STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SHANNON FRYBARGER AND STEVEN
FRYBARGER, INDIVIDUALLY AND ON
BEHALF OF JACOB FRYBARGER, A MINOR,

Petitioners,

vs. Case No. 15-3930N

FLORIDA BIRTH-RELATED NEUROLOGICAL
INJURY COMPENSATION ASSOCIATION,
A/K/A NICA,

Respondent,

and

ADVENTIST HEALTH SYSTEM/SUNBELT,
INC., D/B/A FLORIDA HOSPITAL ORLANDO;
ATHENA THEODOSATOS, M.D.; FLORIDA
PHYSICIANS MEDICAL GROUP, INC., D/B/A
CENTER FOR NEONATAL CARE; LEWIS
OTERO, M.D.; EDUARDO LUGO, M.D.;
D. JIM RAWLINGS, M.D.; WINSLADE
BOWEN, M.D.; CARLOS A. ALANA, M.D.;
HILTON BERNSTEIN, M.D.; RUTH
BARTLESON, ARNP; AND DINORAH
RODRIGUEZ-WARREN, ARNP,

Intervenors.
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*AMENDED FINAL ORDER

Pursuant to notice, a final hearing was conducted in Orlando, Florida, on January 7 and 8, 2020, before Administrative Law Judge Todd P. Resavage of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioners: Carlos R. Diez-Arguelles, Esquire
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For Respondent: Brooke M Gaffney, Esquire
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For Intervenors Adventist Health:

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For Intervenors Florida Physicians:

John W. Bocchino, Esquire
Beytin, McLaughlin, McLaughlin, O'Hara,
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STATEMENT OF THE ISSUES

For the purpose 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 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), Florida Statutes, or the giving of notice was not practicable.

Preliminary Statement

On July 10, 2015, Petitioners filed a Petition Under Protest Pursuant to Florida Statute Section 766.301 et seq. (Petition) with the DOAH for a determination of compensability under the Florida Birth-Related Neurological Injury Compensation Plan (Plan). The matter was initially assigned to Administrative Law Judge (ALJ) Barbara J. Staros.

The Petition named Franklyn Christensen, M.D., and Athena Theodosatos, D.O., as the physicians who provided obstetric services at the birth of Jacob Frybarger (Jacob) on January 18, 2008, at Florida Hospital South/Orlando in Orlando, Florida.

On July 16, 2015, DOAH mailed a copy of the Petition to Respondent, Dr. Theodosatos, Dr. Christensen, and Florida Hospital Orlando by certified mail. Respondent was served with the Petition on or before July 17, 2015.

On September 14, 2015, Intervenors, Adventist Health Systems/Sunbelt, Inc., d/b/a Florida Hospital Orlando (Adventist Health) and Athena Theodosatos, M.D. filed a petition for leave to intervene, which was granted by Order dated September 24, 2015. On September 21, 2015, Florida Physicians Medical Group, Inc., d/b/a Center for Neonatal Care, Lewis Otero, M.D., Eduardo Lugo, M.D., D. Jim Rawlings, M.D., Winslade Bowen, M.D., Hilton Bernstein, M.D., Ruth Bartleson, ARNP, and Dinorah Rodriguez-Warren, ARNP (Florida Physicians), filed a petition for leave to intervene, which was granted by Order dated October 2, 2015.

Following several extensions of time to respond to the Petition, on October 28, 2015, Respondent filed its Response to the Petition. Respondent suggested that, based on its review of the claim, Jacob had not suffered a "birth-related neurological injury" as defined in section 766.302(2) and,

therefore, the claim was not compensable under the Plan. Thereafter, on November 17, 2015, ALJ Staros issued a Notice of Hearing wherein the final hearing was scheduled for May 24 and 25, 2016.

On March 23, 2016, Petitioners filed a Motion for Summary Final Order. Said motion was denied on March 31, 2016. On April 21, 2016, the final hearing was rescheduled to February 8 and 9, 2017; and again rescheduled on December 5, 2016, to June 7 and 8, 2017.

On February 14, 2017, Petitioners renewed their Motion for Summary Final Order, which, on February 23, 2017, was denied, without prejudice. On April 14, 2017, the parties filed an Agreed Motion to Reset the Final Hearing, which was granted on April 17, 2017. Ultimately, the final hearing was rescheduled to February 8 and 9, 2018.

On September 5, 2017, the matter was reassigned to the undersigned for all further proceedings. Following a telephonic case management conference conducted on February 2, 2018, based on the stipulation of the parties that additional time was necessary to complete discovery, the final hearing scheduled for February 8 and 9, 2018, was cancelled.

The parties thereafter continued to engage in extensive discovery. Intervenors Adventist Health filed a Motion for Partial Summary Final Order and Petitioners filed an Incorporated Motion for Summary Final Order on April 27 and May 22, 2018, respectively. Both motions were denied on June 6, 2018. The final hearing was rescheduled for July 23 through 25, 2019, and then, on July 9, 2019, rescheduled for January 7 and 8, 2020.

The final hearing proceeded, as scheduled, on January 7 and 8, 2020. The final hearing Transcript was filed on February 4, 2020. The identity of the

witnesses and exhibits and rulings regarding each, as well as pre-hearing motions, are as set forth in the Transcript.[1]

At the conclusion of the final hearing, the parties stipulated to submitting proposed final orders on or before March 5, 2020, and that the undersigned's Final Order would issue on or before April 6, 2020. The parties filed proposed final orders which have been considered in this Final Order.

Unless otherwise indicated, all Florida Birth-Related Neurological Injury Compensation Association (NICA) statutory references are to the versions in effect at the time of Jacob's birth.

FINDINGS OF FACT

1. Petitioners are the parents and natural guardians of Jacob.

2. Jacob was born a live infant on January 18, 2008, at Adventist Health, a hospital located in Orlando, Florida. At the time of delivery, Mrs. Frybarger was 33 weeks and four days pregnant.

3. Franklyn Christensen, M.D., provided obstetrical services in the course of Jacob's delivery, and during resuscitation in the immediate post-delivery

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[1] Intervenors objected to the testimony of Ronald Davis, M.D., and subsequently filed a post-hearing Motion to Strike Petitioners' Testimony of Witness Ronald Davis, M.D. The motion is granted in part and denied in part. The undersigned will not consider the testimony of Dr. Davis regarding his treatment of Jacob from February 16, 2017, through November 25, 2019, as Intervenors would suffer prejudice as they were unaware of said treatment until after Intervenor's case-in-chief had concluded. The undersigned will consider, however, Dr. Davis's observations and opinions as to Jacob's mental impairment, and the undersigned concludes that Intervenors suffer no prejudice as a result. Finally, the undersigned will consider Dr. Davis's treatment record from November 25, 2019, and Respondent's Exhibit 6 is admitted into evidence. The undersigned concludes Intervenors will not suffer prejudice as a result.

period. Dr. Christensen was a participating physician in the Plan on the date of delivery.

4. Athena Theodosatos, M.D., assisted in the delivery. Dr. Theodosatos was a resident physician at the time of delivery, and is deemed a participating physician in the Plan at the time she rendered obstetrical services.

5. Jacob was delivered via Caesarean-section delivery. The delivery took approximately 51 minutes to complete. At some point during the procedure, the placenta was cut, which resulted in bleeding. Accordingly, there was blood loss to the placenta and to Mrs. Frybarger. As a result, there was also blood loss to Jacob during the process of delivery and in the immediate post-delivery period. The blood loss, in turn, resulted in oxygen deprivation to Jacob during the delivery and resuscitation in the immediate post-delivery period.

6. Jacob was a single gestation weighing over 2,500 grams at birth.

7. Jacob suffered an injury to his brain caused by mechanical injury leading to oxygen deprivation that occurred in the course of delivery and resuscitation in the immediate post-delivery period in the hospital.

