaining Intervenors called any live witnesses. Joint Exhibits 1-34 were admitted in evidence without objection. Joint Exhibit 3 Bates Numbers J308 and J309 were substituted with clearer copies by stipulation of the parties. Joint Exhibit 32 was replaced in its entirety with a correct copy of the contract by stipulations of the parties.

Respondent/Intervenors' Exhibits 1, 2, and 5 through 7 were not admitted in evidence. Whether to admit Respondent/ Intervenor's Exhibit 3 was taken under advisement at the final hearing. Having reviewed the depositions of Dr. Ojeda and Dr. Maki, Respondent/Intervenor's Exhibit 3 is admitted pursuant to section 120.57(1)(c), Florida Statutes (2012).

On August 8, 2012, Petitioner filed Petitioner's Motion to Withdraw, or in the Alternative, Motion to Strike Deposition of Robert F. Cullen, Jr., M.D., as Joint Exhibit 21. Counsel for Petitioner stated at the final hearing, that there was no objection to any of the Joint Exhibits, while knowing that Dr. Cullen would be called as a live witness by Petitioner. The motion was denied by Order dated August 14, 2012.

The taking of testimony and admission of exhibits was completed at approximately 8:00 p.m., on July 30, 2012. Because of the lateness of the hour, the parties were allowed to present closing arguments via a telephonic conference call at a later date. Closing arguments were presented on August 21, 2012.

The three-volume Transcript of the final hearing held on July 30, 2012, was filed on August 17, 2012. The Transcript of closing arguments given on August 21, 2012, was filed on August 28, 2012.

On August 23, 2012, Petitioner filed Petitioner's Unopposed Motion for Extension of Time to File Proposed Final Order and Supporting Memorandum of Law, requesting that the time for filing proposed final orders be extended to September 21, 2012. The motion was granted by Order dated August 24, 2012.

On September 21, 2012, Petitioner filed Petitioner's Unopposed Motion for Extension of Time to File Proposed Orders. The motion was granted by Order dated September 21, 2012, and the time for filing proposed final orders was extended to September 28, 2012. All parties, with the exception of Petitioner, filed their proposed final orders before 5:00 p.m. on September 28, 2012. All the parties' proposed orders have been given careful consideration in the preparation of this Final Order.

Due to some clerical error, Petitioner's proposed final order was filed shortly after 5:00 p.m., on September 28, 2012; therefore, the docket reflected October 1, 2012, as the date of filing. On October 1, 2012, Petitioner filed Petitioner's Motion to Deem Filing of Proposed Order Timely, or in the Alternative to Accept Filing at 5:01 p.m., on September 28, 2012. An Order granting the motion was entered on October 2, 2012.

On September 25, 2012, Petitioner filed Petitioner's Motion to Strike Pleadings for Perpetrating a Fraud upon the Court. The motion was heard by telephonic conference call on October 11, 2012. The motion was denied by Order issued October 11, 2012.

At the final hearing on July 30, 2012, and at the closing arguments on August 21, 2012, Petitioner made several motions for directed verdict. All the issues presented in the motions have been addressed in the findings of fact and conclusions of law of this Final Order.

FINDINGS OF FACT

1. While living in Puerto Rico, Ms. Rivera became pregnant. She had some prenatal care in Puerto Rico prior to moving to Florida in approximately August 2009. She had no

prenatal care after coming to Florida until she presented at Osceola on October 21, 2009.

2. In 2009, Osceola contracted with OB Hospitalists Group, LLC (OB Hospitalists), for hospital-based physicians for the provision and management of health care for Osceola's unassigned and emergent obstetrics and gynecology patients. The physicians provided by OB Hospitalists rotated so that a physician from OB Hospitalists was at Osceola at all times. Obstetric patients who did not have an obstetrician and presented to Osceola for obstetrical care would be seen by one of the physicians from OB Hospitalists. Although an obstetrical patient may see one physician from OB Hospitalists during a visit to the emergency room, the patient may see another physician from OB Hospitalists on another visit.

3. The contract between OB Hospitalists and Osceola provided that OB Hospitalists and its representatives were providing services pursuant to the contract as independent contractors and not as "employees, agents, partners of, or joint ventures with" the hospital. The contract also provided that OB Hospitalists would provided medical malpractice coverage for the physicians it provided to Osceola.

4. OB Hospitalists contracted with physicians to provide the services required under the agreement between Osceola and OB Hospitalists. Among the physicians who contracted with OB

Hospitalists to provide services to Osceola were Dr. Maki and Dr. Ojeda. OB Hospitalists required its physicians to participate in the NICA Plan and paid their annual assessments for participation in the NICA Plan.

5. In October and November 2009, Dr. Maki provided hospital-based physician services at Osceola pursuant to the contract between Osceola and OB Hospitalists. During this time, he was a participating physician in the NICA Plan, and his assessment was paid by OB Hospitalists. He was a physician licensed in Florida and was practicing obstetrics on a full-time basis.

6. Osceola is a licensed hospital in Florida as evidenced by its license numbers listed on the Hospital Assessment and Record and Admittance form, Joint Exhibit 31, J0925. Osceola paid its 2009 assessment for the NICA Plan.

7. Ms. Rivera, whose primary language is Spanish, presented at the Osceola emergency room on October 21, 2009, complaining of abdominal cramping. She was accompanied by her mother, Jeanette Rivera. A security guard, who spoke Spanish, translated Ms. Rivera's communications to the hospital secretary on duty. Ms. Rivera filled out a sign-in sheet for emergency services upon arrival at the hospital. The form requested that she state her name, address, social security number, telephone number, date of birth, and reason for the visit. Ms. Rivera

wrote her name and address on the form. The security guard placed Ms. Rivera in a wheelchair and wheeled her to the nurses' station, where he left her.

