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## Who Pays First?: Medicaid Third-Party Liability in Florida and Virginia's Birth-Related Neurological Injury Compensation Programs

Alexandra M. Robbins

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**WHO PAYS FIRST?: MEDICAID THIRD-PARTY LIABILITY IN  
FLORIDA AND VIRGINIA'S BIRTH-RELATED NEUROLOGICAL  
INJURY COMPENSATION PROGRAMS**

ABSTRACT

*In response to an impending obstetrician shortage and medical malpractice crisis, the states of Florida and Virginia adopted no-fault birth-related neurological injury compensation programs in the 1980s. Both of these programs provide lifetime coverage for eligible children with serious birth-related neurological injuries; however, both programs treated themselves as the payer of last resort and required families to submit claims to Medicaid first based on an inaccurate interpretation of Medicaid third party-liability ("TPL") laws and the program-enabling statutes. Both programs' policies treating themselves as the payer of last resort not only violated Federal and State Medicaid laws, they caused harm to the enrolled children and their families and resulted in False Claims Act lawsuits. This Article examines the Medicaid TPL policies in Florida and Virginia's birth-related neurological injury compensation programs and a proposed program in Maryland as well as proposes recommendations for future statutory, administrative guidance, and policy changes to avoid Medicaid TPL issues in the future. It argues that clear and consistent legislation, policies, and administrative guidance are needed to address Medicaid TPL issues in existing programs and ensure similar issues do not recur in the future.*

## I. INTRODUCTION

Imagine the following hypothetical situation:<sup>1</sup> You are eagerly expecting a child. During delivery, something goes catastrophically wrong, and your child's brain is deprived of oxygen. This results in a condition known as periventricular leukomalacia,<sup>2</sup> and your child is later diagnosed with cerebral palsy, for which he will be permanently disabled and need lifelong medical treatment.<sup>3</sup>

You contact a lawyer to discuss filing a medical malpractice lawsuit for your child's injuries. However, the lawyer says your obstetrician participates in your state's no-fault birth-related neurological injury compensation ("BRNIC") program, and you must apply to that program instead of filing a lawsuit.<sup>4</sup> If your child's claim is compensable, he is entitled to receive lifetime coverage for all of his injury-related health care expenses.<sup>5</sup> You decide to apply, and a few months later, you are told his claim is compensable. "Great," you think. "My child will be taken care of for the rest of his life. I did not have to go through the time and stress of a trial, and I no longer have to worry about him not being able to get the medical care or supplies he needs."<sup>6</sup>

You soon learn how wrong you were. Your state's BRNIC program provides you with a benefit handbook that states it is "the payer of last resort."<sup>7</sup> Because your child qualifies for Medicaid, the BRNIC program makes you apply for and

1. This hypothetical situation is partially based on the experience of Cody Arven. *See infra* Section II.C.1 (describing the *qui tam* lawsuit in which Cody Arven's family were the relators).

2. Periventricular leukomalacia is a type of white matter brain injury that "can cause damage to the nerve pathways that control motor movements." *Periventricular Leukomalacia*, BOS. CHILD.'S HOSP., <https://www.childrenshospital.org/conditions-and-treatments/conditions/p/periventricular-leukomalacia> (last visited Mar. 14, 2022).

3. Cerebral palsy is defined as a spectrum of nerve and muscle disorders that cause problems with movement, balance, and posture; it can be, but is not always, caused by a brain injury during delivery. AM. MED. ASS'N, FAMILY MEDICAL GUIDE 409 (4th ed. 2004).

4. FLA. STAT. § 766.303 (2022); VA. CODE ANN. § 38.2-5002 (2022).

5. FLA. STAT. § 766.31(b)(1), (3) (2022); VA. CODE ANN. § 38.2-5009(A)(1)(a), (c) (2022).

6. Daniel Chang & Carol Marbin Miller, *A Program Promised to Pay for Brain-Damaged Infants' Care. Then It Sent Families to Medicaid Instead.*, PROPUBLICA (June 1, 2021, 7:00 AM), <https://www.propublica.org/article/a-program-promised-to-pay-for-brain-damaged-infants-care-then-it-sent-families-to-medicare-instead>. These quoted thoughts are based on an actual quote from Alexandra Benitez, who was told her son and "[a]ll his medical care would be taken care of" by Florida's BRNIC Program. *Id.*

7. *See* FLA. BIRTH-RELATED NEUROLOGICAL INJ. COMP. ASS'N, BENEFIT HANDBOOK FEB. 6, 2020 at 3 (2020), <https://www.nica.com/wp-content/uploads/2021/04/NICA-Benefit-Handbook.pdf> (stating Florida's BRNIC Program is "the payer of last resort"); VA. BIRTH-RELATED NEUROLOGICAL INJ. COMP. PROGRAM, PARTICIPANT HANDBOOK AUG. 2018 at 1 (2018), <https://www.vabirthinginjury.com/wp-content/uploads/2018/09/2018-Handbook.5.pdf> (stating Virginia's BRNIC Program is "the payer of last resort"). A payer of last resort is "an entity that pays after all other programs have been pursued for enrollment and payment." *Payer of Last Resort Definition*, L. INSIDER, <https://www.lawinsider.com/dictionary/payer-of-last-resort> (last visited Feb. 27, 2023).

enroll your child in Medicaid, and then submit claims for all his medical expenses to Medicaid as the primary payer, where many claims are denied.<sup>8</sup> Only after you have exhausted your Medicaid appeal rights can you send the claims to the BRNIC program.<sup>9</sup> The BRNIC program requires you to do this for everything your child needs, from doctor's visits to medical equipment, to diapers.<sup>10</sup>

Unfortunately, this hypothetical situation has proven to be not so hypothetical for families in Florida and Virginia. In response to a 1980s medical malpractice crisis threatening obstetricians,<sup>11</sup> both states enacted BRNIC programs—the Florida Birth-Related Neurological Injury Compensation Association (“NICA”)<sup>12</sup> and the Virginia Birth-Related Neurological Injury Compensation Program (“Virginia Program”)<sup>13</sup>—which created a no-fault administrative compensation system that replaced families’ ability to sue health care providers for certain birth-related neurological injuries.<sup>14</sup> Eligible children are promised lifetime coverage for injury-related medical expenses.<sup>15</sup>

BRNIC programs’ ability to meet their goal of providing lifetime compensation for health care expenses for injured children has been frustrated by conflicts over whether the BRNIC program or Medicaid should be the payer

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8. See FLA. BIRTH-RELATED NEUROLOGICAL INJ. COMP. ASS’N, *supra* note 7, at 17 (noting Florida’s Program “pays after available insurance or governmental programs have paid for such medically necessary and reasonable expenses”); VA. BIRTH-RELATED NEUROLOGICAL INJ. COMP. PROGRAM, *supra* note 7, at 1 (noting Virginia’s Program pays for “expenses remaining after all available insurances and any other sources have paid the expenses they cover,” which includes Medicaid); Chang & Marbin Miller, *supra* note 6 (noting “Medicaid’s arcane rules” and the “frequent denial of claims” for children in Florida’s BRNIC Program).

9. See Chang & Marbin Miller, *supra* note 6 (Florida’s Program “would not cover any medical care for [Alexandra Benitez’s son] until she could prove that Medicaid had already denied the claim”).