8. There is no known genetic or congenital abnormality that resulted in Jacob's brain injury.

9. The injury to Jacob rendered him permanently and substantially physically impaired.

10. There is no dispute that the injury to Jacob rendered him permanently mentally impaired. At issue is whether the injury to Jacob's brain rendered him substantially mentally impaired. Petitioners and Respondent contend that the brain injury impairment does not rise to the level of substantial.

Intervenors contend the brain injury did render him substantially mentally impaired. [2]

Intervenors' Experts

11. Intervenors offered the testimony of Anthony Mancuso, M.D. Dr. Mancuso is board-certified in diagnostic radiology, with a subspecialty in neuroradiology. Dr. Mancuso practices at University of Florida Health, and is the Chairman of the Radiology Department at the University of Florida College of Medicine.

12. Dr. Mancuso reviewed MRI imaging of Jacob's brain from February 2009 and June 2012, as well as Jacob's medical records. He opined that Jacob did suffer a hypoxic ischemic injury to his brain based on the imaging findings and the circumstances surrounding the delivery and the resuscitation of Jacob following a difficult delivery. Dr. Mancuso testified that the MRI imaging demonstrated a pattern that was entirely consistent with a hypoxic ischemic injury and that the imaging showed a substantial amount of permanent injury to the brain that would reasonably result in substantial mental and physical neurologic deficits.

13. In terms of the frontal lobes, the parietal, the occipital lobes, the corpus callosum, and to a lesser degree the temporal lobes of Jacob's brain, based upon the images of Jacob from approximately one year after birth and when he was approximately four years old, Dr. Mancuso opined that the imaging evidence is predictive of and supports substantial mental and

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[2] Pursuant to Florida Administrative Code Rule 28-106.205(1), persons other than the original parties to a pending proceeding whose substantial interests will be affected by the proceeding and who desire to become parties may move the presiding officer for leave to intervene. The undersigned acknowledges that an intervenor's rights are subordinate to the rights of the parties and an intervenor's status exists "only so long as the litigation continues between the parties" and is "lost altogether if the parties decided to settle the case or voluntarily dismiss it." *Louis Del Favero Orchids, Inc. v. Fla. Dep't of Health*, 2020 Fla. App. LEXIS 1531 at *5 (Fla. 1st DCA 2020) quoting *Environmental Confederation of S.W. Fla, Inc. v. IMC Phosphates, Inc.*, 857 So. 2d 207 (Fla. 1st DCA 2003). Here, Petitioners filed their Petition "under protest," asserting they were not "claimants" and not seeking NICA compensation. Notwithstanding, as Respondent disputes the compensability of the injury, the undersigned must, in its present posture, determine the claim. §§ 766.304, 766.309, 766.301(1) and 766.31, Fla. Stat.

physical neurological deficits. Dr. Mancuso further opined that, based on the imaging, the corpus callosum, the white matter that connects the lobes, was diminished, leading to a highly disconnected brain.

14. Dr. Mancuso opined that the brain injury, as demonstrated on imaging, would be predictive of impaired cognitive functioning as measured by intelligence tests, impaired expressive and receptive language skills, the necessity of substantial accommodations in school, below average cognitive or academic skills, impaired perceptual and processing abilities, and the necessity of special assistance to learn and develop intellectually to reach his full potential. He further opined that the diminished corpus callosum would be predictive of Jacob's inability to transfer his cognitive skills into adequate learning in a normal manner and that his ultimate vocational options would be limited by these neurologic deficits.

15. Dr. Mancuso, who had never seen Jacob nor treated him, credibly acknowledged that his opinions would require confirmation by physical examination and neuropsychiatric testing. The undersigned finds Dr. Mancuso's opinions, as set forth above, credible and persuasive.

16. Intervenors also offered the testimony of Russell Addeo, Ph.D. Dr. Addeo received his Ph.D. in neuropsychology from the University of Florida and is a board certified clinical neuropsychologist. He is the Director of Behavioral Medicine at Brooks Rehabilitation. As a neuropsychologist, Dr. Addeo makes determinations, on a daily basis, with respect to a patient's degree of mental impairment.

17. On March 21, 2019, when Jacob was 11 years, two months old, a Compulsory Neuropsychological Examination of Jacob was conducted at Brooks Rehabilitation. A Forensic Neuropsychological Evaluation Report was generated after the neuropsychological evaluation, assessment, and record review. Dr. Addeo's opinions and report are based on the results of the standardized testing conducted, his analysis of depositions in this matter, review of Jacob's educational records, medical records, and past

neuropsychological exams. The criteria he considered in rendering his opinion included an analysis of cognitive function; an analysis of intelligence tests; analysis of language skills; whether special accommodations were necessary; Jacob's perceptual and processing abilities; whether Jacob can learn and develop intellectually without substantial accommodations; whether he can translate his cognitive abilities into adequate learning; an analysis of Jacob's social and vocational developments; and the degree to which he is impaired.

18. Dr. Addeo testified and explained the neuropsychological exam and results in detail. His neuropsychological exam was conducted over a period of approximately seven hours. The results of the examination are fairly summarized in the 30 page report, which was admitted into evidence and addressed at length during the hearing.

19. Dr. Addeo's ultimate opinion is that Jacob is substantially mentally impaired. In reaching this opinion, inter alia, Dr. Addeo relied upon *Steadman's Medical Dictionary* for informing himself as to what the terms "substantial" and "mental impairment" refer to. He testified that the general definition of the term "substantial" means "significantly–considerable in quantity and significantly great."

20. Dr. Addeo testified that "mental impairment" to him is "really a disorder characterized by the display of an intellectual defect as determined by things like diminished cognitive, interpersonal, social and vocational effectiveness and by psychological exam and assessment."

21. With respect to the testing, Dr. Addeo assessed Jacob's full scale IQ to be a 52. This score, which falls in the severely impaired category, places Jacob at the .01 percentile, meaning 99.9 percent of the population's scores are above his. In the subcomponent of verbal IQ, Jacob scored an 81. Jacob's verbal IQ is a relative strength for him, and, if standing alone, would place him in the mildly impaired category. Jacob's performance IQ resulted in a score of 45, placing him in the severely impaired category.

22. Dr. Addeo acknowledged that Jacob has significant visual and fine motor skill deficits and the difficulties that the same present:

> It's true, but some of it is difficult to establish, you know, to separate (visual and motor deficits from cognitive) but I tried to give tests and tried to look at how he's doing cognitively. I don't want to say that Jacob has got substantial mental impairment when in fact it just may be that he has some visual difficulty or that he has motor difficulty.

23. Dr. Addeo was aware that Jacob is legally blind and, at times, utilizes a magnifier in the classroom. Jacob has nystagmus, an involuntary eye movement that makes it difficult to focus vision, which was observed during the testing. Indeed, Jacob's eyes were observed darting up and to the right several times per minute. Dr. Addeo credibly opined that this condition "most likely" would affect his ability to focus and visualize materials. During the testing, Jacob did not utilize a magnifier, and, while not precluded from doing so, did not have the assistance of a paraprofessional (as he has at school).

24. During the testing, Dr. Addeo attempted to remove from consideration difficulties that might be introduced due to Jacob's visual and motor deficits. As an example, Dr. Addeo described two tests where vision is not a factor and yet Jacob still performed poorly. On one test, Jacob was asked if there were three ducks on a lake and one flies away, to state how many remained. Jacob's answer was four. Even when told that was incorrect, Jacob would repeat that answer. He also had difficulty with determining the value of money.

25. The results of the examination revealed the following scores: for the working memory index, fluid reasoning index, and visuospatial index he scored in the .1 percentile or lower. In the verbal comprehension index, a relative area of strength for Jacob, he scored in the 10th percentile. In math and reading, he scored at the .05 percentile (95 percent of the population better than him in academic skills).