8. The triage nurse note on the sign-in sheet indicated that Ms. Rivera had no known allergies and had been taking prenatal vitamins.

9. Ms. Rivera was seen by Dr. Maki on her visit on October 21, 2009, but he did not admit her to the hospital. She was discharged with nurse's instructions, which were in Spanish.

10. Sari Falcon was an out-patient registrar employed by Osceola who was on duty on October 21, 2009, and registered Ms. Rivera. As an out-patient registrar, it was Ms. Falcon's responsibility to collect demographic information, to get the patients to sign the condition of admission form, to verify insurance, and to schedule, if necessary.

11. Ms. Falcon's family is from Puerto Rico, and she is fluent in Spanish, which is her first language. Although Ms. Falcon does specifically remember registering Ms. Rivera, Ms. Falcon has certain practices to which she adheres during the registration process. One of her practices is to converse in Spanish with patients who speak only Spanish.

12. If the patient is an obstetric patient whose pregnancy is over 20 weeks, Ms. Falcon takes the patient to the labor and delivery department to complete the registration process.

Ms. Falcon's initial registration of an obstetrical patient occurs during one interaction/transaction, and all pages are reviewed, signed, and witnessed by her during that single transaction.

13. One of her duties is to prepare a registration form or face sheet which contains demographic and other information about the patient. She verifies the information on the registration form with the patient.

14. The registration form for Ms. Rivera indicated that Ms. Rivera was unemployed, that her insurance was in the form of Medicaid, her last menstrual cycle was February 9, 2009, and that she did not have a primary or family physician. The form shows that the person registering Ms. Rivera is Ms. Falcon.

15. On October 21, 2009, Ms. Rivera signed the Conditions of Admission and Consent for Medical Treatment form, which Ms. Falcon presented to Ms. Rivera. Ms. Rivera also initialed a part of the form, indicating that she was given the opportunity to read and ask questions about the information on the form and that she either had no questions or her questions had been answered. Ms. Rivera also initialed the form indicating that she did not have an executed Advance Directive and did not desire to execute one. By her initials, Ms. Rivera also acknowledged that she had received a copy of the hospital's Notice of Privacy Practices. Ms. Falcon signed the Conditions

of Admission and Consent for Medical Treatment, indicating that she had witnessed Ms. Rivera signing the form.

16. When Ms. Falcon presents the consent form to a patient, she goes over the information on the form with the patient prior to the patient signing the form. If the patient speaks only Spanish, Ms. Falcon goes over the material in Spanish. She explains the part of the form, which requires the patient to indicate by initialing the appropriate box, whether the patient has an Advance Directive, does not have an Advance Directive and would like to get information on Advance Directives, or does not have an Advance Directive and does not wish to execute one.

17. Another of Ms. Falcon's responsibilities is to give the obstetric patients she registers a copy of the brochure prepared by the Association (NICA brochure). If the patient speaks only Spanish, Ms. Falcon would provide a copy of the NICA brochure which is written in Spanish. Ms. Falcon explains to the patient what the NICA brochure is.

18. Ms. Falcon has the patient sign an acknowledgment form in Ms. Falcon's presence, showing the patient received the NICA brochure. Ms. Rivera executed an acknowledgment form dated October 21, 2009. The form, which is written in English, states:

> 1. I acknowledge that I have received the Florida Birth Related Neurological Injury Compensation Plan brochure.
>
> 2. I acknowledge and understand that I may contact the Florida Birth Related Neurological Compensation Association about the details of the plan at 1-800-398-2129.

Ms. Rivera printed her name on the line which had "Print Name" underneath it and signed her name on "Signature" line underneath it.

19. Dr. Maki does not speak English. He did not give Ms. Rivera a NICA brochure on October 21, 2009, and did not advise Ms. Rivera that he was a participating physician in the NICA Plan. Additionally, Ms. Rivera was not advised on October 21, 2009, that any of the obstetric physicians which OB Hospitalists provided to Osceola were participating physicians in the NICA Plan.

20. Ms. Rivera's testimony concerning her October 21, 2009, visit to Osceola is not credible. There are many inconsistencies in Ms. Rivera's testimony, and some of Ms. Rivera's testimony is contradicted by her own mother, who was present at all times during the October 21, 2009, visit. Ms. Rivera stated that the only person who spoke Spanish to her at the hospital, aside from her mother, was the security guard. She also testified that she did not speak, read, or understand English on October 21, 2009. However, she contradicted herself

when she testified that she knew what "name" and "address" meant in English because she learned that in school. Ms. Rivera also said that she was able to understand the words "print name" and "signature" because she had signed forms written in English in Puerto Rico with similar requirements. In her deposition, Ms. Rivera's mother testified that a female nurse spoke to them in Spanish after Ms. Rivera was told that she would be discharged and that another nurse came in with some documents for Ms. Rivera to sign. In her deposition, Ms. Rivera testified that the doctor gave her the Conditions of Admission and Consent to Treat form for her to sign, showed her where to initial the appropriate boxes, and said, "Sign and this is to have your baby." At the final hearing, Ms. Rivera changed her testimony and testified that Ms. Falcon gave her the form and told her where to sign and initial. At the final hearing, Ms. Rivera testified that on October 21, 2009, Dr. Maki gave her the acknowledgement form to sign indicating that she had received the NICA brochure and told her where to print her name and where to sign her name. Ms. Rivera's mother testified that Ms. Rivera did not sign any documents in the presence of the doctor and that the doctor only examined Ms. Rivera. In her deposition, Ms. Rivera denied receiving discharge instructions in Spanish and denied signing the discharge instructions. At the final hearing, Ms. Rivera acknowledged that she received the discharge

instructions at her October 21, 2009, visit and that she signed the discharge documents.