10. *Id.*

11. In the 1980s, Virginia was facing a “‘crisis’ in obstetrics, in which physicians were reportedly eliminating obstetrical care from their practices.” JOINT LEGIS. AUDIT & REV. COMM’N OF THE VA. GEN. ASSEMB., REVIEW OF THE VIRGINIA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PROGRAM, at i (2003), <https://vabirthinjury.com/wp-content/uploads/2012/08/rpt2841.pdf>. Moreover, in 1987, “approximately one out of every four Virginia obstetricians was at risk of losing his malpractice insurance coverage.” Peter H. White, *Innovative No-Fault Tort Reform for an Endangered Specialty*, 74 VA. L. REV. 1487, 1488–89 (1988). Florida was facing a similar crisis at the same time. *About NICA*, FLA. BIRTH-RELATED NEUROLOGICAL INJ. COMP. ASS’N, <https://www.nica.com/about-nica/> (last accessed Mar. 15, 2022). For example, in 1985, the average medical malpractice liability premium for obstetrician-gynecologists in Florida was \$185,460, more than \$160,000 higher than the national average of \$23,300. *Id.*

12. See generally FLA. STAT. §§ 766.301–.316 (2022) (enacting NICA).

13. See generally VA. CODE ANN. §§ 38.2-5000 to -5021 (2022) (enacting the Virginia Program).

14. FLA. STAT. § 766.303(2) (2022); VA. CODE ANN. § 38.2-5002(B) (2022).

15. FLA. STAT. § 766.31(1)(a) (2022); VA. CODE ANN. § 38.2-5009(A)(1) (2022).

of last resort.<sup>16</sup> The Florida and Virginia Programs' policies of making families submit claims for health care expenses to Medicaid first not only resulted in violations of federal law, but detrimentally impacted children's health.<sup>17</sup> Clear and consistent legislation, policies, and administrative guidance requiring BRNIC programs to pay before Medicaid are needed to ensure BRNIC programs comply with Federal and State Medicaid laws and ensure injured children and their families receive the benefits to which they are entitled.

This Article examines the Medicaid third-party liability ("TPL") policies in Florida and Virginia's BRNIC programs and proposes recommendations for statutory and administrative guidance, and policy changes to avoid Medicaid TPL issues in the future. Part II will describe Florida and Virginia's BRNIC programs, their Medicaid policies, the lawsuits, and the harm these policies caused to participating children and their families. Part III will establish why BRNIC programs must pay as primary to Medicaid under federal and state laws. Part IV will provide recommendations for clear and consistent statutes, policies, and administrative guidance that should be adopted to resolve the current Medicaid TPL issues and avoid similar problems in the future. These recommendations include amending states' BRNIC program enabling statutes and Medicaid statutes to state the BRNIC program will pay before Medicaid, adopting policies for BRNIC programs to reimburse Medicaid for expenses that the program should have covered, and updating State Medicaid and BRNIC program employee training materials as well as benefit handbooks and other materials given to the families describing these changes.

## II. BACKGROUND ON BRNIC PROGRAMS AND THEIR MEDICAID POLICIES

### A. Florida and Virginia's BRNIC Programs

Virginia was the first state to adopt a BRNIC program in 1988, and Florida adopted NICA the following year.<sup>18</sup> While there are some differences, both programs operate in a similar manner and cover an almost-identical class of birth-related neurological injuries.<sup>19</sup> While Florida and Virginia's state

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16. FLA. BIRTH-RELATED NEUROLOGICAL INJ. COMP. ASS'N, *supra* note 7, at 3; VA. BIRTH-RELATED NEUROLOGICAL INJ. COMP. PROGRAM, *supra* note 7, at 1; 42 U.S.C. § 1396a(a)(25)(A) (federal statute defining Medicaid as the payer of last resort).

17. *See infra* Sections II.C and D (discussing how families were harmed by having to falsely submit claims to Medicaid and how children's medical treatment was affected by these programs' policies).

18. *See* VA. CODE ANN. § 38.2-5014 (2022) (the Virginia Program officially began Jan. 1, 1988); FLA. STAT. § 766.303(1) (2022) (NICA officially began Jan. 1, 1989).

19. In Virginia, a birth-related neurological injury is defined as an "injury to the brain or spinal cord . . . caused by the deprivation of oxygen or mechanical injury . . . which renders the infant permanently motorically disabled and (i) developmentally disabled or (ii) for infants sufficiently developed to be cognitively evaluated, cognitively disabled." VA. CODE ANN. § 38.2-5001 (2022).

legislatures made an initial payment into their respective program's reserves, both programs are now exclusively funded through assessments paid by health care providers and medical malpractice insurance carriers.<sup>20</sup> The BRNIC program process can be faster than litigation, taking as little as 90 to 180 days.<sup>21</sup> To apply for the Virginia Program, a family must submit an application to the Virginia Workers' Compensation Commission, which determines if the child's claim is compensable after a hearing.<sup>22</sup> The process is similar for NICA, except applications are submitted to Florida's Department of Administrative Hearings ("DOAH"), and admissions decisions are made by an administrative law judge ("ALJ").<sup>23</sup> While Florida and Virginia are the only states that have no-fault BRNIC programs, similar programs have been considered in other states, including, most recently, Maryland in 2019.<sup>24</sup>

In March 2021, *ProPublica* and *The Miami Herald* began publishing a series of articles on NICA.<sup>25</sup> In addition to the Medicaid issues discussed in this Article, NICA was found to deny children access to medically necessary

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In Florida, a birth-related neurological injury is defined as an "injury to the brain or spinal cord . . . caused by oxygen deprivation or mechanical injury . . . which renders the infant permanently and substantially mentally and physically impaired." FLA. STAT. § 766.302(2) (2022).

20. VA. BIRTH-RELATED NEUROLOGICAL INJ. COMP. PROGRAM, *supra* note 7, at 2; VA. CODE ANN. § 38.2-5020 (2022); NICA, *supra* note 7, at 4; FLA. STAT. § 766.314 (2022).

21. *See Primary Talking Points*, FLA. BIRTH-RELATED NEUROLOGICAL INJ. COMP. ASS'N (Feb. 20, 2020), <https://www.documentcloud.org/documents/21171392-talking-points> (noting that "[u]ncontested NICA cases typically only take 90–180 days to resolve").

22. VA. BIRTH-RELATED NEUROLOGICAL INJ. COMP. PROGRAM, *supra* note 7, at 3, 5; VA. CODE ANN. §§ 38.2-5003, -5004 (2022).

23. FLA. STAT. §§ 766.304, .309, .31 (2022); FLA. BIRTH-RELATED NEUROLOGICAL INJ. COMP. ASS'N, *supra* note 4, at 16–17.

24. *See* Saul Spiegel, *Birth Injury Compensation Funds*, CONN. OFF. OF LEGIS. RSCH. (Feb. 13, 2004), <https://www.cga.ct.gov/2004/rpt/2004-R-0135.htm> (2004 Connecticut state legislature report analyzing Florida and Virginia's BRNIC programs); Julian D. Bobbitt Jr. et al., *North Carolina's Proposed Birth-Related Neurological Impairment Act: A Provocative Alternative*, 26 WAKE FOREST L. REV. 837, 839 (1991) (discussing a BRNIC program proposed by the North Carolina state legislature in 1991); S.B. 869, 2019 Leg., Reg. Sess. (Md. 2019) (2019 Maryland State Senate Bill proposing the creation of a BRNIC program similar to those in Florida and Virginia). In 2011, the state of New York adopted a fault-based birth-related injury compensation program, the Medical Indemnity Fund, which covers future health care costs for qualified children with birth-related neurological injuries who receive judgments or settlements from medical malpractice lawsuits. *Medical Indemnity Fund*, N.Y. STATE DEP'T OF HEALTH, [https://www.health.ny.gov/regulations/medical\\_indemnity\\_fund/](https://www.health.ny.gov/regulations/medical_indemnity_fund/) (last updated Nov. 2021). *See also generally* Michael W. Kessler & Matthew Fahrenkopf, *The New York State Medical Indemnity Fund: Rewarding Tortfeasors Who Cause Birth Injuries By Rationing Care to Their Victims*, 22 ALB. L.J. SCI. & TECH. 173 (2012) (discussing and critiquing the Medical Indemnity Fund).

25. *Birth Rights*, PROPUBLICA, <https://www.propublica.org/series/birth-rights> (last visited Feb. 6, 2022).

treatment and misuse funds.<sup>26</sup> Consequently, starting in June 2021, the Florida State Legislature passed reforms to NICA,<sup>27</sup> which included requiring Florida's Medicaid program, the Agency for Health Care Administration ("AHCA"), to review NICA's liability to Medicaid pursuant to the Medicaid TPL laws and expanding benefits.<sup>28</sup>

*B. Florida and Virginia's BRNIC Program Policies to Treat Medicaid as Primary*

Perhaps the most lucrative benefit that children in both programs receive is lifetime coverage for injury-related health care expenses.<sup>29</sup> Instead of awarding money upfront, families are told to submit claims for these expenses to the programs for reimbursement.<sup>30</sup> However, both programs' statutes exclude compensation or reimbursement for health care expenses for which the child has received or is entitled to receive payment from state or federal programs, except where "prohibited by federal law."<sup>31</sup> Neither the excluded federal and state programs nor the prohibitive federal laws are specified,<sup>32</sup> but both programs,

26. See, e.g., *id.* (including several articles discussing these issues); Chang & Marbin Miller, *supra* note 6 (discussing Medicaid policies and treatment denials); Carol Marbin Miller & Daniel Chang, *Audit Confirms That a Program for Brain-Damaged Kids Arbitrarily Denied Claims and Overspent on Perks*, PROPUBLICA (Aug. 18, 2021, 5:30 PM), <https://www.propublica.org/article/audit-confirms-that-a-program-for-brain-damaged-kids-arbitrarily-denied-claims-and-overspent-on-perks> (noting that, for example, "NICA spent nearly \$800 for holiday luncheons and violated state spending laws").