26. With respect to attention and concentration, Jacob scored poorly. His score on the ability to repeat digits forward and backward and sequence them was in the 1st percentile, and in the auditory attention response test, he scored in the 2nd percentile. Dr. Addeo testified that neither of these tests is affected by visual/motor deficiencies. In the Auditory Response Set Correction, Jacob scored in the .1 percentile (99.9 percent of the population scored higher).

27. Jacob performed relatively well on verbal executive skills: similarities (25 percent), letter fluency (9 percent), category switching (16 percent), total set loss errors (37 percent), and total repetition errors (5 percent). In matrix reasoning, however, where Jacob was presented with a square composed of four red triangles, and one was missing, he could not correctly solve the problem. Notwithstanding his visual deficiencies, Dr. Addeo testified that Jacob would could see and make out the shapes and colors.

28. With respect to language and verbal reasoning, Jacob scored in the .5 percentile in expressive vocabulary and at the 1st percentile in categorical fluency (the ability to tell category names of things: girl's names, animals, and etc.). Jacob did relatively better in similarities, scoring in the 25th percentile.

29. Jacob had a difficult time with comprehension of instructions, which included no visual or motor skills for the most part, obtaining a score of .1 percentile. Not surprising, based on his visual and fine motor deficits, Jacob performed poorly on spatial and visual reasoning, scoring in the .1 percentile or below.

30. Dr. Addeo noted that Jacob's verbal memory for stories and for lists of items was in the low average to average range. He further noted that Jacob performed better on verbal memory on this occasion than on the prior testing performed with Dr. Kanter (discussed below).

31. Jacob's educational history is discussed, in detail, in a separate section of this Order below. Dr. Addeo in formulating his ultimate opinion, in part,

considered Jacob's education records. Accordingly, his opinions on the matter are set forth here. As Jacob has been determined as a student with a disability pursuant to the Individuals with Disabilities Education Act (IDEA), he has an individualized educational program (IEP). Dr. Addeo reviewed Jacob's IEPs over the years. In doing so, Dr. Addeo observed that Jacob is enrolled in an "access points" curriculum for English/language arts, mathematics, social studies, and science. Accordingly, the grading is different from courses following the general curriculum and Jacob does not have to take the same standardized tests as other children.

32. Jacob's IEPs document multiple accommodations and services that he receives on a daily basis while in school. Dr. Addeo credibly opined that Jacob will always require these services and accommodations to learn and develop intellectually. While some of Jacob's language skills are better than others, he has significant difficulty with expressive and receptive language skills and impaired perceptual and processing abilities. Dr. Addeo opined that despite substantial accommodations in school, he has not achieved average cognitive or precognitive skills. While Jacob's memory in some areas is a relative strength, he has difficulty with translating his cognitive abilities into normal learning.

33. With respect to his future, Dr. Addeo opined that while Jacob can speak, communicate, and conduct a conversation, his social and vocational development has been drastically impaired and that his probability of employment, outside of a "benevolent employer," is not very high. Dr. Addeo agreed that Jacob might be able to be employed in the future answering phones.

34. The undersigned finds that Dr. Addeo's opinions, as set forth above, and the findings set forth in the report, to be credible and persuasive.

35. Intervenors also presented the testimony of Stewart Ater, M.D. Dr. Ater is a board certified pediatrician and neurologist with special qualifications in child neurology. In 2016, Intervenors retained Dr. Ater to

conduct a neurological examination of Jacob. The examination was conducted on June 17, 2016, in Orlando, Florida, when Jacob was eight years, four months old. While Dr. Ater spent approximately 10 hours reviewing Jacob's medical and educational records prior to the examination, the examination spanned approximately one hour.

36. Dr. Ater's ultimate opinion in this matter is that Jacob "does have substantial neurological problems, cognitive as well as cerebral palsy motor problems" and that Jacob satisfies the criteria for a birth-related neurological injury. Dr. Ater credibly testified, based on his training and experience, review of the available records and physical examination, that Jacob sustained a hypoxicischemic brain injury during the course of delivery and the post-delivery period.

37. Dr. Ater testified that, upon examination, he found Jacob's intellectual and executive functions were obviously and severely impaired. In support of this position, Dr. Ater explained that Jacob, at the age of eight, misspelled his own last name, could not accurately identify his birth month or date, and could not read the word "father."

38. Dr. Ater conceded that, during the examination, Jacob was able to answer questions regarding his grade, his teacher, his favorite subjects and the reasons therefore. Jacob also demonstrated some ability to follow some directions correctly and spontaneously commented upon when his counsel left and returned to the room during examination. Jacob also informed Dr. Ater that he (in the past) would advise his parents when he felt a seizure coming on and recalled the name of his seizure medication. Due to his visual deficits, it appears that Jacob had some degree of difficulty in reading the print provided during the examination.

39. According to Dr. Ater, Jacob has impaired cognitive functioning as measured by intelligence tests and, following his evaluation, recommended that Jacob undergo a neuropsychological evaluation. Dr. Ater opined that

more recent psychoeducational or neuro-psychoeducational testing is more reliable than similar testing performed at a young age as "[a]reas of the brain . . . need to develop more complex functions as children grow and get older, that children typically grow into their deficits" and "[t]hat is as the other people in their classes learn more and more complex things, these kids fall farther and farther behind." Accordingly, Dr. Ater opines that IQ scores generally tend to be more accurate at an older age than a younger age.

40. Based upon document review and examination, Dr. Ater opined that Jacob clearly has problems with both expressive and receptive language, but the same are not as damaged as other cognitive areas. Based upon his review of Jacob's educational records, he opined that, despite substantial accommodations in school, he has not achieved average cognitive or pre-academic skills. Jacob, in his opinion, has impaired perceptual and processing abilities and requires substantial educational help in an exceptional student education (ESE) program and is not able to translate his cognitive capabilities into adequate learning in a normal manner.

41. With respect to his future, Dr. Ater opines that Jacob's social and vocational development has been drastically impaired. Dr. Ater testified that Jacob is not likely to be employed in meaningful competitive work and will not be able to live independently.

42. The undersigned finds that Dr. Ater's opinions with respect to whether Jacob sustained a hypoxic-ischemic brain injury during the course of delivery and the post-delivery period to be credible and persuasive. The undersigned further credits and finds persuasive Dr. Ater's opinions regarding the reliability of more recent psychoeducational or neuro-psychoeducational testing and that that IQ scores generally tend to be more accurate at an older age than a younger age.

43. The undersigned finds, however, that Dr. Ater's testimony regarding the interpretation of MRI studies and the exercise of matching damaged lobes of the brain to distinct cognitive functions less persuasive than that of

Dr. Mancuso, due, in part, to the limited duration of the examination. The undersigned finds Dr. Ater's opinions concerning Jacob's potential educational and vocational opportunities less persuasive.

Respondent's Experts

44. Respondent retained Laufey Sigurdardottir, M.D., to review the available medical records, conduct a neurological examination, and opine as to whether Jacob met the criteria for a birth-related neurological injury and should be eligible for compensation under the Plan. Dr. Sigurdardottir is a board certified child neurologist and epileptologist.

45. Dr. Sigurdardottir conducted an examination of Jacob on October 7, 2015, when Jacob was seven years, eight months old. A report was drafted on the date of the examination after a review of the medical records, full physical, and thorough neurological examination. She drafted an addendum to her report, dated September 8, 2017, following the review of additional MRI imaging studies and medical records. The results of her examination are fairly summarized in her report, and were admitted into evidence and addressed at the hearing.