21. An interpreter was present at the depositions of both Ms. Rivera and her mother and translated from English to Spanish and from Spanish to English for their benefit. An interpreter was also present at the final hearing and translated from English to Spanish and from Spanish to English for their testimonies.

22. Much of the information that is contained on the Registration Form, Joint Exhibit 1, J0003, would require that it be communicated to someone at the hospital. Information such as Ms. Rivera's mother's name and address, the employment status of Ms. Rivera, the date of Ms. Rivera's last menstrual period, and the lack of a primary care or family physician could only have come from Ms. Rivera or her mother, who speaks only Spanish. This information was not contained on the sign-in sheet that Ms. Rivera filled out with the help of the security guard.

23. There is also information that is contained on the OB Triage form that had to have been communicated by Ms. Rivera to the staff at the hospital. Such information includes whether Ms. Rivera had certain allergies, the time of the day that Ms. Rivera's cramping began, pain of three on the pain scale, use of prenatal vitamins, and her level of education. The OB Triage form also stated that Ms. Rivera's primary language was

Spanish and that an interpreter would be needed. There is no reason for the triage nurse to make up this information.

24. Ms. Falcon always follows the procedure discussed above when registering obstetric patients, which is the same procedure outlined in Osceola's printed policies. There is no dispute that she speaks fluent Spanish, and there would be no logical reason that she would not speak Spanish to a patient who speaks only Spanish, particularly in a hospital with a 90 percent population of Spanish-speaking patients. Additionally, Ms. Falcon signed the Conditions of Admissions and Consent to Treatment form, as a witness to Ms. Rivera's signature. Ms. Rivera signed the form acknowledging that she received the NICA brochure.

25. The greater weight of the evidence establishes that Ms. Rivera did receive a NICA brochure from Ms. Falcon on October 21, 2009; Ms. Falcon explained in Spanish to Ms. Rivera about the NICA brochure; and Ms. Falcon had Ms. Rivera sign a form acknowledging her receipt of the NICA brochure.

26. On November 4, 2009, Ms. Rivera again presented to the Osceola emergency room at 9:40 a.m., complaining of abdominal cramps "all night long" and leakage of clear vaginal fluid since 9:00 a.m. The OB Triage note stated that Ms. Rivera was having moderate contractions every two to three minutes with a duration of 30 to 50 seconds. Dr. Maki admitted her to the hospital at

2:40 p.m. At 6:06 p.m., Dr. Maki artificially ruptured Ms. Rivera's membranes.

27. Dr. Maki did not advise Ms. Rivera on November 4, 2009, that he was a participating physician in the NICA Plan and did not provide Ms. Rivera with a NICA brochure.

28. After Dr. Maki's shift ended, Dr. Ojeda took over the care of Ms. Rivera. Dr. Ojeda, a licensed physician in Florida, was also an independent contractor with OB Hospitalists. On November 4, 2009, he was a participating physician in the NICA Plan and was practicing obstetrics on a full-time basis. His NICA assessment for 2009 was paid by OB Hospitalists.

29. Dr. Ojeda arrived at Osceola on November 4, 2009, at 7:15 p.m., and first came in contact with Ms. Rivera at 7:26 p.m. At that time Ms. Rivera's membranes had been ruptured, her contractions were coming every one to two minutes, and the duration of the contractions was 60 seconds. Dr. Ojeda did a vaginal examination and reviewed the fetal heart rate tracings. According to Ms. Rivera's mother, when Dr. Ojeda first saw Ms. Rivera, the baby's hair was visible in the birth canal. Petitioner's expert, Berto Lopez, M.D., was of the opinion that at the time that Dr. Ojeda first saw Ms. Rivera, that it was not an appropriate time to transfer Ms. Rivera to another hospital and a new obstetrician.

30. Dr. Ojeda speaks Spanish. When he first met Ms. Rivera, he advised her that he was a participating physician in the NICA plan, and gave her a NICA brochure in Spanish. He regularly keeps NICA brochures with him when he is on duty. Dr. Ojeda noted in the physician's progress notes that he informed Ms. Rivera at 7:40 p.m., that he was an active member of the NICA Plan.

31. When Ms. Rivera came to Osceola on November 4, 2009, a fetal monitor was attached to her to monitor the heart rate of the baby. A normal fetal heart rate is between 120 and 160 beats per minute. Kevin's baseline fetal heart rate was 150 beats per minute. A little after 10:00 a.m., the fetal heart strip registered a variable deceleration of Kevin's heart rate that went down to 90 beats per minute. At approximately 2:14 p.m., the heart decelerated to about 75 beats per minute, which was followed by another deceleration to about 60 beats per minute at 2:19 p.m. From approximately 2:20 p.m., until 8:06 p.m., Kevin experienced small fetal heart rate decelerations, which evidenced an overall poor fetal heart rate variability. At approximately 8:06 p.m., Kevin's heart rate decelerated to about 60 beats per minute and then returned quickly to baseline. Decelerations continued, and at approximately 8:44 p.m., the variable fetal heart rate

decelerations became severe and consistent. At this point, Kevin suffered oxygen deprivation.

32. At 9:27 p.m., Dr. Ojeda delivered Kevin. He weighed 3,290 grams. At the time of birth, Kevin had poor muscle tone, no cry, and no respiratory effort and required three minutes of positive pressure ventilation with bag and mask. His Apgar scores at one, five, and ten minutes were two, five, and seven, respectively. At birth the umbilical cord ph was 7.05, which demonstrated that Kevin had acidosis at time of delivery. Acidosis is a sign of oxygen deprivation.