27. On June 21, 2021, Governor Ron DeSantis signed S.B. 1786 into a law, a unanimously passed bill that brought sweeping reforms to NICA. Carol Marbin Miller & Daniel Chang, *Florida Governor Signs Law Reforming Program for Brain-Damaged Infants*, PROPUBLICA (June 22, 2021, 6:35 PM), <https://www.propublica.org/article/florida-governor-signs-law-reforming-program-for-brain-damaged-infants>; S.B. 1786, 2021 Leg., Reg. Sess. (Fla. 2021).

28. Marbin Miller & Chang, *supra* note 27; Fla. S.B. 1786 § 7; AGENCY FOR HEALTH CARE ADMIN., THE NEUROLOGICAL INJURY COMPENSATION ASSOCIATION AND FLORIDA MEDICAID THIRD-PARTY LIABILITY 1 (2021), [https://ahca.myflorida.com/Medicaid/recent\\_presentations/2021/NICA\\_Florida\\_Medicaid\\_TPL.pdf](https://ahca.myflorida.com/Medicaid/recent_presentations/2021/NICA_Florida_Medicaid_TPL.pdf).

29. FLA. STAT. § 766.31(1)(a) (2022); VA. CODE ANN. § 38.2-5009(A)(1) (2022).

30. FLA. BIRTH-RELATED NEUROLOGICAL INJ. COMP. ASS'N, *supra* note 7, at 17–18; VA. BIRTH-RELATED NEUROLOGICAL INJ. COMP. PROGRAM, *supra* note 7, at 8.

31. In Florida, NICA will neither cover nor reimburse health care services, items, and other related expenses for which the child has received or is entitled to receive "under the laws of any state or the Federal Government, except to the extent such exclusion may be prohibited by federal law." FLA. STAT. § 766.31(b)(1), (3) (2022). Similarly, the Virginia Program will not cover health care services, items, and other related expenses for which the child has received or is entitled to receive "under the laws of any state or the federal government except to the extent prohibited by federal law." VA. CODE ANN. § 38.2-5009(A)(1)(a), (c) (2022).

32. FLA. STAT. § 766.31(b)(1), (3) (2022); VA. CODE ANN. § 38.2-5009(A)(1)(a), (c) (2022).

from the outset, held themselves out as the “payer of last resort” and required families to submit claims to Medicaid as the primary payer.<sup>33</sup>

The rationale for both programs’ Medicaid policies appears to be financial. In 2003, the Virginia General Assembly’s Joint Legislative Audit and Review Commission determined the Virginia Program was “actuarially unsound.”<sup>34</sup> Possibly in response to this report, legislation was passed requiring eligible children to participate in Medicaid, Children’s Health Insurance Program (“CHIP”), or another government health insurance program, which would pay as primary.<sup>35</sup> Meanwhile in Florida, Kenney Shipley, NICA’s former executive director, stated that requiring NICA to pay before Medicaid would “make NICA insolvent,” and potentially unable to accept new participants in the future.<sup>36</sup>

While there is some evidence suggesting at least NICA knew it was potentially skirting the law,<sup>37</sup> both states’ programs had also been told they were not responsible for paying Medicaid-eligible health care expenses.<sup>38</sup> In at least one Florida DOAH hearing, an ALJ noted NICA was not responsible for reimbursing Medicaid for a child’s injury-related health care expenses.<sup>39</sup> Additionally, in 1989, then-Attorney General of Virginia Mary Sue Terry issued

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33. See David L. Sieradzki, *Throwing Out the Baby with the Bathwater: Reform in the System for Compensating Obstetric Accidents*, 7 YALE L. & POL’Y REV. 538, 550 (1989) (“Both states reduce the compensation by the amount received from collateral sources (such as Medicaid, other government benefits and first-party health insurance benefits).”); FLA. BIRTH-RELATED NEUROLOGICAL INJ. COMP. ASS’N, *supra* note 7, at 17 (defining the program as “the payer of last resort”); 2018 VA. BIRTH-RELATED NEUROLOGICAL INJ. COMP. PROGRAM, *supra* note 7, at 1 (noting the program will only pay after “all available insurances and any other sources have paid the expenses they cover”).

34. JOINT LEGIS. AUDIT & REV. COMM’N OF THE VA. GEN. ASSEMB., *supra* note 11, at 8.

35. VA. CODE ANN. § 38.2-5009(A)(1)(d) (2022)

36. Deposition of Kenney Shipley on Sept. 25, 2008 at 49–50, *Ruiz v. Fla. Birth-Related Neurological Inj. Comp. Program*, No. 07-07105CA09 (Fla. Cir. Ct. Sept. 24, 2010). See also Chang & Marbin Miller, *supra* note 6 (quoting Shipley’s deposition).

37. In a 2019 e-mail, Kenney Shipley wrote that NICA had “always known it was a risk” to treat Medicaid as primary because it never received written confirmation from the state or federal government that it was exempt from Medicaid’s payer of last resort status. E-mail from Kenney Shipley, Exec. Dir., Fla. Birth-Related Neurological Inj. Comp. Ass’n, to Paul Monsees, Foley & Lardner LLP (Jan. 28, 2019, 1:22 PM), <https://s3.documentcloud.org/documents/20794336/nica-email-sword-of-damocles.pdf>.

38. David M. Studdert & Troyen A. Brennan, *Toward a Workable Model of “No-Fault” Compensation for Medical Injury in the United States*, 27 AM. J.L. & MED. 225, 251 (2001) (noting both programs had “informal arrangements” to establish offset arrangements with their state Medicaid programs).

39. *Williams v. Fla. Birth-Related Neurological Inj. Comp. Ass’n*, No. 11-5710N, 2014 WL 4704711, at \*3 (Fla. Div. Admin. Hrgs. Sept. 17, 2014). See *infra* Section II.D for further discussion of this case.



an opinion authorizing the Virginia Department of Medical Assistance Services to pay before the Virginia Program.<sup>40</sup>

### C. *The Medicaid Lawsuits*

This section discusses the False Claims Act (“FCA”)<sup>41</sup> lawsuits brought against the Virginia Program and NICA. While the lawsuits alleged FCA violations, the real harm caused by both programs’ policies is that families were being told to enroll their children in and submit claims to Medicaid before the programs would pay, which both violated federal law and detrimentally impacted children’s health.<sup>42</sup>

#### 1. The Virginia Lawsuit

Cody Arven was born on May 28, 2003, in Roanoke, Virginia, and suffered “bilateral cystic periventricular leukomalacia leading to cerebral palsy.”<sup>43</sup> While Cody was not eligible for Medicaid when he was admitted into the Virginia Program, after he became Medicaid-eligible in 2014, the Virginia Program required the Arvens to submit claims to Medicaid first.<sup>44</sup> On July 7, 2015, the Arvens filed a *qui tam* lawsuit in the United States District Court for the Eastern District of Virginia, alleging the Virginia Program violated the FCA by requiring the Arvens and other families to submit claims to Medicaid before the Virginia Program.<sup>45</sup>