46. Dr. Siguardardottir's ultimate opinion in this matter is that Jacob does not have a substantial mental impairment, but rather, a mild mental impairment. As noted in her evaluative report, Jacob's "[o]verall developmental assessment does suggest some delays in language and comprehension as well as expressive language, but overall skills that are higher than his motor abilities." She concluded that, "[t]he patient is found to have a permanent substantial physical impairment, but to have mild mental impairment with areas of strength in verbal realms."

47. Dr. Sigurdardottir testified regarding the motor impairments that Jacob has that would make standardized testing difficult: quadriplegic cerebral palsy; difficulties with fine motor skills; multiple vision abnormalities; abnormal eye movement where he has a difficult time keeping his gaze focused on what he is looking at; difficulty sweeping his eyes when

attempts to read; and he is considered legally blind, even with corrective lenses. Indeed, Dr. Sigurdardottir testified that, "visual disturbance, hearing impairment and motor disability is one [sic] of the hardest things to overcome in testing true intelligence."

48. Dr. Sigurdardottir reviewed several prior assessments in formulating her opinions and testified regarding the same. Her review of the Battelle Inventory administered to Jacob at age eight months showed his lowest areas were in motor development (79), but all other scores (adaptive skills, personal and social development, communication and cognitive function) were within normal limits (84+).

49. She also reviewed prior neuropsychological testing from the Volusia County School District. With respect to a neuropsychological assessment performed in 2011, she noted Jacob obtained the following scores: developmental quotient (78); personal/social (83); communication (94); and motor skills (68). Dr. Sigurdardottir explained that 78 is "borderline," 83 is on "the cusp of completely normal," and 94 is "completely normal." With respect to a psychoeducation assessment completed in 2017, she noted Jacob was only given the verbal part of the Wechsler Intelligence Scale Children, Firth Edition (WISC-V), wherein he obtained a score of 76. She explained that an 85+ is within normal limits; 71-85 is borderline; and 70 and below would be considered impaired.

50. Dr. Sigurdardottir also discussed the 2013 evaluation conducted by Dr. Kanter. She noted that, pursuant to his evaluation, Jacob's full scale IQ was a 63; however, the verbal component of the assessment was an 83. Dr. Sigurdardottir opines that, when there is a large discrepancy in areas of strength and other areas that are very difficult to test (due to motor and visual deficiencies), the lower scores do not reflect Jacob's true abilities. Similarly, she opined that the testing performed by Dr. Addeo is unreliable because the performance IQ portion, particularly those components that

rated Jacob's visual and motor dexterity, would underestimate his true abilities.

51. Dr. Sigurdardottir opined that intellectual disability is not merely comprised of IQ, but rather, one must look at the individual's adaptive skills. Accordingly, if one merely looked to Jacob's verbal and adaptive skills upon testing, he would fall into the "borderline category," and not that of an intellectual disability.

52. In essence, Dr. Sigurdardottir opined that to the extent any cognitive testing requires vision or fine motor skill components, the same would be unreliable as it would underestimate Jacob's true abilities. As a corollary, she opined that purely verbal testing and assessment is the most accurate method to determine his true mental abilities.

53. The undersigned finds that Dr. Sigurdardottir possesses significant education, training, and expertise and is well-qualified and credentialed to render the above-noted opinions. The undersigned, however, finds her opinions with respect to limiting cognitive testing to purely verbal as less persuasive and overly restrictive.

54. Respondent also retained Ronald Willis, M.D., a board certified obstetrician and gynecologist specializing in maternal-fetal medicine, to review Jacob's medical records and opine as to whether Jacob sustained an injury to his brain in the course of labor, delivery, or in the immediate post-delivery period due to oxygen deprivation or mechanical injury. Dr. Willis conducted his review and authored a report on September 15, 2015, and a subsequent report on January 14, 2016, both of which contain his findings and opinions. Dr. Willis was also deposed on July 25, 2017, and his deposition was admitted into evidence without objection. Dr. Willis testified that, in his opinion, Jacob sustained an injury to his brain due to oxygen deprivation during the immediate post-delivery period. He offered no opinions on the degree or permanency of the brain injury. Dr. Willis's opinions are credited.

55. Respondent also retained Tushar Chandra, M.D., a board-certified radiologist, to review and opine on the previously obtained MRI images (2009 and 2012) of Jacob's brain. Of relevance to the primary issue in this proceeding, Dr. Chandra could not provide an opinion or predict whether or not Jacob has a permanent and substantial mental or physical impairment based on the imaging alone. As Dr. Chandra explained in his deposition of February 8, 2018:

> Because – because what I'm looking at is anatomy, and there's no clear correlation of anatomy with function. So to comment on that, you need a good clinical neurological examination to look at his cranial nerves, motor tests, sensory tests. For all that, you need a clinical examination.
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> ***
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> What my specialty is, is to say whether or not this is a normal scan. If not normal, then based on my experience, what has been the kind of injury and when, and then I usually try to say to make my recommendations. . . . But in no capacity does my expertise allow me to comment on how this kid will do clinically, because there's no way I can know that.

56. The undersigned finds that the above-noted opinions of Dr. Chandra are credible and persuasive.

<u>Petitioners' Experts</u>

57. On March 14, 2011, prior to the filing of the instant Petition, Petitioners' counsel referred Jacob to Robert F. Cullen, Jr., M.D., a neurologist at Miami Children's Hospital, for a neurological evaluation. Jacob was three years, two months old at the time of the evaluation. A report was generated following the evaluation, which was admitted without objection. In the summary section of his report, Dr. Cullen noted, inter alia, that: 1) Jacob had some speech articulation difficulties and would need ongoing speech therapy; 2) was at risk for seizures over and above the general population;

3) had cognitive delays and was behind in terms of naming pictures and colors; 4) would require special educational help in school; and 5) that his employability will certainly be limited.

58. On June 12, 2013, prior to the filing of the instant Petition, Petitioner's counsel referred Jacob for a neuropsychological evaluation by Geoffrey Kanter, Ph.D. Jacob was five years, four months old at the time of evaluation. A report was generated following the evaluation, which was admitted without objection. Dr. Kanter did not offer testimony in this matter.

59. Dr. Kanter documented that, at the time of the evaluation, Jacob was unable to dress himself, walk without assistance, tie his shoelaces, correctly say the alphabet, read, button his clothing, and name coins. Dr. Kanter also documented that, upon examination, Jacob's visual acuity problems "were quite evident." Specifically, he documented as follows:

> Jacob's eyes would frequently roll upwards involuntarily. On all visual tasks, he required assistance and prompting to focus on the visual stimuli in front of him. He would focus on a particular area directed by the examiner, his eyes would roll upwards, and then he would need redirection again to focus back on the particular location on the stimulus he was previously looking at. With this type of assistance, he was able to focus on and view particular areas of visual stimuli in order to comprehend the task and make a response. However, his performance was likely clearly impacted.

60. Dr. Kanter further observed that Jacob's fine motor skills "were also obviously impacted," and that his fine motor dysfunction "clearly impacted the test results on tasks with high fine motor demand." Finally, he noted that "[o]ther fine-motor tasks were beyond his capabilities and not administered."

61. Jacob's general intellectual functioning was documented by Dr. Kanter as follows:

> On the WPPSI-III [Wechsler Pre-School and Primary Scale of Intelligence-III], Jacob obtained a

> Full Scale I.Q. score of 63 which falls within the Extremely Low range (1st percentile) at a Moderate level of impairment. Sub-indices were variable with a significant strength in terms of verbal reasoning ability (Verbal I.Q. =83, 13th percentile, Low Average, Mildly impaired) versus a significant weakness in visual-spatial and visual-motor ability (performance IQ=53, .1 Percentile, Extremely Low, Severely impaired).