33. After delivery, Kevin was taken to the nursery, at which time the post-delivery resuscitation had ended. His color was pale. Dr. Medina was notified of the delivery and status of Kevin. Dr. Medina ordered laboratory work to be done.

34. About an hour after delivery, blood was drawn. Kevin had a platelet count of 117,000, which is low. Kevin was bathed while in the nursery.

35. Around midnight of November 5, 2009, attempts were made to feed Kevin, and he did not tolerate feeding. At this time, the nurse noted that Kevin had odd movements, his left arm was straight, and his hand was in a tight fist. He had a facial grimace with his mouth slanting to the right side.

36. At 12:23 a.m., the nurse noted that Kevin continued to have odd movements to the right side with arm straightening and

fist clenched. His head was turned to the right side. He had a facial grimace with a droop to the right side, and his eyes were turned upward to the right side. His oxygen saturation was down to 82 percent. Dr. Medina, who was notified of Kevin's condition, ordered a consult. No evidence was presented to establish that Dr. Medina or J. Rapha Medical, P.A., provided obstetric services to Ms. Rivera. It was not established that Dr. Medina was a participating physician in the NICA Plan or that J. Rapha Medical, P.A., participated in the NICA Plan. No evidence was presented that either Dr. Medina or J. Rapha Medical, P.A., gave notice they participated in the NICA Plan.

37. Dr. Pera, a neonatologist, was called on consult. Neither Dr. Pera nor Pediatrix rendered any obstetric services to Ms. Rivera. The evidence did not establish that Dr. Pera or Pediatrix participated in the NICA Plan or that they gave notice to Ms. Rivera that they participated in the NICA Plan.

38. At 12:35 p.m., Kevin was admitted to the neonatal intensive care unit, pursuant to orders from Dr. Pera. Kevin moved with both arms straightened and fist clenched. His eyes turned upward to the right side, and his mouth drooped to the right side. These symptoms are indicative of a seizure. His oxygen saturation dropped to the mid 70's.

39. Orders were given for Phenobarbital, which was administered at 2:50 a.m. Kevin was transferred to the Winnie

Palmer Hospital for Women and Babies (Winnie Palmer) at 6:45 a.m.

40. Diagnostic studies were done at Winnie Palmer, which showed that Kevin had suffered from oxygen deprivation. The EEG was abnormal; MRI's showed multiple intracranial hemorrhages and a progression to diffuse cystic encephalomalacia; and CAT scans showed intracranial hemorrhage with enlarged ventricles and cystic encephalomalacia.

41. Petitioner retained Robert Cullen, Jr., M.D. (Dr. Cullen), as an expert witness, and Respondent retained Dr. Donald Willis, M.D. (Dr. Willis), and Raymond Fernandez, M.D. (Dr. Fernandez), as expert witnesses. All doctors agree that Kevin sustained a brain injury during labor and delivery due to oxygen deprivation.

42. Dr. Cullen believes that the brain injury, which occurred during labor and delivery, was a significant injury and that Kevin sustained a separate significant brain injury around midnight to 12:30 a.m., on November 5, 2009. He is of the opinion that Kevin's impairment is a result of the combination of the two injuries, and he cannot apportion the impairment between the two injuries.

43. Dr. Cullen bases his opinion that a second injury occurred because Kevin had stabilized by the time that he was placed in the nursery and the seizure activity started over two

hours after oxygen deprivation was sustained during labor and delivery. However, Dr. Cullen concedes that an infant may not always show symptoms of a permanent and substantial impairment within three hours of birth.

44. Dr. Fernandez, Respondent's expert pediatric neurologist, opined that Kevin suffered brain injury during labor and delivery and that a brief period of stability after resuscitation is not unusual. He stated:

> [I]t's not uncommon at all for a baby to then stabilize for a period of time even after sustaining severe injury. There's sort of a period of time when people look pretty good after brain injury; that doesn't last too long. It might last minutes to hours, two or three or four hours, and then decline begins to occur.
>
> There are progressive changes that take place that mount gradually and eventually instability recurs, so that period of relative stability or stability immediately after initial resuscitation is not unusual.

Dr. Fernandez's testimony is credited.

45. Dr. Willis is of the opinion that the seizure episode that began around midnight to 12:30 a.m., on November 5, 2009, was a manifestation of the brain injury that was sustained during labor and delivery and that the seizure episode was not a separate injury from the oxygen deprivation which occurred during labor and delivery. His opinion is based on the severe and consistent variable heart rate decelerations that Kevin

experienced intrapartum; the Apgar scores after birth; the poor respiratory effort after birth requiring positive pressure ventilation with a mask and bag; the low platelet count of 117,000 after delivery; and the low ph of 7.05 of the umbilical cord, indicating acidosis at the time of delivery. The testimony of Dr. Willis is credited.

46. The greater weight of the evidence establishes that Kevin sustained an injury to his brain during labor and delivery due to oxygen deprivation and the seizures and brain hemorrhage after birth were a manifestation or continuation of the early injury and not a separate brain injury.

47. The brain injury sustained during labor and delivery resulted in substantial and permanent mental and physical impairment to Kevin. Dr. Fernandez, was the expert retained by Respondent to opine on Kevin's impairments. Dr. Fernandez opined that Kevin has mental and physical impairments, which are both substantial and permanent. He described Kevin's condition at the time Kevin was examined by Dr. Fernandez on January 18, 2012, as follows:

> He's virtually non-interactive, responds very little to sound, but otherwise does not interact. He does not speak. I don't think that he has any understanding of language. He has very poor motor control. His head circumference, his brain is very small and there is cystic change within his brain and that's highly predictive of permanent impairment.