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40. COMMW. OF VA. OFF. OF THE ATT’Y GEN., OPINIONS OF THE ATTORNEY GENERAL AND REPORT TO THE GOVERNOR OF VIRGINIA 247, 248 (1989), [https://www.oag.state.va.us/files/AnnualReports/Vols1980-81to2000/1989\\_Annual\\_Report.pdf](https://www.oag.state.va.us/files/AnnualReports/Vols1980-81to2000/1989_Annual_Report.pdf). The opinion held the Virginia Program was “not a ‘third party’” with respect to Medicaid because both Virginia’s Department of Medical Assistance Services, which administers Medicaid, and the Virginia Program were subdivisions of the state enacted to serve complementary goals of providing health care to certain individuals and cited a First Circuit case which held that a Massachusetts Department of Education program “was not a ‘third party’” to the state’s Medicaid program. *Id.* (citing *Massachusetts v. Sec’y of Health & Hum. Servs.*, 816 F.2d 796, 803 (1st Cir. 1987)). The Virginia Program has since relied on this opinion as justification for its policy to make Medicaid pay first. Michael Martz, *Family’s Ordeal Leads to State Paying U.S. \$20.7 Million Settlement Over Birth-Injury Program*, RICHMOND TIMES-DISPATCH (Jan. 11, 2019), [https://richmond.com/news/local/government-politics/familys-ordeal-leads-to-state-paying-u-s-20-7-million-settlement-over-birth-injury/article\\_f2c6b33c-fe2e-50b2-bf3d-eea8110af4f8.html](https://richmond.com/news/local/government-politics/familys-ordeal-leads-to-state-paying-u-s-20-7-million-settlement-over-birth-injury/article_f2c6b33c-fe2e-50b2-bf3d-eea8110af4f8.html).

41. *See generally* False Claims Act, 31 U.S.C. §§ 3729–33; *see generally* U.S. DEPT. OF JUST., THE FALSE CLAIMS ACT: A PRIMER, [https://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS\\_FCA\\_Primer.pdf](https://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf) (last visited Mar. 17, 2022) (providing an overview of the False Claims Act).

42. *See infra* Sections II.C.1, C.2, D.

43. Complaint at 5, *United States ex rel. Arven v. Va. Birth-Related Neurological Inj. Comp. Program*, No. 1:15cv870 (E.D. Va. Aug. 31, 2018).

44. *Id.* at 7.

45. *Id.* at 1, 4–9 (describing the charges levied against the Virginia Program).

In response to this lawsuit, and a subsequent investigation by the U.S. Department of Justice, the Virginia Program was required to adopt policies requiring all participating children to have private health insurance coverage; the Virginia Program would pay for the insurance premiums if families could not afford them.<sup>46</sup> On August 31, 2018, a settlement was reached, and the Virginia Program agreed to pay \$20.7 million, including a \$4.1 million relators' share.<sup>47</sup> The Virginia Program was also required to ensure it would no longer treat Medicare, Tricare, or the Federal Employee Health Benefits Program ("FEHBP")—three other government health care payers—as primary to the Virginia Program, and pay for injury-related health care expenses before billing those programs for payment.<sup>48</sup>

## 2. The Florida Lawsuit

During the course of their lawsuit against the Virginia Program, the Arvens learned about NICA and discovered it operated in a "nearly identical fashion" by publicly holding itself out as the "payer of last resort" and requiring families to submit claims to Medicaid first.<sup>49</sup> Consequently, on April 25, 2019, the Arvens filed another *qui tam* FCA lawsuit against NICA in the United States District Court for the Southern District of Florida.<sup>50</sup> On February 26, 2020, NICA filed a motion to dismiss, asserting, among other things, it was not a "third-party" under Federal Medicaid laws.<sup>51</sup> Judge William Dimitrouleas denied this motion on September 8, 2020,<sup>52</sup> finding NICA was a third-party

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46. VA. BIRTH-RELATED NEUROLOGICAL INJ. COMP. PROGRAM, ADMINISTRATIVE GUIDANCE REGARDING CHANGES IN THE PROGRAM'S MANNER OF PROCESSING CLAIMS 1–2 (2017), <https://www.vabirthinjury.com/wp-content/uploads/2017/09/Procedural-Guidance-Documents.pdf>.

47. Settlement Agreement at 5–13, United States *ex rel.* Arven v. Va. Birth-Related Neurological Inj. Comp. Program, No. 1:15cv870 (E.D. Va. Aug. 31, 2018).

48. *Id.* at 6–7; VA. BIRTH-RELATED NEUROLOGICAL INJ. COMP. PROGRAM, *supra* note 46, at 4. Medicare is the federal health insurance program for people aged 65 and older, as well as certain individuals with disabilities and individuals with End-Stage Renal Disease. *What's Medicare?*, MEDICARE.GOV, <https://www.medicare.gov/what-medicare-covers/your-medicare-coverage-choices/whats-medicare> (last visited Apr. 15, 2023). Tricare is the health insurance program for active-duty and retired military servicemembers and their families. *Eligibility*, TRICARE, <https://www.tricare.mil/Plans/Eligibility> (last visited Feb. 27, 2023). The Federal Employee Health Benefits Program provides health insurance for federal government employees and their families. *Eligibility*, OFF. OF PERS. MGMT., <https://www.opm.gov/healthcare-insurance/healthcare/eligibility/> (last visited Mar. 17, 2022).

49. Complaint at 8–10, United States *ex rel.* Arven v. Fla. Birth-Related Neurological Inj. Comp. Ass'n, No. 19-61053-CIV-DIMITROULEAS, 2020 WL 5540367 (S.D. Fla. Apr. 25, 2019).

50. *See id.* at 8–13.

51. United States *ex rel.* Arven v. Fla. Birth-Related Neurological Inj. Comp. Ass'n, 2020 WL 5540367, at \*1, \*6 (S.D. Fla. Sept. 8, 2020).

52. *Id.* at \*7.

payer under Federal and State Medicaid laws.<sup>53</sup> NICA appealed this decision to the United States Court of Appeals for the Eleventh Circuit,<sup>54</sup> and the District Court's decision to affirm the denial of NICA's motion to dismiss was affirmed by the Eleventh Circuit Court of Appeals in April 2022.<sup>55</sup> On November 14, 2022, NICA entered into a settlement agreement with the United States in which the program agreed to pay \$51 million, including a \$12.75 million relators' share.<sup>56</sup> NICA also agreed to not submit claims for injury-related health care expenses to Medicaid, Medicare, Tricare, or FEHBP.<sup>57</sup>

*D. How These Programs' Medicaid Primary Policies Harmed Children and Their Families*

Making families falsely submit claims to Medicaid was not the only way in which these BRNIC programs' policies caused harm. In Florida, NICA's policy requiring families to submit claims—and appeal denied claims—to Medicaid first impeded children's ability to get necessary medical equipment and treatment.<sup>58</sup> Jay Benitez and Justin Nguyen are two children who were harmed by NICA's policies. Jay was hospitalized every other month because of pneumonia or other respiratory infections.<sup>59</sup> However, Medicaid denied the claims for medically necessary equipment, such as the nebulizer machine his physician recommended to fight pneumonia.<sup>60</sup> Jay's mother spent months going through the repeated request-denial-appeal process with Medicaid before NICA would pay—a process which “depleted her” until Jay's death in 2015.<sup>61</sup> NICA's policies similarly required Justin's family to fight and appeal Medicaid to cover a specialized shower chair he needed, as well as physician-recommended

53. *Id.* at \*6.

54. See Appellants' Opening Brief at \*3, *United States ex rel. Arven v. Fla. Birth-Related Neurological Inj. Comp. Ass'n*, No. 20-13448, 2020 WL 7626578 (11th Cir. Dec. 18, 2020).

55. *United States ex rel. Arven v. Fla. Birth-Related Neurological Inj. Comp. Ass'n*, No. 20-13448, 2022 WL 1180142 at \*8 (11th Cir. Apr. 21, 2022).

56. Settlement Agreement at 4–5, *United States ex rel. Arven v. Fla. Birth-Related Neurological Inj. Comp. Ass'n*, Case No. 19-61053-CIV-DIMITROULEAS (S.D. Fla. Apr. 25, 2019); OFF. PUB. AFFS., *Florida Birth-Related Neurological Injury Compensation Plan and Association to Pay \$51 Million to Resolve False Claims Act Allegations*, DEP'T OF JUST. (Nov. 14, 2022), <https://www.justice.gov/opa/pr/florida-birth-related-neurological-injury-compensation-plan-and-association-pay-51-million>.