62. The "Impressions and Conclusions" section of Dr. Kanter's report is set forth, in full, below:

> The pattern and severity of cognitive test scores across this evaluation are consistent with the electroencephalographic and neuroradiological test findings of grossly impaired neurological functioning on a diffuse and localized basis. The EEG pointed more toward a right hemisphere locus of the seizure disorder which is consistent with relatively more spared (but still impaired) left hemispheric, verbal/language areas. The neurological dysfunction would certainly be expected to impact his cognitive capacities in the areas of processing speed, memory, and speech/language functioning to some degree. Visual skills are affected not only due to visual acuity issues (i.e., having to hold small images close to his face) but also likely visual processing problems. To some degree, it is difficult to parcel out which factor may be primary although from a functional standpoint, it does not matter. Impaired visual acuity would certainly be expected to cause visual-spatial and visualmotor processing speed problems. The parent questionnaire results from the Vineland-II and BASC-2 are consistent with the cognitive test findings in terms of how his cognitive, visual, and motor problems significantly impact his ability to engage in functional communication and functional activities.
>
> Overall, consistent with MRI and EEG results, it is evident that multiple areas of Jacob's brain were

> damaged, with both hemispheres affected, as well as cortical and subcortical components with global and specific cognitive and behavioral consequences. It is also important to note that at Jacob's age, certain neuro-cognitive functions have not yet developed (such as higher level executive functioning related to frontal lobe development) and as such, more specific impairments are likely to emerge as he reaches adolescence and beyond when cognitive, educational, and life tasks will present increased complexity and demand for more independent problem-solving.
>
> The severity of the cognitive and functional impairments clearly impacts his ability to function normally within an educational setting, family setting, and social setting. The impact of the pattern and severity of cognitive deficits will result in the need for special education services throughout Jacob's educational career and will greatly impact his capacity for vocational employment.

63. Dr. Kanter's prognosis and recommendations for Jacob, as documented in his report, are set out in pertinent part, as follows:

> Jacob will continue to need significant assistance throughout his educational career, into adulthood, and throughout his life. While he may develop some adaptive compensatory strategies, the severity of his areas of deficit in language, memory, and visual-motor areas in particular will not likely change in a significant functional manner. He will require special education assistance throughout school. The likelihood of Jacob successfully completing a 4-year regular college or even a 2-year college is extremely minimal.
>
> The probability for Jacob to obtain and maintain competitive employment on a full-time basis is minimal. Given the pattern and severity of deficits in the visual, cognitive, and academic realms, his employment choices will be extremely limited. It is likely that he will qualify for and require Social

Security Disability. He would likely require a limited type of job placement which does not require a high degree of concentration and attention, memory, verbal expressive abilities, fine-motor skills, physical mobility, visual acumen, or writing capacity, and only under circumstances with very significant assistance and accommodations. It is unknown what type of employment setting would be able to meet such requirements. He may be able to obtain a volunteer position on a part time basis as a productive activity but we still need a great deal of direct supervision.

After reaching his majority, Jacob will continue to need significant assistance with regard to most aspects of his life which includes:

- financial management and decision-making
- paying rent and utility bills
- decisions concerning costs, benefits, advantages, and disadvantages of residential location
- decisions concerning social and intimate relationships
- emotional coping with his disability

Non-medical professionals who will need to become involved in his life include an accountant, a lawyer, and financial manager, and case manager. As he gets older, there may be a potential increase in emotional and behavioral problems which may require more assistance in understanding and dealing with his emotions and behavior. Psychotherapy on a weekly basis should be initiated immediately to provide assistance to Jacob and Mr. and. Mrs. Frybarger, and his school to help him develop adaptive coping strategies to deal with understanding his impairments and disability. Psychotherapy on an as needed basis will be required from now through adulthood.

Issues with physical disability (quadriplegia, visual dysfunction) as well as cognitive dysfunction will

> certainly eliminate Jacob's ability to drive. He will need an aide to help transport him as he gets older. He will need assistance for other functional activities such as shopping. Given the combination of cognitive as well physical disability, he will likely require assistance for cooking and cleaning once he reaches his majority. Overall, taking into account all the areas of impairment, it is likely that he will require approximately 24 hour seven day per week professional aide assistance if his parents are unable to care for him and provide for all of his needs. So long as he is with his parents, he will still need assistance for the time be is outside of the house whether within a very structured school setting, sheltered vocational setting, or within any other environment.
>
> Finally, as noted, Jacob will continue to require professional speech therapy, physical therapy, occupational therapy services, and counseling beyond that which the school provides.

64. Petitioner offered the testimony of one of Jacob's treating physicians, Ronald Davis, M.D. Dr. Davis is board certified in general pediatrics, adult and pediatric neurology, and has a special qualification in epilepsy. Jacob was presented to Dr. Davis in 2012 for a second opinion. Following the initial evaluation, Dr. Davis confirmed the diagnosis of spastic quadriplegic cerebral palsy and partial epilepsy. Dr. Davis most recently treated Jacob on November 25, 2019.

65. Dr. Davis testified that this treatment of Jacob focused on "seizure-related issues, developmental aspects, and in particular for that is the spastic cerebral palsy, so treatment approaches to try to improve range of motion, functionality of motor skills. . . ." Based upon his care and treatment, Dr. Davis opined that Jacob does not have a substantial mental impairment. He reported that Jacob was doing well cognitively, noting that he was making passing grades in his ESE classes and was conversational in speech.

66. Dr. Davis explained that Jacob is not a "total care" patient--that is a patient who requires total care and who is not interactive. Dr. Davis explained that a total care patient would have a substantial mental impairment. Dr. Davis testified that he anticipates Jacob to progress in the future, both mentally and physically, if he continues treatment.

67. The undersigned finds that Dr. Davis possesses significant education, training, and expertise and is well-qualified and credentialed to render the above-noted testimony as one of Jacob's treating physicians. The undersigned finds his ultimate opinion with respect to whether Jacob has a substantial mental impairment to be less persuasive; however, as his methodology for arriving at the opinion is overly restrictive.

<u>Family testimony:</u>

68. Jacob testified on his behalf and was able to provide limited, but primarily appropriate, responses to questions concerning his family (members, pets, parents' employment), his favorite educational topics and teachers, his current grades, his ability to use technology, and hobbies.

69. Jacob, who was almost 12 years old at the time of the hearing, attended the entire hearing at counsel's table. Jacob was observed to have a very pleasant and friendly demeanor. Throughout the hearing, Jacob was observed to be calm, compliant, cordial and respectful of the proceeding. The undersigned was able to hear and comprehend Jacob's speech. He was observed providing limited, but appropriate, greetings and responses; communicating on occasion with his legal counsel; and expressing his basic needs and wants.

70. Petitioner's mother, Shannon Frybarger, testified that Jacob is not impulsive, but rather, mature, independent, and responsible. In comparing Jacob to her elder son, she opined that Jacob is the more mature of the two. Mrs. Frybarger testified that he is able to stay home alone, for a period of time, and independently recalls when he is required to take medication. She

opined that Jacob has consistently and successfully progressed in school and is confident the he will ultimately matriculate to college, and then to a career.

Educational history

71. As noted above, Jacob has been identified, evaluated, and determined to be a student with a disability under the IDEA. The evidentiary record indicates that he was evaluated by Child Find services through the Volusia County School District on January 10, 2011, when he was just under three years old. There, he was served through the Early Steps program for occupational therapy (OT), physical therapy (PT), and communication therapies. At that time, his primary exceptionality was noted, in his IEP, to be orthopedically impaired, with secondary exceptionalities including OT, PT, and other health impaired (OHI).

72. When Jacob entered kindergarten, he participated in the general education curriculum with accommodations and intensive support in language arts, math, communication, social skills, and independent function. He was placed in a "separate class" educational setting, wherein he was with non-exceptional students less than 40 percent of the school day. He received specialized instruction, daily, in language arts, math, social studies, social skills, communication, and independent functioning. He also received supplemental aids and services such as text, picture and/or object support for communication and learning; digital text; and adapted computer access.