CONCLUSIONS OF LAW

48. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 766.301-766.316, Fla. Stat. (2012).

49. The NICA 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. § 766.303(1), Fla. Stat.

50. 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 DOAH. §§ 766.302(3), 766.303(2), and 766.305(1), Fla. Stat. NICA, 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." § 766.305(4), Fla. Stat. 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.

51. In the instant case, Petitioner filed a claim under protest, alleging that Kevin did not sustain a birth-related

neurological injury that is compensable under the NICA Plan, and NICA has determined that the injury is compensable under the Plan. As the proponent of the issue of compensability, the burden of proof as to compensability is upon Respondent. See Balino v. Dep't of Health & Rehab. Servs. 348 So. 2d 349, 350 (Fla. 1st DCA 1997). Therefore, 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.

52. 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 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. 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 birth." § 766.31(1), Fla. Stat.

53. The term "birth-related neurological injury" is defined in section 766.302(2) as follows:

> "Birth-related neurological injury" means 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 the infant permanently and substantially mentally and physically impaired.

54. Section 766.302(6) defines the term "hospital" as "any hospital licensed in Florida."[1/] Section 766.302(7), defines the term "participating physician" as follows:

> [A] physician licensed in Florida to practice medicine who practices obstetrics or performs obstetrical services either full time or part time and who had paid or was exempted from payment at the time of the injury the assessment required for participation in the birth-related neurological injury compensation plan for the year in which the injury occurred. Such term shall not apply to any physician who

> practices medicine as an officer, employee, or agent of the Federal Government.

55. The evidence establishes that Ms. Rivera was provided obstetrical services by two participating physicians, Dr. Maki and Dr. Ojeda. At the time of Kevin's birth, both physicians were full-time obstetricians, licensed to practice medicine in Florida. Both physicians participated in the NICA Plan, and their annual assessments were paid by OB Hospitalists for 2009. The obstetrical services during labor and delivery were provided at a Florida-licensed hospital, Osceola, and Osceola had paid its 2009 assessment for participation in the NICA Plan.

56. The evidence established that Kevin sustained a brain injury during labor and delivery due to oxygen deprivation. The evidence also established that as a result of the brain injury sustained during labor and delivery that Kevin is both substantially and permanently mentally and physically impaired.

57. The greater weight of the evidence establishes that Kevin sustained a birth-related neurological injury which is compensable under the NICA Plan.

58. Section 766.316 provides:

> Each hospital with a participating physician on its staff and each participating physician, other than residents, assistant residents, and interns deemed to be participating physicians under s. 766.314(4)(c), under the Florida Birth-Related Neurological Injury Compensation Plan shall provide notice to the obstetrical

> patients 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. The hospital or the participating physician may elect to have the patient sign a form acknowledging receipt of the notice form. Signature of the patient acknowledging receipt of the notice form raises a rebuttable presumption that the notice requirements of this section have been met. Notice need not be given to a patient when the patient has an emergency medical condition as defined in s. 395.002(8)(b) or when notice is not practicable.

59. Petitioner contends that no physician involved in the labor, delivery, or resuscitation in the immediate postdelivery period in the hospital gave pre-delivery notice and that any notice that may have been provided by the hospital was insufficient. Respondent did not take a position on the notice issue. Intervenors, Osceola, Dr. Ojeda, and Dr. Maki contend that notice was appropriately given or, in the alternative, an exception to the notice requirement is applicable. As proponents of the proposition that appropriate notice was given or, in the alternative, an exception applies, the burden on the issue of notice is upon the Intervenors. See Balino 348 So. 2d at 350.

60. The greater weight of the evidence established that Osceola provided the notice required by section 766.316 on

Ms. Rivera's visit to Osceola on October 21, 2009. Ms. Rivera was provided the notice by Ms. Falcon in the form of a brochure furnished by NICA. The NICA brochure satisfies the legislative mandate of providing a "clear and concise explanation of a patient's rights and limitations under the plan" pursuant to section 766.316. Dianderas v. Fla. Birth Related Neurological, 973 So. 2d 523, 527 (Fla. 5th DCA 2007).

61. Although Ms. Falcon does not independently remember registering Ms. Rivera on October 21, 2009, she follows her normal routine and practice when registering obstetrical patients, which includes giving the brochure to the patient, speaking to Spanish-speaking patients in Spanish, and having the patient sign the acknowledgment form. "Evidence of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is admissible to prove the conduct of the organization on a particular occasion was in conformity with routine practice." § 90.406, Fla. Stat. (2012); see also Tabb v. Fla. Birth-Related Neurological Injury Comp. Ass'n, 880 So. 2d 1253, 1259 (Fla. 1st DCA 2004).

62. Ms. Rivera signed a form acknowledging receipt of the NICA brochure. Her signature on the acknowledgment form raises a prebuttable presumption that the notice requirements of section 766.316 have been met. § 766.316, Fla. Stat. The presumption has not be rebutted by Petitioner. Ms. Rivera's

testimony that she did not receive the brochure and that she did not understand the acknowledgment form because it was in English is not credible. Ms. Falcon gave the brochure, written in Spanish, to Ms. Rivera and explained the acknowledgment form to Ms. Rivera in Spanish.

63. Petitioner argues that the notice was defective because the NICA brochure did not provide that the hospital participated in the NICA Plan. Nothing in the statute provides that a hospital must identify that it participates in the plan. The statute plainly states: "Each hospital with a participating physician on its staff . . . shall provide notice to the obstetrical patients as to the limited no-fault alternative for birth-related neurological injuries." The notice provided was the NICA brochure.