57. Settlement Agreement, *supra* note 56, at 8–9.

58. The “*Birth Rights*” series published by *ProPublica* and *The Miami Herald* includes stories of several families harmed by these policies. See e.g., Chang & Marbin Miller, *supra* note 6; Daniel Chang & Carol Marbin Miller, “*We Are Not Here or Funded to ‘Promote the Best Interest’ of the Children*,” *Wrote the Head of a Program for Brain-Damaged Infants*, PROPUBLICA (Apr. 10, 2021, 5:00 AM), <https://www.propublica.org/article/we-are-not-here-or-funded-to-promote-the-best-interest-of-the-children-wrote-the-head-of-a-program-for-brain-damaged-infants>.

59. Chang & Marbin Miller, *supra* note 6.

60. *Id.*

61. *Id.*

Benadryl, a medication costing less than seven dollars per bottle, to treat his seizures.<sup>62</sup>

NICA's Medicaid policy caused additional harm to families who had to endure Medicaid liens. After a difficult birth in 2007, infant Fatema Shakir had a prolonged stay in the neonatal intensive care unit ("neonatal ICU").<sup>63</sup> One month after she was admitted into NICA in 2013, her family was hit with a \$1.4 million Medicaid lien for health care expenses paid during her neonatal ICU stay.<sup>64</sup> Her mother worked with an attorney to petition Florida's DOAH to order NICA to pay this lien,<sup>65</sup> but an ALJ denied the petition in 2014, stating those health care expenses were "not covered under the NICA Plan."<sup>66</sup> The First District Court of Appeals affirmed that decision in 2015.<sup>67</sup> The AHCA ultimately decided not to enforce the lien, and there is no record of NICA ever paying it before Fatema passed away in 2017.<sup>68</sup>

The stories of Jay Benitez, Justin Nguyen, Fatema Shakir, and others demonstrate how NICA's policy to treat itself as secondary to Medicaid traded the time and stress families would endure from a lawsuit for the time and stress the families endured fighting Medicaid to cover their child's necessary medical expenses, something potentially more harmful.<sup>69</sup> This is troubling because this policy only affected families with Medicaid-eligible children, many of whom were in living in poverty, a stressor in itself,<sup>70</sup> and were more likely to stay in

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62. Chang & Marbin Miller, *supra* note 58.

63. Chang & Marbin Miller, *supra* note 6.

64. *Id.*

65. *Id.*

66. *Id.*; Williams v. Fla. Birth-Related Neurological Inj. Comp. Ass'n, No. 11-5710N, 2014 WL 4704711, at \*3 (Fla. Div. Admin. Hrgs. Sept. 17, 2014).

67. Chang & Marbin Miller, *supra* note 6; Williams v. Fla. Birth-Related Neurological Inj. Comp. Ass'n, No. 1D14-4775, at \*1 (Fla. Dist. Ct. App. July 15, 2015).

68. Chang & Marbin Miller, *supra* note 6.

69. *See id.* (Jay Benitez and Fatema Shakir); Marbin Miller & Chang, *supra* note 58 (Justin Nguyen). One parent stated the following about their experience with NICA:

"What we had to go through to get CIMT covered (after denials and a lawyer getting involved etc) was ridiculous. Then even after it was approved (limited amount) the way they made the providers bill it (send to Medicaid, get rejected, some other step, then bill NICA) etc turned out to be such a pain that the providers didn't ever want to deal with us again."

FLA. DEP'T OF FIN. SERVS., SUMMARY OF NICA PARTICIPANT SURVEY RESPONSES 8 (2021), <https://s3.documentcloud.org/documents/21084616/summary-of-nica-participant-survey-responses.pdf>.

70. *See Low-Income Communities, ANXIETY & DEPRESSION ASS'N OF AM.*, <https://adaa.org/find-help/by-demographics/low-income> (last updated Nov. 9, 2022) (noting that "poverty leads to physiologic responses to stress . . . [that can] ultimately lead to both long-term physical and mental health consequences").

poverty due to the challenges of having a disabled child.<sup>71</sup> Moreover, in cases like Jay's and Justin's, children either did not receive, or were delayed in receiving, necessary medical equipment or treatment, meaning they continued to experience medical problems that could aggravate their disabilities and cause more pain.<sup>72</sup> In cases like Fatema's, in which attorneys and lawsuits became involved, litigation-related stress,<sup>73</sup> can add onto all the other stress parents of disabled children experience, making it even harder to care for their children.<sup>74</sup> Instead of replacing the award for future medical expenses families would receive after a successful malpractice lawsuit, NICA's policies required families to fight Medicaid to pay for the health care expenses they were promised. Ironically, NICA and the Virginia Program's policies—implemented to save money<sup>75</sup>—likely also caused financial harm by reducing the money in both programs' reserves. The \$20.7 million<sup>76</sup> the Virginia Program paid in settling its lawsuit is more than the \$15.9 million the Virginia Program paid in 2019 for nursing expenses,<sup>77</sup> and the \$4.1 million relator's share<sup>78</sup> is greater than the \$3.4 million total the Virginia Program paid for hospital and physician expenses between 1988

71. See Chang & Marbin Miller, *supra* note 6 (discussing how Florida families' issues with in-home nursing care for their disabled children can cause them to “fall[] deeper into poverty”); Nikita Stewart, *When Caring for Your Child's Needs Becomes a Job All Its Own*, N.Y. TIMES (July 28, 2020), <https://www.nytimes.com/2020/07/24/us/children-disabilities-parenting-poverty-assistance.html> (“Parents of children with disabilities often face an agonizing choice: working outside the home or caring for their children. Either option can spiral a family into poverty or keep them there.”).

72. See, e.g., *Pneumonia*, MEDLINEPLUS, <https://medlineplus.gov/pneumonia.html> (updated June 20, 2021) (noting that complications of pneumonia can include sepsis, lung abscesses, kidney failure, and respiratory failure); Ken Harris, *The Dangers of Seizures: Why You Need Immediate Treatment*, OSF HEALTHCARE (Apr. 22, 2022), <https://www.osfhealthcare.org/blog/dangers-of-seizures/> (describing how medication for seizure treatment is needed to prevent future seizures and improve patients' health).

73. Michaela Keet et al., *Anticipating and Managing the Psychological Cost of Civil Litigation*, 34 WINDSOR Y.B. ACCESS TO JUST. 73, 76–77, 82 (2018). The legal process itself can have emotional and psychological effects, including causing “critogenic (law-caused) harm.” *Id.* at 77. Critogenic harm is “the ‘intrinsic and often inescapable harms caused by the litigation process itself.’” *Id.* at 77. Individuals involved in lawsuits, including medical malpractice lawsuits, can develop “litigation-response syndrome” as a result. *Id.* at 77, 82.

74. See Nancy E. Reichman et al., *Impact of Child Disability on the Family*, 12 MATERNAL & CHILD HEALTH J. 679, 680 (2008) (noting that “the time and financial costs, physical and emotional demands, and logistical complexities associated with raising a disabled child” and that “having a disabled child may increase [parents'] stress [and] take a toll on mental and physical health”).

75. See *supra* Section II.B (discussing the financial motivations behind both programs' policies).

76. Settlement Agreement, *supra* note 47, at 5.

77. PINNACLE ACTUARIAL RES., STATE CORP. COMM. BUREAU OF INS., 2020 ANALYSIS OF THE VIRGINIA BIRTH-RELATED NEUROLOGICAL INJURY COMPENSATION PROGRAM 30 (2020), <https://www.vabirthinjury.com/wp-content/uploads/2021/02/2020-Actuarial-Analysis-from-SCC-Scan.pdf>.