73. The following year, he began receiving, in addition to prior services, special instruction for 30 minutes per week in a visually impaired setting. At that time, it was determined that he would be able to participate in state and district-wide assessment programs with a number of test accommodations.

74. On November 30, 2016, through January 11, 2017, Jacob was referred to Cynthia M. Fraser, Ph.D., a school psychologist with the School District of Volusia County. The documented referral was to obtain measures of his intellectual ability, academic achievement, and adaptive behavior. At the time, Jacob was in third grade.

75. Dr. Fraser documented that Jacob was "receiving ESE services under the exceptionalities of Orthopedically Impaired, Occupational Therapy, Physical Therapy, Visually Impaired, and Other Health Impaired. Jacob is diagnosed with Cerebral Palsy, Seizure Disorder, Optic Atrophy in both eyes, Myopia, Nystagmus, disorder of eye movement, and Astigmatism." She also documented that he "uses either a wheelchair or walker and requires adult assistance to navigate around campus. He also receives ESE services from the vision teacher." Dr. Fraser's summary and recommendation are set out in full, as follows:

> Jacob is an 8 year, 11-month old boy in the third grade that was referred for reevaluation by the ESE Reevaluation Committee to provide an updated measure of updated measures of his intellectual ability, academic achievement, and adaptive behavior.
>
> Due to Jacob's significant physical limitations and vision deficits only the Verbal Comprehension subtests of the WISC-V were administered. His score of 76 fell within the low range. Jacob received the following scores on the WJ-IV: Reading (<40), Math (51), and Written Language (<40). The achievement test was administered with accommodations and modifications for his physical and visual deficits including enlarging items and assistance from the vision teacher.
>
> Results from the ABAS-III (Teacher GAC = 72, Parent GAC = 70) fell below average. A strength was noted on the Social Domain while the Conceptual and Practical Domains were areas of weakness.

76. An IEP meeting was conducted for Jacob on March 9, 2017, when Jacob was in the third grade. The IEP team was comprised of Petitioner's mother and the following school based members: an ESE teacher; a vision teacher; a primary teacher; a school psychologist; a speech therapist; a social worker; a behavior specialist; the local educational authority representative;

and an evaluation interpreter. At that time, the IEP team, in discharging its duty, was required to determine Jacob's participation in the statewide standardized assessment program. In making that determination, the IEP team, including Petitioner's mother, proceeded through the following analysis, as documented on the IEP:

> In determining the appropriate assessment for a student, the IEP team should consider the student's present level of educational performance in reference to the Florida Standards and the Next Generation Sunshine State Standards. The IEP team should also be knowledgeable of guidelines and the use of appropriate testing accommodations. To facilitate informed and equitable decision making, the IEP team should answer each of the following questions when determining the appropriate course of instruction and assessment.
>
> 1) Does the student have a significant cognitive disability?
>
> 2) Even with appropriate and allowable instructional accommodations, assistive technology, or accessible instructional materials, does the student require modifications, as defined in Rule 6A-6.03411(1)(z), F.A.C., to the grade-level general state content standards pursuant to Rule 6A-1.09041, F.A.C.?
>
> 3) Does the student require direct instruction in academic areas of English Language Arts (ELA), mathematics, social studies, and science based on Access Points in order to acquire, generalize, and transfer skills across settings?
>
> If the IEP team answers "no" to any of these three questions, the student should be instructed in general education courses and participate in the general statewide standardized assessment with accommodations, as appropriate.
>
> If the IEP teams answers "yes" to all three questions, the student should be enrolled in access

> courses and participate in the Florida Standards Alternate Assessment-Performance Task.

77. The IEP team conducted the above-cited analysis, concluded that Jacob has a significant cognitive disability, and answered the remaining questions in the affirmative. Ultimately, the IEP team concluded that Jacob will participate in the Florida Standards Alternate Assessment-Performance Task. Jacob's most recent IEP in evidence, dated April 23, 2019, documents that Jacob continues to participate in access courses and participates in the Florida Standards Alternate Assessment-Performance Task.

78. The undersigned, based upon review of the record evidence, is unaware of any evidence that Petitioners declined to provide parental consent for Jacob's participation in either the access points curriculum or the Florida Standards Alternate Assessment-Performance Task.

Notice

79. On August 7, 2007, Mrs. Frybarger, signed a document entitled "Notice to Obstetric Patient (See Section 766.316, Florida Statutes)." This document provides as follows:

> I have been furnished information by *Fetal Diagnostic Center of Orlando, Inc.* prepared by the Florida Birth-Related Neurological Injury Compensation Association (NICA), and have been advised that *Ahmed Al-Malt*, *M.D.* and *Franklyn Christensen, M.D.* are participating physicians in that program, wherein certain limited compensation is available in the event certain neurological injury may occur during labor, delivery or resuscitation. For specifics on the program, I understand I can contact the Florida Birth-Related Neurological Injury Compensation Association, P.O. Box 14567, Tallahassee, Florida, 32317-4567, (800)398-2129. I further acknowledge that I have received a copy of the brochure prepared by NICA.

80. On December 16, 2007, Petitioner, Shannon Frybarger, signed a document entitled "Notice to Obstetric Patient Pursuant to Florida Statute 766.315." Said document provided as follows:

> I have been furnished with information by Florida Hospital that was prepared by the Florida Birth Related Neurological Injury Compensation Association (NICA). Under the Association's NICA program, certain limited compensation is available in the event that certain neurological injury may occur to my infant during labor, delivery or resuscitation. I have also been informed that Florida Hospital, its related or affiliated organizations, and their employed physicians are participants in the NICA program.
>
> I acknowledge and understand that my personal physician, or an on-call physician who I have been assigned to, may or may not participate in the NICA program. I understand that I may seek clarification from my physician as to his/her participation in the NICA program. I understand it is my responsibility to discuss this with my physician.
>
> For specifics on the program, I understand that I can contact the Florida Birth Related Neurological Compensation Association (NICA), 1435 East Piedmont Drive, Suite 101, Tallahassee, Florida 32312, (904) 488-8191, which is also listed in the NICA brochure. I further acknowledge that I have received a copy of the NICA brochure called "Peace of Mind for an Unexpected Problem" from Florida Hospital prepared by NICA.

81. The undersigned finds that Intervenor, Adventist Health, provided notice to Mrs. Frybarger, of its participation in the Plan. The undersigned finds that Dr. Christensen provided notice to Mrs. Frybarger of his participation in the Plan. Petitioner presented no contrary evidence at the final hearing, and does not address the notice issue in Petitioner's Proposed Final Order.

Conclusions of Law

82. DOAH has jurisdiction over the parties to and the subject matter of these proceedings. §§ 766.301-766.316, Fla. Stat.

83. The 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.

84. Section 766.301(2) provides that 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."

85. 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.

86. If Respondent determines that the injury alleged is a claim that is a compensable birth-related neurological injury, it may award compensation to the claimant, provided that the award is approved by the ALJ to whom the claim has been assigned. § 766.305(7), Fla. Stat. If, on the other hand, Respondent disputes the claims, as here, the dispute must be resolved by the assigned ALJ in accordance with the provisions of chapter 120, Florida Statutes. §§ 766.304, 766.309, and 766.31, Fla. Stat.

87. Section 766.313 provides that any claim for compensation under sections 766.301 through 766.316 that is filed "more than 5 years after the birth of an infant alleged to have a birth-related neurological injury shall be barred." Jacob was born January 18, 2008. The Petition was filed July 10,

2015, well past the five-year limitation in section 766.313. While the Petition was untimely filed more than five years after Jacob's birth, whether the claim presented is compensable must still be determined. *University of Miami v. Exposito ex rel. Gonzalez*, 87 So. 3d 803 (Fla. 3d DCA 2012).