64. Petitioner argues that the acknowledgment form signed by Ms. Rivera was defective because it did not identify Osceola. Section 766.316 does not require that a hospital have the patient sign an acknowledgment form. It is up to the hospital to elect whether to use an acknowledgment form. Petitioner contends that Osceola should have used the form developed by NICA, which states:

> I have been furnished information in the form of a Brochure prepared by the Florida Birth-Related Neurological Injury Compensation Association (NICA), pursuant to Section 766.316, Florida Statutes, by

> (insert name of Hospital), wherein certain limited compensation is available in the event certain types of qualifying neurological injuries may occur during labor, delivery, or resuscitation in a hospital.

The suggested NICA acknowledgment does not state that the hospital participates in the NICA Plan, only that the hospital provided the brochure.

65. Section 766.316 requires that "[e]ach hospital with a participating physician on its staff and each participating physician" shall provide notice. Unless the notice provided by the hospital indicates that the notice was also being given on behalf of a participating physician, the notice does not extend to the participating physicians. The participating physicians must give notice on their own. See Fla. Birth-Related Neurological Injury Comp. Ass'n v. Dep't of Admin. Hearings, 29 So. 3d 992, 994 (Fla. 2010).

66. The greater weight of the evidence established that Dr. Maki did not provide the required notice to Ms. Rivera when he first saw her on October 21, 2009. He did not provide the required notice when he provided obstetrical services to Ms. Rivera on November 4, 2009.

67. Dr. Maki argues that because he did not speak Spanish that the only practical way to communicate with Ms. Rivera was through hospital personnel who are Spanish-English translators.

While Dr. Maki may not have been able to understand Spanish, this communication problem does not relieve him of the responsibility of providing notice for himself.

68. In Weeks v. Florida Birth-Related Neurological Injury Compensation Association, 977 So. 2d 616, 618-619 (Fla. 5th DCA 2008), the court stated:

> [T]he formation of the provider-obstetrical patient relationship is what triggers the obligation to furnish the notice. The determination of when this relationship commences is a question of fact. Once the relationship commences, because [section 766.316] is silent on the time period within which notice must be furnished, under well-established principles of statutory construction, the law implies that notice must be given within a reasonable time. Burnsed v. Seaboard Coastline R. Co., 290 So 2d 13, 19 (Fla. 1974); Concerned Citizens of Putnam County v. St. Johns River Water Mgmt. Dist., 622 So. 2d 520, 523 (Fla. 5th DCA 1993). The determination depends on the circumstances, but a central consideration should be whether the patient received the notice in sufficient time to make a meaningful choice of whether to select another provider prior to delivery, which is the primary purpose of the notice requirement.

69. The obstetrician-patient relationship between Dr. Maki and Ms. Rivera began when he saw her at Osceola on October 21, 2009. At that time, there was no emergency medical condition and it would be reasonable and practicable for Dr. Maki to give the required notice. He did not do so.

70. The next time that Dr. Maki had contact with Ms. Rivera was on November 4, 2009, when she presented to Osceola. Dr. Maki argues that Ms. Rivera was in an emergent condition when she came to the hospital on November 4, 2009. Section 766.316 provides that notice need not be given when the patient has a medical condition pursuant to section 395.002(8)(b), which provides:

> (8) "Emergency medical condition" means:
>
> * * *
>
> (b) With respect to a pregnant woman:
>
> 1. That there is inadequate time to effect safe transfer to another hospital prior to delivery;
> 2. That a transfer may pose a threat to the health and safety of the patient or fetus; or
> 3. There is evidence of the onset and persistence of uterine contractions or rupture of the membranes.

71. The evidence in this case did not establish that there was inadequate time to effect a safe transfer to another hospital at the time Ms. Rivera presented to Osceola on November 4, 2009. She arrived at the hospital at approximately 9:40 a.m., was not admitted until 2:40 p.m. Thus, if she was not admitted until five hours after she presented at the hospital, there would have been adequate time to transfer her to another hospital. Additionally, no evidence was presented that established that a transfer at the time she presented to the

hospital would have endangered the health and safety of Ms. Rivera or the fetus.

72. The evidence did establish that at the time that Ms. Rivera presented to Osceola on November 4, 2009, her membranes had not been ruptured, but she was having persistent contractions every two to three minutes with a duration of 30 to 50 seconds, and her contractions had started the evening before. Her membranes were not ruptured until 6:06 p.m. Because she was having persistent uterine contractions when she came to Osceola on November 4, 2009, she, by statutory definition, had a emergency medical condition as defined in section 395.002(8)(b). The Weeks case does not stand for the proposition that a woman having persistent uterine contractions does not have an emergency medical condition. The court in Weeks held:

> [T]he NICA notice must be given within a reasonable time after the provider-obstetrical relationship begins, unless the occasion of the commencement of the relationship involves a patient who presents in an "emergency medical condition," as defined by the statute, or unless the provision of notice is otherwise "not practicable." When the patient first becomes an "obstetrical patient" of the provider and what constitutes a "reasonable time" are issues of fact. As a result, conclusions might vary, even where similar situations are presented. For this reason, a prudent provider should furnish the notice at the first opportunity and err on the side of caution.

Id. at 619-620.

73. Dr. Maki had an opportunity to provide notice to Ms. Rivera when she presented on October 21, 2009, and it would have been reasonable for him to do so at that time. Ms. Rivera's emergency medical condition on November 4, 2009, did not excuse his failure to give notice on October 21, 2009. Thus, Dr. Maki did not give notice as required by section 766.316.