78. Settlement Agreement, *supra* note 47, at 8.

and 2019.<sup>79</sup> In Florida, the \$51 million NICA agreed to pay under the settlement agreement is more than one-third of the estimated \$143.8 million the state's Medicaid program paid for both injury- and non-injury-related health care expenses for NICA participating children between 1989 and 2021.<sup>80</sup> While both programs would have had to pay at least some of this money to cover children's health care expenses, they could be paying more as a result of the FCA lawsuits because of the related legal fees and the FCA's allowance for an award of treble damages and a relators' share.<sup>81</sup>

### III. WHY BRNIC PROGRAMS MUST PAY PRIMARY TO MEDICAID UNDER THE LAW

Federal laws set many conditions that a State Medicaid program must meet in order to qualify to receive Federal Medicaid funds.<sup>82</sup> One of these conditions is that State Medicaid programs will be the payer of last resort for Medicaid beneficiaries.<sup>83</sup> Medicaid, created in 1965 under Title XIX of the Social Security Act, is a jointly-funded federal-state entitlement program that provides health insurance coverage to children, disabled individuals, and individuals living in poverty.<sup>84</sup> In 1997, Congress enacted CHIP under Title XXI of the Social Security Act, which expanded coverage for low-income children who fell outside Medicaid's original income eligibility requirements.<sup>85</sup> While participation in both Medicaid and CHIP is voluntary, all fifty states and the District of Columbia have since chosen to participate in both programs.<sup>86</sup>

In response to growing concerns over unnecessary Medicaid spending, Congress passed the Deficit Reduction Act of 2005 ("DRA").<sup>87</sup> The DRA

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79. PINNACLE ACTUARIAL RES., *supra* note 77, at 30.

80. Settlement Agreement, *supra* note 56, at 5; AGENCY FOR HEALTH CARE ADMIN., *supra* note 28, at 7–8 (2022). The 2021 AHCA report estimates that, between 1989 and 2021, the total expenditures for fee-for-service (FFS) Medicaid was over \$93 million, and the total expenditures for managed care organization (MCO) Medicaid was over \$50 million, bringing the total expenditures to over \$143 million. *Id.*

81. U.S. DEP'T OF JUST., *supra* note 41, at 1, 3.

82. *See generally* 42 U.S.C. § 1396a(a) (discussing the conditions state Medicaid programs must meet).

83. 42 U.S.C. § 1396a(a)(25)(A).

84. BARRY R. FURROW ET AL., HEALTH LAW: CASES, MATERIALS AND PROBLEMS, (8th ed. 2018) at 678, 687–89; *Matching Rates*, MACPAC, <https://www.macpac.gov/subtopic/matching-rates/> (last visited Feb. 25, 2023).

85. FURROW ET AL., *supra* note 84, at 696.

86. *See* Federal Fiscal Year (FFY) 2020 Statistical Enrollment Data System (SEDS) Reporting, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://www.medicaid.gov/chip/downloads/fy-2020-childrens-enrollment-report.pdf> (last visited Mar. 17, 2022) (showing all states enroll participants in both programs).

87. Deficit Reduction Act of 2005, Pub. L. No. 109–171, § 6035, 120 Stat. 79 (2006); PAUL W. SHAW & SPENCER D. LEVINE, THE DEFICIT REDUCTION ACT AND ITS IMPACT ON MEDICAID

strengthened laws on State Medicaid programs' TPL requirements to ensure states either do not use Medicaid dollars or recover the Medicaid dollars used to pay health care expenses for which another party is responsible.<sup>88</sup> Under Title 42, § 1396a(a)(25)(A) of the United States Code, State Medicaid programs are required to take "all reasonable measures to ascertain the legal liability of third parties," including "parties that are, by statute, contract, or agreement, legally responsible for payment of a claim for a health care item or service."<sup>89</sup> States must also adopt policies for recovering expenses that should have been covered by third-party payers.<sup>90</sup> The Bipartisan Budget Act of 2018 applied these same Medicaid TPL requirements to state CHIP programs.<sup>91</sup>

Because of Medicaid's jointly-funded status, Federal Medicaid funds are distributed to states based on conditions set by federal laws.<sup>92</sup> The Supremacy Clause of the U.S. Constitution also provides that federal laws—such as the federal laws regarding Medicaid—will supersede state laws—such as Florida and Virginia's laws regarding health care expenses payable by the BRNIC program—when the two sets of laws conflict.<sup>93</sup>

Because interpreting Florida and Virginia's BRNIC program-enabling statutes to allow the programs to pay after Medicaid would necessarily conflict with Federal Medicaid laws, Medicaid must be the payer of last resort after the BRNIC programs. BRNIC programs meet the definition of a third-party payer under Federal Medicaid laws, as their statutory obligation to provide lifetime compensation for injured children makes them legally responsible for paying the same injury-related health care expenses that Medicaid would cover.<sup>94</sup> Since federal law requires all payers meeting the "third-party" definition to pay before Medicaid,<sup>95</sup> the "except" clauses in BRNIC program enabling statutes necessarily mean the programs must cover medical expenses for Medicaid-eligible children first, regardless of BRNIC programs' administrative guidance,

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FRAUD ENFORCEMENT 2–3, [https://assets.hcca-info.org/Portals/0/PDFs/Resources/Conference\\_Handouts/Compliance\\_Institute/2007/605-2.pdf](https://assets.hcca-info.org/Portals/0/PDFs/Resources/Conference_Handouts/Compliance_Institute/2007/605-2.pdf).

88. *Deficit Reduction Act Important Facts for State Policy Makers: Third Party Liability in the Medicaid Program*, CTRS. FOR MEDICARE & MEDICAID SERVS. (Dec. 11, 2007), <https://www.cms.gov/regulations-and-guidance/legislation/deficitreductionact/downloads/tpl.pdf>.

89. 42 U.S.C. § 1396a(a)(25)(A).

90. *Id.*; *Medicaid Third Party Liability Statutes*, MACPAC, <https://www.macpac.gov/medicaid-third-party-liability-statutes/> (last visited Mar. 17, 2022).

91. 42 U.S.C. 1397gg(e)(1)(B); Bipartisan Budget Act of 2018, Pub. L. No. 115–123, § 53102(d), 132 Stat. 299 (2018).

92. MACPAC, *supra* note 84; *see generally* 42 U.S.C. § 1396a(a) (discussing the conditions state Medicaid programs must meet).

93. U.S. CONST. art. VI.

94. FLA STAT. § 766.31(b)(1), (3) (2022); VA. CODE ANN. § 38.2-5009(A)(1)(a), (c) (2022); 42 U.S.C. § 1396a(a)(25)(A).

95. 42 U.S.C. § 1396a(a)(25)(A).

policies, or judicial decisions.<sup>96</sup> Moreover, pursuant to Federal Medicaid requirements, all states—including Florida and Virginia—adopted laws requiring their State Medicaid programs to ascertain which third parties have to pay as primary and giving State Medicaid program a right to recovery.<sup>97</sup> Thus, State Medicaid programs have legal obligations to enforce their rights to recover monies they paid for which the child was eligible for coverage through a BRNIC program.<sup>98</sup>

Despite federal laws establishing Medicaid’s payer of last resort status, there are other reasons why BRNIC programs should pay before Medicaid. Unlike publicly funded programs which pay after Medicaid,<sup>99</sup> both Florida and Virginia’s BRNIC programs have been funded almost exclusively through assessments levied against hospitals, obstetricians, and medical malpractice insurance carriers.<sup>100</sup> This type of funding makes BRNIC programs more akin to workers’ compensation programs and the National Vaccine Injury Compensation Program both of which provide a no-fault alternative compensation system for injured individuals and pay before Medicaid.<sup>101</sup> Moreover, BRNIC programs replace traditional medical malpractice litigation, for which an award for health care expenses could be subject to a Medicaid

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96. FLA. STAT. § 766.31(b)(1), (3) (2022); VA. CODE ANN. § 38.2-5009(A)(1)(a), (c) (2022); 42 U.S.C. § 1396a(a)(25)(A); U.S. CONST. art. VI.

97. FLA. STAT. § 409.910; 12 VA. ADMIN. CODE 30-20-200 (2022); see HINSHAW & CULBERTSON LLP, 50 STATE PRIMER ON MEDICAID RECOVERY LAWS 3, 19, 114 (3rd ed. 2022), <https://www.hinshawlaw.com/assets/htmldocuments/Booklets/50StatePrimeronMedicaidRecoveryLawsMrMedicare.pdf> (providing an overview of each state’s laws on Medicaid recovery and TPL).

98. FLA. STAT. § 409.910 (2022); 12 VA. ADMIN. CODE 30-20-200 (2022); see HINSHAW & CULBERTSON LLP, *supra* note 97, at 3, 19–20, 114–15 (describing Medicaid’s right to recovery and associated state statutes).