88. In its present posture, the undersigned is required to make the following threshold determinations 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.
>
> * * *
>
> (d) Whether, if raised by the claimant or other party, the factual determinations regarding the notice requirements in s. 766.316 are satisfied. The administrative law judge has the exclusive jurisdiction to make these factual determinations.

§ 766.309(1), Fla. Stat. An award may be sustained only if the ALJ concludes that the "infant has sustained a birth-related neurological injury. . . ." § 766.31(1), Fla. Stat.

89. 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.

90. The phrase "substantial mental impairment" is neither defined by statue nor present rule. In *Florida Birth-Related Neurological Injury Compensation Association v. Florida Division of Administration Hearings*, 686 So. 2d 1348 (Fla. 1997) [hereinafter *Bernie*], the court was asked to resolved the certified question as to whether, under the Plan, an infant must suffer both substantial mental and physical impairment, or can the definition be construed to require only substantial impairment, mental and/or physical. In resolving the question, the *Bernie* court explained that "[w]here, as here, the legislature has not defined the words used in a phrase, the language should usually be given its plain and ordinary meaning." *Bernie*, at 1354, citing *Southeastern Fisheries Ass'n , Inc. v. Dep't Nat. Res.*, 453 So. 2d 1351 (Fla. 1984). "Nevertheless, consideration must be accorded not only to the literal and usual meaning of the words, but also to their meaning and effect on the objectives and purposes of the statue's enactment." *Id.*

91. The *Bernie* court concluded that the NICA statute is written in the conjunctive and requires a permanent and substantial impairment to both the physical and mental elements. *Id.* at 1356. The *Bernie* court did not establish a definition or test for the determination of "substantial mental impairment," but found that the underlying decision by the ALJ must be supported by competent and substantial evidence.

92. In *Adventist Health System/Sunbelt, Inc. v. Florida Birth-Related Neurological Injury*, 865 So. 2d 561 (5th DCA 2004) [hereinafter *Shoaf*], the Fifth District Court of Appeals likewise rejected setting forth a formulaic approach to the resolution of the term "substantial mental impairment." Addressing the argument that *Bernie* had created a definition, the *Shoaf* court countered:

> It is apparent, however, that the *Bernie* court did not define or redefine "substantial mental impairment." They simply said that the decision of the ALJ was supported by competent substantial evidence. All this language in *Bernie* suggests is that, under NICA, 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.

Shoaf, at 567.

93. The *Shoaf* court again reiterated that, as the legislature did not define the terms used in the test for NICA qualification, these terms are to be given their ordinary meanings. *Id*. at 568. Indeed, the *Shoaf* court further directed that:

> The legislature left the application of the terms they used to the administrative law judges designated by statute to hear these claims and to apply the expertise they develop in carrying out this task to determine from the evidence adduced in each case whether these for NICA is met.
>
> * * *
>
> In cases such as the one before us, the ALJ, as fact finder, brings his own background, training, experience and expertise to the task of weighing and evaluating very sophisticated evidence. The child's advocate likewise brings his own communication and strategic skills to the fact-

> finding process; and finally, the evidence in each case will vary in its power to persuade. This will be especially true in cases where the opinions of experts are concerned.

Id., at 568-569.

94. Finally, the *Shoaf* court, in concluding that the underlying decision by the ALJ was supported by competent substantial evidence, advised that the term "substantial mental impairment" is broad enough to encompass more than just damage to cognitive capacity and more than merely the inability to translate cognitive capabilities into adequate learning in a normal manner or impairment of social and vocational development. *Id.* at 569.

95. Against this backdrop, the undersigned concludes that sufficient evidence was presented, or otherwise stipulated or admitted by the parties, to establish that: Petitioners, Shannon Frybarger and Steven Frybarger, are the parents and natural guardians of Jacob, a minor; that Jacob was born a live infant on January 18, 2008, at Adventist Health System/Sunbelt, Inc., d/b/a Florida Hospital Orlando, a hospital located in Orlando, Florida; and that Jacob was a single gestation, weighing over 2,500 grams at birth.

96. It is further concluded that sufficient evidence was presented, or otherwise stipulated or admitted by the parties, to establish that obstetrical services were delivered by participating physicians, Dr. Christensen and Dr. Theodosatos, in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital.

97. The undersigned further concludes that the evidence establishes that Jacob suffered an injury to his brain caused by mechanical injury leading to oxygen deprivation in the course of labor, delivery, or resuscitation in the immediate post-delivery period in the hospital. Jacob's injury was not caused by genetic or congenital abnormality or due to infection. The undersigned concludes that the evidence further establishes that Jacob's injury rendered

him permanently and substantially physically impaired, and permanently mentally impaired.

98. Each of the parties to this proceeding presented one or more experts to support their respective position as to whether Jacob is substantially mentally impaired. All of the experts presented were well-qualified, credentialed, and possessed extensive and significant training and experience in their respective discipline or area of expertise. Having thoroughly reviewed and weighed the considered expert opinions and evidence, the undersigned concludes that the better evidence supports the conclusion that Jacob's injury at issue, based on the Findings of Fact above, rendered him substantially mentally impaired. The undersigned concludes that Jacob's brain injury is substantial, as evidenced by his more recent cognitive assessments; his significant educational barriers (discussed in greater detail below); and his social, vocational, and independent functioning prognoses.

99. As discussed in the Findings of Fact above, Jacob has been previously evaluated and determined as a student with a disability under the IDEA, 20 U.S.C. § 1400, *et seq*., for which he is entitled to receive ESE services. In enacting the IDEA, Congress sought to "ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasized special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A); *Phillip C. v. Jefferson Cty. Bd. of Educ.*, 701 F.3d 691, 694 (11th. Cir. 2012). The statute was intended to address the inadequate educational services offered to children with disabilities and to combat the exclusion of such children from the public school system. 20 U.S.C. § 1400(c)(2)(A)-(B). To accomplish these objectives, the federal government provides funding to participating state and local educational agencies, which is contingent on the agency's compliance with the IDEA's procedural and substantive requirements. *Doe v. Ala. State Dep't of Educ.*, 915 F.2d 651, 654 (11th Cir. 1990).

100. Parents and children with disabilities are accorded substantial procedural safeguards to ensure that the purposes of the IDEA are fully realized. *See Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 205-06 (1982). Among other protections, parents are entitled to examine their child's records and participate in meetings concerning their child's education; receive written notice prior to any proposed change in the educational placement of their child; and file an administrative due process complaint "with respect to any matter relating to the identification, evaluation, or educational placement of [their] child, or the provision of a free appropriate public education [FAPE] to such child." 20 U.S.C. § 1415(b)(1), (b)(3), (b)(6).

101. Local school systems must satisfy the IDEA's substantive requirements by providing all eligible students with FAPE, which is defined as:

> Special education services that--(A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity 21 with the individualized education program required under [20 U.S.C. § 1414(d)].

20 U.S.C. § 1401(9).

102. The components of FAPE are recorded in an IEP, which, among other things, identifies the child's "present levels of academic achievement and functional performance"; establishes measurable annual goals; addresses the services and accommodations to be provided to the child, and whether the child will attend mainstream classes; and specifies the measurement tools and periodic reports that will be used to evaluate the child's progress. 20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R. § 300.320. "Not less frequently than

annually," the IEP team must review and, as appropriate, revise the IEP. 20 U.S.C. § 1414(d)(4)(A)(i).