74. At the time that Dr. Ojeda first saw Ms. Rivera at 7:26 p.m., on November 4, 2009, Ms. Rivera had an emergency medical condition. She was in active labor with persistent uterine contractions and her membranes had been ruptured by Dr. Maki at 6:06 p.m. Additionally, the transfer of Ms. Rivera at that time would have endangered the health and safety of both Ms. Rivera and her fetus. Dr. Ojeda did inform Ms. Rivera that he was a participant in the NICA Plan and gave her a copy of the NICA brochure written in Spanish.

75. In Northwest Medical Center, Inc. v. Ortiz, 920 So. 2d 781, 784 (Fla. 4th DCA 2006), the court, (citing Galen of Florida, Inc. v. Braniff, 920 So. 2d 781 (Fla. 1997)) discussed the timing of the provision of notice required by section 766.316 and stated:

> The supreme court [in Braniff] determined "this language makes clear that the purpose of the notice is to give an obstetrical patient an opportunity to make an informed choice between using a health care provider

> participating in the NICA Plan or using a provider not a participant and thereby preserving her civil remedies."
>
> * * *
>
> The court also determined that "whether a health care provider was in a position to give a patient pre-delivery notice of participation and whether notice was given a reasonable time before delivery will depend on the circumstances of each case and therefore must be determined on a case-by-case basis."

76. In Ortiz, the patient, Mrs. Ortiz, had preregistered at the hospital over three months prior to her delivery. The hospital did not give notice to the patient at the time of preregistration. When Mrs. Ortiz came to the hospital for delivery, she was having soft contractions. About five hours after she arrived at the hospital, she was given an NICA acknowledgment form to sign. A short time later a cesarean was performed on Mrs. Ortiz because she was in critical condition. The court held that the notice provided by the hospital was ineffective.

> Northwest [the hospital] knew that Mrs. Ortiz intended to deliver her child there three months before her actual admission. At that time she was given substantial information regarding her medical care at the hospital and she signed several consent forms. If the purpose of the notice requirement is to give the patient the choice to choose NICA protected delivery or not, hospitals should give notice at a time where such choice can still be made. By waiting until an emergency

> arises, the hospital is depriving the patient of this choice. Therefore, by failing to give notice of NICA participation a reasonable time prior to delivery, although able to do so, Northwest lost the protection of NICA and the Ortizes are entitled to pursue their civil remedies.
>
> * * *
>
> Northwest also argues that even if it could have given an earlier notice, it satisfied the statutory notice provision by informing Mrs. Ortiz about NICA on the day she was admitted to the hospital. The Ortizes maintain this notice was ineffective because it was not given to Mrs. Ortiz until a time when she would have been unable to act on the information. Because the purpose of the notice is "to give an obstetrical patient an opportunity to make an informed choice between using a health care provider participating in the NICA plan or using a provider who is not a participant and thereby preserving her civil remedies," see Braniff, 696 So 2d at 309-310, the notice was ineffective in this case.

Ortiz, 920 So. 2d at 785-786.

77. The notice which Dr. Ojeda provided was ineffective because at the time that it was provided Ms. Rivera could not be safely transferred to another hospital with a non-participating physician. There was not adequate time for her to be able to make a decision on whether she wanted to be treated by a participating physician as opposed to a non-participating physician, which is the purpose for the requirement in section 766.316 that notice be given.

78. Petitioner argues that OB Hospitalists should have provided notice for Dr. Ojeda when Ms. Rivera first saw Dr. Maki, because Dr. Ojeda was providing obstetrical services based on a contract between OB Hospitalists and Osceola. Petitioner's argument has merit to the extent that someone should have given notice for the OB Hospitalists physicians who were providing services at Osceola when Ms. Rivera came to Osceola on October 21, 2009, or during the time between the preregistration and the time Ms. Rivera presented to Osceola for the birth of Kevin.

79. The circumstances in the instant case are similar to the facts in University of Miami v. Ruiz, 916 So. 2d 865 (Fla. 3rd DCA 2005), in which the court held that the participating physicians treating the obstetrical patient should have provided notice as required by section 766.316. In Ruiz, Mrs. Ruiz, who could not afford private medical care, came to the hospital to preregister. She was given a NICA brochure and signed a form acknowledging her receipt of the brochure. Neither the brochure nor the acknowledgement form indicated that any of the physicians on the staff were participants in the NICA Plan. A sign near the entrance of the hospital stated that the hospital was a University of Miami (University) facility.

80. Three weeks after Mrs. Ruiz preregistered, she presented to the hospital in labor, with contractions and

ruptured membranes. She was seen by Dr. Norris, a University professor, who was the medical director and attending physician at the hospital. Three hours after she came to the hospital, Dr. Barker, who was also employed by the University, took over Dr. Norris' responsibilities. Neither doctor advised Mrs. Ruiz of their status as participants in the NICA Plan at the time she presented for delivery or at any time prior to that.

81. Dr. Norris was aware that he had a separate and independent responsibility under section 766.316 to give notice, but he thought that the hospital's notice provided at preregistration satisfied his obligation to provide the statutory notice. The physician also argued on appeal that they were exempted from the notice provision because Mrs. Ruiz had an emergency medical condition when they first saw her.

82. The court held that the notice provided by the hospital was inadequate to satisfy the physician's independent duty because the notice did not indicate that it was being given on behalf of any physician associated with the hospital. Id. at 869.