99. Publicly funded programs “that have been statutorily designated as payers of last resort after Medicaid include the Ryan White HIV/AIDS grant program, the Title V Maternal and Child Health block grant program, the Indian Health Service, and Individuals with Disabilities Education Act programs.” *Third Party Liability*, MACPAC, <https://www.macpac.gov/subtopic/third-party-liability/> (last visited Feb. 25, 2023).

100. See *supra* Section II.A (describing BRNIC programs and how they are funded).

101. See *Workers’ Compensation Insurance*, FLA. OFF. OF INS. REG., <https://www.flair.com/sections/pandc/wc/default.aspx> (last visited Feb. 25, 2023) (overview of workers’ compensation programs); Alfred P. Vitarelli, *Medicaid Liens and Workers’ Comp*, NAT’L L. REV. (Mar. 27, 2019), <https://www.natlawreview.com/article/medicaid-liens-and-workers-comp> (discussing Medicaid liens); *About the National Vaccine Injury Compensation Program*, HEALTH SERVS. & RES. ADMIN., <https://www.hrsa.gov/vaccine-compensation/about/index.html> (last visited Mar. 17, 2022) (describing the program); Public Health Service Act, 42 U.S.C. § 300aa–15(g) (“Payment of compensation under the Program shall not be made for any item or service to the extent that payment has been made, or can reasonably be expected to be made . . . under any State compensation program, under an insurance policy, or under any Federal or State health benefits program (other than under title XIX of the Social Security Act [the Medicaid Program])”).



lien.<sup>102</sup> Additionally, critics have suggested that BRNIC programs' funding mechanisms and Medicaid policies—which allow obstetricians and hospitals to reap the benefits of not getting sued while taxpayer money, instead of the money providers pay into BRNIC programs' reserves, is used to cover injured children's expenses—amount to stealing from Medicaid.<sup>103</sup> Adopting statutes and policies requiring BRNIC programs to pay before Medicaid could also help avoid this scrutiny and would be consistent with the Medicaid TPL policies followed for similar other no-fault administrative compensation programs and medical malpractice litigation.

#### IV. RECOMMENDATIONS FOR STATUTES, POLICIES, AND ADMINISTRATIVE GUIDANCE

Imprecise language and ambiguities in the Florida and Virginia BRNIC programs' enabling statutes, administrative guidance, and policies resulted in serious harm to participating children and their families. Clear and consistent language is needed to ensure these problems do not recur. While the recommendations made here are targeted toward NICA, the Virginia Program, and the 2019 proposed Maryland S.B. 869, they would also apply to any other state or national BRNIC program that may be proposed in the future.

Both Florida and Virginia's BRNIC program-enabling statutes provide, in almost identical language, that they will cover health care expenses for which the child has received or is entitled to receive payment or reimbursement from state or federal programs, except where "prohibited by federal law."<sup>104</sup> While these "except" clauses implicate the federal statutes defining Medicaid as the payer of last resort, the lack of an explicit mention of Medicaid contributed to the continuation of the both programs' policies for Medicaid to pay first.<sup>105</sup> Consequently, both Florida and Virginia's state legislatures should amend their statutes to state that the BRNIC program is primary to Medicaid and will cover Medicaid-eligible expenses for participating children. This type of clear and straightforward language will ensure that BRNIC program administrators know,

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102. See, e.g., Erik V. Larson & Diana Panian, *Successfully Discharging Medicaid Liens in Personal Injury Cases*, 32 CUMB. L. REV. 349, 355–56 (2001–2002) (describing the Medicaid lien process for personal injury—including medical malpractice—lawsuits).

103. See George H. "Dutch" Anderson III, *Immunity for Obstetricians*, ORLANDO SENTINEL (July 3, 2003), <https://www.orlandosentinel.com/news/os-xpm-2003-07-03-0307030119-story.html> ("the state of Florida has effectively shifted the responsibility back to the parents and their health insurance company (or the taxpayers through Medicaid) to pay for the damages caused by the OB/GYN's carelessness"); Chang & Marbin Miller, *supra* note 6 (noting the lawyer who represented Fatema Shakir's mother stated NICA not paying Fatema's Medicaid lien amounted to the program "stealing from Medicaid"). See also *infra* Section II.D.

104. FLA. STAT. § 766.31(b)(1), (3) (2022); VA. CODE ANN. § 38.2-5009(A)(1)(a), (c) (2022).

105. 42 U.S.C. 1396a(a)(25)(A).

just from reading the statute, that the BRNIC program must pay before Medicaid.

In 2019, the Maryland State Senate proposed S.B. 869, a bill which would establish a no-fault birth injury fund that operates similarly to NICA and the Virginia Program; the bill was never passed nor enacted.<sup>106</sup> S.B. 869 has similar language to the current Virginia and Florida statutes that is also problematic and, if proposed again in the future, should be amended to state any future BRNIC program will pay as primary to Medicaid and CHIP.<sup>107</sup> This proposed program would cover injury-related health care expenses excluding those for which the child has received or is “eligible to receive reimbursement, under the laws of a state or the United States, *including benefits provided under the Maryland Rare and Expensive Case Management [REM] Program*, except to the extent the exclusion may be prohibited by federal law.”<sup>108</sup> The clause stating the BRNIC program will not cover health care expenses eligible under the REM Program is problematic and should be omitted. Because the REM program is a specialized Medicaid managed care program providing “case management services and subspecialty care for . . . eligible individuals with rare and expensive conditions,” including cerebral palsy,<sup>109</sup> the same Federal and State Medicaid TPL laws apply.<sup>110</sup> Thus, any injury-related expenses for which the child is eligible under the REM program must be first paid by the BRNIC program, rendering this clause moot.

As NICA is undergoing a transition,<sup>111</sup> there are several recent adopted and proposed changes addressing Medicaid TPL issues that warrant discussion. First, on August 25, 2022, NICA adopted a new benefit handbook which stated:

[W]hile, given recent legislative changes in Florida, NICA considers itself to be primary to Medicaid and a third party for NICA-covered services, we are still working with AHCA on a plan to coordinate services to ensure seamless service

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106. S.B. 869 § 3-2D-06(A)(1)(III), 2019 Leg., Reg. Sess. (Md. 2019); *Legislation SB0869*, MD. GEN. ASSEMB., <https://mgaleg.maryland.gov/mgaweb/Legislation/Details/sb0869?ys=2019RS&search=True> (last visited Apr. 15, 2023). S.B. 869 was also cross-filed with H.B. 1320 and was previously introduced in the 2018 Regular Session. *See id.*; H.B. 1320, 2019 Leg., Reg. Sess. (Md. 2019).

107. S.B. 869 § 3-2D-06(A)(1)(III), 2019 Leg., Reg. Sess. (Md. 2019).

108. *Id.* (emphasis added).

109. MD. CODE REGS. § 10.09.69.01 (2022); *Rare and Expensive Case Management (REM) Program*, MD. DEP’T OF HEALTH, <https://health.maryland.gov/mmcp/longtermcare/pages/rem-program.aspx> (last visited Jan. 28, 2022); MD. DEP’T OF HEALTH, REM PROGRAM INTAKE PACKET (May 20, 2019), [https://health.maryland.gov/mmcp/longtermcare/SiteAssets/SitePages/REM/REM\\_Intake\\_Packet\\_May2019.pdf](https://health.maryland.gov/mmcp/longtermcare/SiteAssets/SitePages/REM/REM_Intake_Packet_May2019.pdf) (listing spastic quadriplegic cerebral palsy, spastic diplegic cerebral palsy, and athetoid cerebral palsy as covered diagnoses).

110. 42 U.S.C. § 1396a(a)(25)(A); MACPAC, *supra* note 90; MD. CODE ANN. HEALTH § 15-120 (West 2021).