103. Section 1003.5715, Florida Statutes, delineates two specific actions that require the Department of Education to adopt separate consent forms with respect to an IEP. One such action is if a school district determines that there is a need to change an exceptional student's IEP as it relates to the administration of an alternate assessment pursuant to section 1008.22, Florida Statutes, and to provide instruction in the state standards access points curriculum. If so, the school must hold an IEP team meeting that includes the parent to discuss the reason for the change. The school is required to provide written notice of the meeting to the parent at least 10 days before the meeting, indicating the purpose, time, and location of the meeting and who, by title or position, will attend the meeting. § 1003.5715(1) and (4), Fla. Stat.

104. Section 1003.5717(5) further provides that the school district may not implement the change (alternate assessment and access points curriculum) without parental consent unless the school district documents reasonable efforts to obtain the parent's consent and the child's parent has failed to respond or the school district obtains approval through a due process hearing.

105. Here, the IEP team convened, as set forth in the Findings of Fact above, and made a change in Jacob's IEP with respect to the alternate assessment and access points curriculum. There is no evidence in the record to suggest that his parents failed to provide consent for the same or that the Volusia County School District was required to initiate a due process hearing seeking approval of the change.

106. The significance of this IEP change with respect to the present proceeding (and specifically to whether Jacob is substantially mentally impaired), is that it could not have occurred without the IEP team's consensus that, as an initial matter, Jacob is a student with a "significant cognitive disability." This phrase, like "substantially mentally impaired," is

not defined by statue or rule. Rather the interpretation is left to the IEP team when discharging their duty.

107. Florida Administrative Code Rule 6A-1.0943, entitled "Statewide Assessment for Student with Disabilities" provides, in pertinent part, as follows:

> (3) All students with disabilities will participate in the statewide standardized assessment program based on state standards, pursuant to Rule 6A-1.09401, F.A.C., without accommodations unless the individual educational plan (IEP) team, or the team that develops the plan required under Section 504 of the Rehabilitation Act, determines and documents that the student requires allowable accommodations during instruction and for participation in a statewide standardized assessment.
>
> * * *
>
> (5) Participation in the Statewide, Standardized Alternate Assessment. The decision that a student with a significant cognitive disability will participate in the Statewide, Standardized Alternate Assessment as defined in Section 1008.22(3)(c), F.S., is made by the IEP team and recorded on the IEP. The provisions with regard to parental consent for participation in the Statewide, Standardized Alternate Assessment in accordance with subsection 6A-6.0331(10), F.A.C., must be followed. The following criteria must be met:
>
> (a) Even with appropriate and allowable instructional accommodations, assistive technology or accessible instructional materials, the student requires modifications, as defined in paragraph 6A-6.03411(1)(z), F.A.C., to the grade-level general state content standards pursuant to Rule 6A-1.09401, F.A.C.; and,
>
> (b) The student requires direct instruction in academic areas of English language arts, math, social studies and science based on access points,

> pursuant to Rule 6A-1.09401, F.A.C., in order to acquire, generalize, and transfer skills across settings.

108. Having determined that Jacob is a student with a significant cognitive disability, Jacob was enrolled in the access points curriculum, with parental consent, and is to be administered the FSAA-Performance Task, based on the access points curriculum.

109. The access point curriculum provides "access to the general education curriculum for students with significant cognitive disabilities." Fla. Admin. Code R. 6A-1.09401(1). The standards, benchmarks, and access points are contained in publications incorporated by reference and made a part of rule 6A-1.09401. An instructive history and explanation of access points is set forth in the incorporated publication and provides, in pertinent part, as follows:

> **History of the Access Points**
> Beginning in 2006, access points became the means through which students with a significant cognitive disability have accessed the general education content found in the Next Generation Sunshine State Standards (NGSSS). Access points were developed for all standards with three complexity levels that represented a continuum of understanding (participatory, supported and independent). Courses containing these standards, also known as access courses, were developed to support access for all students to the general education standards. These courses are setting neutral, which means a student working on access points can attend classes with non-disabled peers in general education courses. Students with a significant cognitive disability work on a "parallel curriculum" that is aligned to the general education content but delivered at the individual level of complexity needed for the student to be successful. When the State Board of Education adopted the new Florida Standards in March 2014, it became necessary to develop new access points that are appropriate for Florida's students. As is the case

> with the NGSSS, these new access points for students with a significant cognitive disability fully align with the Florida Standards. Moving forward, access courses for students with significant cognitive disabilities will be revised to contain these new access points. This way, all students can continue to access the general education standards in a way that promotes high expectations and encourages inclusive learning environments for students with a significant cognitive disability.
>
> **New Access Points Aligned to the Florida Standards**
> Making the content of the Florida Standards personally relevant and accessible to students with a significant cognitive disability begins by articulating the general education content through access points. The new access points in English/Language Arts identify the most salient grade-level, core academic content for students with a significant cognitive disability. It is important to note that the access points are NOT "extensions" to the standards, but rather they illustrate the necessary core content, knowledge and skills students with a significant cognitive disability need at each grade to promote success in the next grade. Essential Understandings, or EUs, are supports and scaffolds that unpack the access points to assist in the teaching and learning of the standards.

Fla. Admin. Code R. 6A-1.09401(1)(l).

110. The undersigned, in construing the ordinary meaning of the word "substantial," agrees with Dr. Addeo's interpretation that the word means "significant" or "considerable in quantity and significantly great." In reaching the conclusion that Jacob is substantially mentally impaired, the undersigned finds persuasive the IEP team's determination, with parental consent, that Jacob is significantly cognitively disabled. That determination was not arrived at by paid expert witnesses in anticipation of litigation, but

rather, by professional public educators and professionals, together with parental consent.

111. These decision makers possess significant and frequent access to Jacob’s cognitive and adaptive functioning, diagnostic information, and academic performance data. Moreover, these individuals have the ability to observe Jacob’s independent functioning, social behavior, and communication skills and how the same impact him globally. The undersigned finds that Jacob’s status as significantly cognitively disabled in the educational setting is complimentary and supportive of the conclusion that he is substantially mentally impaired for purposes of determining NICA compensability.

112. The undersigned concludes that Intervenors have met their burden of establishing that Jacob’s injury at issue rendered him substantially mentally impaired. Having met the other criteria, the undersigned concludes that the Intervenors met their burden of establishing that Jacob sustained a birth-related neurological injury, as that term is defined in section 766.302(2).

113. During the course of this litigation, the issue was raised as to whether the notice requirements set forth in section 766.316 were met. With respect to the notice issue, as the proponents of the proposition that appropriate notice was given or that notice was not required, the burden on this issue of notice is upon the Intervenors. *Tabb v. Fla. Birth-Related Neurological Injury Comp. Ass'n.*, 880 So. 2d 1253, 1257 (Fla. 1st DCA 2004). Section 766.316, entitled “Notice to obstetrical patients of participation in the plan,” provides as follows:

> 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.

114. Here, Intervenors presented unrefuted evidence that Florida Hospital Orlando and Dr. Christensen satisfied the notice requirements of section 766.316. Dr. Theodosatos, a resident physician at the time of Jacob's birth, was exempted from the notice requirements.

CONCLUSION

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

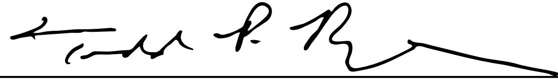
1. Jacob sustained a "birth-related neurological injury," as defined in section 766.302(2).

2. Obstetrical services were delivered by participating physicians, Dr. Christensen and Dr. Theodosatos, in the course of labor, delivery, or resuscitation in the immediate post-delivery period in a hospital, Florida Hospital Orlando.

3. Intervenor Florida Hospital Orlando and Dr. Christensen satisfied the notice requirements of section 766.316.

4. Although Petitioners' claim is otherwise compensable under the Plan, it is untimely pursuant to section 766.313.

DONE AND ORDERED this 30th day of April, 2020, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of April, 2020.

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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).