> In the instant case, notwithstanding the absence of a prior professional relationship between the University physicians and Mrs. Ruiz, the physicians had a reasonable opportunity to furnish notice at pre-registration or during the weeks after pre-registration but prior to the onset of active labor. The record indicates that all of the University physicians participated in

> the NICA Plan and that their services at the hospital were limited to maternity treatment at the onset of labor. There is absolutely no record evidence that it was impracticable for Dr. Norris or Dr. Baker to give the NICA Plan notice to Mrs. Ruiz. By pre-registering three weeks ahead of her eventual maternity admission, Mrs. Ruiz clearly manifested an intent to deliver at that hospital. In light of the fact that all of the University's physicians participated in the NICA Plan, and the University's awareness of the circumstances under which maternity patients typically arrived at the hospital, we find that pre-registration provided a reasonable opportunity for the University's physicians to furnish the NICA Plan notice on July 22, 1998, [the date of pre-registration], until the advent of Mrs. Ruiz' emergency medical condition, the NICA statute required that proper notice be given. The patient's hospital visit three weeks later, admittedly on an emergency basis, did not negate the physicians' earlier statutory duty to provide the NICA Plan notice.

Id. at 870.

83. In the instant case, all the physicians who would be providing obstetrical services at Osceola to patients such as Ms. Rivera, who was an unassigned patient, would be provided by OB Hospitalists. OB Hospitalists required all its physicians at Osceola, including Dr. Maki and Dr. Ojeda, to participate in the NICA Plan. When Ms. Rivera pre-registered with Osceola she manifested an intent to deliver at that hospital. At that time, the physicians who were contracting with OB Hospitalists would have been aware that one or more of the participating physicians

from OB Hospitalists would be providing obstetrical services to Ms. Rivera when it came time for her to deliver her child. As physicians who delivered babies at Osceola to unassigned mothers, Dr. Maki and Dr. Ojeda would have been aware of the circumstances under which maternity patients typically arrived at the hospital when it was time to deliver. Preregistration provided an opportunity for both Dr. Maki and Dr. Ojeda to provide notice to Ms. Rivera.

84. In Ruiz, none of the physicians formed a professional relationship with Mrs. Ruiz at the time of preregistration, and the court found that the physicians should have given notice at preregistration. In the instant case, Dr. Maki had formed a professional relationship with Ms. Rivera on October 21, 2009, when he saw her at the hospital. While Dr. Ojeda did not see Ms. Rivera until November 4, 2009, he was aware that either he or another OB Hospitalists physician more than likely would deliver her baby because she was an unassigned obstetric patient who had preregistered at the hospital.

85. It was practicable for notice to have been provided for Dr. Maki and Dr. Ojeda prior to November 4, 2009. There are a number of ways that notice could have been provided. The hospital could have provided notice during the preregistration process, if it was so inclined, as the hospital did in Sunlife OB/GYN Services of Broward County, P.A. v. Million, 907 So. 2d

624 (Fla. 4th DCA 2005). OB Hospitalists could have done so on behalf all its physicians at Osceola when obstetric patients pre-registered at Osceola. Dr. Maki could have provided notice for himself when he saw Ms. Rivera on October 21, 2009. Dr. Ojeda could have provided notice to Ms. Rivera by mail during the time between her preregistration and her visit to Osceola to deliver her child. Health care providers participating in the NICA Plan know that it is their responsibility to provide NICA notice; therefore, it is up to them to find a way to provide timely notice to their patients.

86. Neither Dr. Maki nor Dr. Ojeda provided the statutory notice required by section 766.316.

87. Petitioner moved that a finding be made that Dr. Pera, Dr. Medina, Pediatrix, and J. Ralpha Medical, P.A., did not have statutory immunity under the NICA Plan. The Administrative Law Judge does not have jurisdiction to make a determination whether any of the parties have statutory immunity. See §§ 766.310-766.316, Fla. Stat.

88. Petitioner raised several issues on the constitutionality of sections 766.30-766.316. The Administrative Law Judge does not have jurisdiction to rule on the constitutionality of statutes. See generally Fla. Hosp. v. Agency for Healthcare Admin., 823 So. 2d 844, 849 (Fla. 1st DCA 2002).

CONCLUSION

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

ORDERED that the injuries sustained by Kevin Terron-Otero are compensable under the NICA Plan.

It is further ORDERED that Osceola Regional Medical Center complied with the notice provisions of section 766.316; that the participating physicians, Dr. Lance Maki and Dr. Ezer Ojeda, did not comply with the notice provisions of section 766.316; that Dr. Angelina Pera and Dr. Tanya Medina are not participating physicians; and that Dr. Angelina Pera, Dr. Tanya Medina, Pediatrix Medical Group of Florida, Inc., and J Rapha Medical, P.A., did not give notice as set forth in section 766.316.

It is further ORDERED that the parties are accorded 30 days from the date of this Order to resolve, subject to approval of the Administrative Law Judge, the amount and manner of payment of an award to Ms. Rivera; the reasonable expenses incurred in connection with the filing of the claim, including reasonable attorney's fees and costs; and the amount owing for expenses previously incurred. If not resolved within such period, the parties shall so advise the Administrative Law Judge, and a hearing will be scheduled to resolve such issues. Once resolved, an award will be made consistent with section 766.31.

It is further ORDERED that in the event Petitioner files an election of remedies declining or rejecting NICA benefits, this case will be dismissed and DOAH's file will be closed.

DONE AND ORDERED this 11th day of October, 2012, in Tallahassee, Leon County, Florida.

SUSAN BELYEU KIRKLAND
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of October, 2012.

ENDNOTE

1/ Section 766.309(1) does not require that the Administrative Law Judge make a determination of whether the hospital has paid its assessment to the NICA Plan. Unlike the definition of participating physician, which requires the physician to have paid his or her assessment for the NICA Plan, the definition of hospital only requires that it be licensed. In the instant case, the evidence also established that Osceola had paid its assessment.

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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).