111. *See supra* Sections II.A, II.D (describing NICA’s changes resulting from the “Birth Rights” news series and the changes resulting from the November 2022 settlement).

delivery to our participants. Until that plan is finalized, participant families should not change how they obtain services from their providers. Once the transition plan is complete, it will be communicated to families along with any new processes.<sup>112</sup>

Second, Florida S.B. 1050, which was introduced in January 2022, but died in mid-March of that year, proposed to amend NICA's enabling statutes to state the program "is not intended to serve as the payor of last resort for claims arising out of such injuries."<sup>113</sup>

While both the amended policy and the proposed law's language are good, neither clarify how NICA will pay Medicaid going forward nor address how NICA will handle reimbursing Medicaid for already-paid expenses for children who enroll in the program at a later time. This is especially problematic given NICA's five-year statute of limitations for submitting a claim to participate in the program.<sup>114</sup> Thus, there may be families currently in the process of applying to NICA or who may apply for NICA for their children in the future for whom Medicaid covered injury-related expenses before the child became eligible.<sup>115</sup> Without clear policies in place describing how NICA will address injury-related health care expenses paid by Medicaid before children become enrolled in the program, other families could potentially endure the same stressful Medicaid lien process as Fatema Shakir's family upon admittance to the program.<sup>116</sup> Consequently, NICA needs to adopt a policy and subsequently amend its benefit handbook to provide information on what the program will do to reimburse Medicaid for injury-related health care expenses paid before a child was enrolled in NICA, as well as reimburse Medicaid for any liens placed against children upon admittance into NICA so other families do not have to go through the same ordeal as Fatema Shakir's family. Moreover, in light of NICA's settlement agreement, NICA should adopt similar policies to not treat and reimburse as

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112. FLA. BIRTH-RELATED NEUROLOGICAL INJ. COMP. ASS'N, BENEFIT HANDBOOK APPROVED AUGUST 25, 2022 at 3 (2022), [https://www.nica.com/wp-content/uploads/2022/09/NICA\\_Benefit\\_Handbook\\_Approved\\_082522.pdf](https://www.nica.com/wp-content/uploads/2022/09/NICA_Benefit_Handbook_Approved_082522.pdf). This is a change from a draft benefit handbook proposed in October 2021 in which the program stated it would only "treat itself as primary to Medicaid for expenses "incurred on or after June 21, 2021." FLA. BIRTH-RELATED NEUROLOGICAL INJ. COMP. ASS'N, DRAFT BENEFIT HANDBOOK 1 (2021), <https://www.nica.com/wp-content/uploads/2021/10/DRAFT-NICA-Benefit-Handbook-For-Public-Comment-10-28-2021.pdf>.

113. S.B. 1050, 2022 Leg. Reg. Sess. (Fla. 2022); Carol Marbin Miller & Daniel Chang, *Lawmakers Approve Payments to Parents of Children Who Died of Catastrophic Brain Injuries*, PROPUBLICA (Mar. 15, 2022, 12:45 PM), <https://www.propublica.org/article/lawmakers-approve-payments-to-parents-of-children-who-died-of-catastrophic-brain-injuries>.

114. FLA. STAT. § 766.313 (2022).

115. *Id.*

116. *See supra* Section II.D (describing the ordeal Fatema Shakir's family endured).

necessary other states' Medicaid programs for any Medicaid-eligible NICA enrollees who later move outside of Florida.<sup>117</sup>

In addition to amending the BRNIC program-enabling statutes and policies, Florida and Virginia, along with other states which may have a BRNIC program in the future, should amend their Medicaid and CHIP statutes to state that BRNIC programs must pay before Medicaid.<sup>118</sup> Like with the states' program-enabling statutes, having this language in the Medicaid and CHIP statutes will ensure those programs' administrators know—just from reading the statutes—that BRNIC programs are third parties who must pay before Medicaid and CHIP. Employee training manuals and other documents should be updated to reflect these changes.

Finally, these recommendations mean nothing if families are not aware of them. Therefore, NICA and the Virginia Program should update *all* of their benefit handbooks, websites, and all other materials they provide to explain that the BRNIC program pays for injury-related health care expenses before a child's Medicaid or CHIP insurance.

## V. CONCLUSION

Since the obstetric medical malpractice crisis of the 1980s, BRNIC programs have been proposed as a way to address medical malpractice litigation of severe birth-related neurological injuries, ensure obstetricians continue to practice in the state, and compensate families without burdening them with a lawsuit/trial.<sup>119</sup> Although the existence of a current medical malpractice crisis is debated,<sup>120</sup> BRNIC programs have been proposed as a solution for another potential crisis: a nationwide obstetrician shortage threatening to leave the country short of 22,000 doctors by 2050.<sup>121</sup> While not the only cause of this

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117. See Settlement Agreement at 1, *United States ex rel. Arven v. Fla. Birth-Related Neurological Inj. Comp. Ass'n*, No. 19-61053-CIV-DIMITROULEAS (S.D. Fla. Apr. 25, 2019) (noting some NICA participants had moved outside other states).

118. FLA. STAT. § 409.901(27), (28) (2022); VA. CODE ANN. § 32.1-325.2 (2022). See generally FLA. STAT. §§ 409.810–409.821 (2022); VA. CODE ANN. §§ 32.1-351 to -353 (2022) (respectively, each state's CHIP statutes).

119. See *supra* Sections I, II.A (describing the crisis and Florida and Virginia's BRNIC programs).

120. In the past, Republicans have claimed a medical malpractice crisis contributes to high health care costs, but some critics disagree. Chad Terhune, *Top Republicans Say There's A Medical Malpractice Crisis. Experts Say There Isn't.*, WASH. POST (Dec. 30, 2016), <https://www.washingtonpost.com/news/to-your-health/wp/2016/12/30/top-republicans-say-theres-a-medical-malpractice-crisis-experts-say-there-isnt/>. However, some scholars suggest the COVID-19 pandemic could cause another medical malpractice crisis. See William M. Sage et al., *Another Medical Malpractice Crisis? Try Something Different*, 14 JAMA 1395, 1395 (2020).

121. DOXIMITY, 2018 OB-GYN WORKFORCE STUDY: LOOMING PHYSICIAN SHORTAGES: A GROWING WOMEN'S HEALTH CRISIS 2 (2018), [https://s3.amazonaws.com/s3.doximity.com/press/OB-GYN\\_Workload\\_and\\_Potential\\_Shortages\\_2018.pdf](https://s3.amazonaws.com/s3.doximity.com/press/OB-GYN_Workload_and_Potential_Shortages_2018.pdf); see also Baldemar Gonzalez, *When Tort*

shortage, obstetricians have cited medical malpractice litigation as a reason for reducing or stopping the number of children they deliver, causing burnout, or leaving the field entirely.<sup>122</sup> If BRNIC programs continue to be part of the solution in medical malpractice reform—especially obstetric medical malpractice, it is important that these programs are designed in a way that will benefit both the health care providers and the participants. Because many eligible children will be covered by Medicaid,<sup>123</sup> BRNIC programs should be designed to cover these children's health care expenses without relying on government funds.

Returning to the hypothetical scenario in Part I, imagine you have just been notified that your child's claim is compensable through your state's BRNIC program. You receive a benefit handbook that tells you to submit claims for all his injury-related health care expenses to the program first; you would only submit claims to Medicaid for non-injury-related health care expenses. When your child needs medicine, services, or equipment, you submit a claim to the program and promptly receive reimbursement. This is how a BRNIC program *should* be designed to benefit all interested parties—the health care providers and hospitals who are protected from costly litigation and medical malpractice insurance rates, the pregnant women who have continued access to obstetric care, and the injured children and their families who have lifetime coverage for medical expenses. Florida, Virginia, and any states considering these programs in the future should adopt statutes, administrative guidance, and policies to ensure such programs will work this way.

ALEXANDRA M. ROBBINS\*

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*Falls Short: Crisis, Malpractice Liability, and Women's Healthcare Access*, 119 COLUM. L. REV. 1099, 1100 (2019) (proposing a national BRNIC program to combat a looming obstetrician shortage).

122. See DOXIMITY, *supra* note 120 (noting that burnout can lead OB-GYNs to retire at younger ages than other physicians); Richard E. Anderson, *Ob-Gyn Shortage is Going to Get Worse*, LIVESCIENCE (June 27, 2013), <https://www.livescience.com/37824-obgyn-shortage-looming.html> (noting that fear of lawsuits and high malpractice rates cause doctors to stop delivering children/monitoring pregnancies).

123. Elizabeth Williams & MaryBeth Musumeci, *Children with Special Health Care Needs: Coverage, Affordability, and HCBS Access*, KAISER FAM. FOUND. (Oct. 4, 2021), <https://www.kff.org/medicaid/issue-brief/children-with-special-health-care-needs-coverage-affordability-and-hcbs-access/>.

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