STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TYRA N. PIERRE, a minor, by and through her mother and guardian, YANIQUE BENJAMIN,

Petitioner,

vs. Case No. 14-5308MTR

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

FINAL ORDER

Pursuant to notice, a final hearing was held in this case on January 16, 2015, in Tallahassee, Florida, before Suzanne Van Wyk, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Floyd B. Faglie, Esquire
Staunton & Faglie, P.L.
189 East Walnut Street
Monticello, Florida 32344

For Respondent: Kevin A. Joyce, Esquire
Xerox Recovery Services Group
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STATEMENT OF THE ISSUE

The issue to be determined is the amount to be reimbursed to Respondent, Agency for Health Care Administration (Respondent

or Agency), for medical expenses paid on behalf of Petitioner, Tyra Pierre, from a medical-malpractice settlement received by Petitioner from a third party.

PRELIMINARY STATEMENT

On November 13, 2014, Petitioner filed a Petition to Determine Amount Payable to Agency for Health Care Administration in Satisfaction of Medicaid Lien, by which she challenged Respondent's lien for recovery of medical expenses paid by Medicaid in the amount of $530,258.86. The basis for the challenge was the assertion that the application of section 409.910(17)(b), Florida Statutes (2014), warranted reimbursement of a lesser portion of the total third-party settlement proceeds than the amount calculated by Respondent pursuant to the formula established in section 409.910(11)(f).

Respondent referred the petition to the Division of Administrative Hearings on November 13, 2014. The final hearing was scheduled for January 16, 2015, and was held as scheduled.

At the final hearing, Petitioner presented the testimony of Scott Leeds, an attorney who represented Petitioner in the personal injury action from which the third-party settlement proceeds were obtained. Petitioner's Exhibits 1 through 9 were received into evidence. Respondent offered no independent witnesses or exhibits.

A one-volume Transcript of the proceedings was filed on February 6, 2015. The evidentiary record remained open for Petitioner to file the deposition transcript of Vincent Barrett, which was filed on February 13, 2015. The undersigned entered an Order Closing Record on February 16, 2015.

Both parties timely filed Proposed Final Orders, which have been duly considered by the undersigned in the preparation of this Final Order.

RULING ON EXPERT WITNESS DESIGNATION

The deposition testimony of R. Vincent Barrett, Jr., was filed on February 13, 2015. During the deposition, Petitioner's counsel offered Mr. Barrett as an expert in valuation of damages. Respondent did not object. The undersigned accepts Mr. Barrett as an expert in valuation of damages in personal injury cases.

FINDINGS OF FACT

1. On November 4, 2011, Petitioner, Tyra Pierre (Petitioner), fell from the window of the fourth floor apartment where she lived with her mother, Yanique Benjamin, in North Miami Beach, Florida.

2. The apartment was owned by Harvard House, LLC (Harvard House).

3. Petitioner was airlifted to, and treated at, Jackson Memorial Hospital Trauma Center. Petitioner suffered a spinal

cord injury at cervical level C7-C8, and is paralyzed from the waist down, rendering her a permanent paraplegic.

4. Medicaid paid for Petitioner's medical expenses in the amount of $530,258.86.

5. Petitioner was three years old at the time of her injury and has a normal life expectancy of 72.9 years.

6. Petitioner is wheel-chair bound. She has no control of her bladder or bowels.

7. Paraplegics suffer from a number of attendant complications, such as erosion of skin integrity, pressure ulcers, and kidney, bladder, and digestive system disorders. Paraplegics require care from neurologists, neurosurgeons, orthopedic surgeons, and gastroenterologists, among other physicians, throughout their normal life expectancy.

8. Ms. Benjamin retained Scott Leeds, an attorney specializing in personal and catastrophic injury claims, to represent Petitioner in a personal injury claim against Harvard House. Mr. Leeds served Harvard House with a Notice of Intent to Initiate Litigation on December 29, 2011.

9. The insurance liability of Harvard House was limited to $1 million. During discovery, Mr. Leeds determined Harvard House had no other collectible assets.

10. Petitioner settled with Harvard House pre-suit for $750,000.[1/]

11. Mr. Leeds has practiced law in the area of catastrophic personal injury for 31 years. He has represented children in cases seeking damages for catastrophic injury. As part of his practice, Mr. Leeds routinely estimates the value of damages suffered by his clients.

12. The components of damages in catastrophic personal injury cases generally follow the elements set out in a jury verdict form, including economic damages, such as past medical expenses (date of injury to date of trial), future medical expenses, loss of past earnings, loss of future earning capacity, past attendant care and rehabilitation, future attendant care and rehabilitation; as well as non-economic damages, such as past and future pain and suffering, and loss of enjoyment of life.

13. Petitioner's claim for past medical expenses is valued at $530,258.86, the amount paid by Medicaid for her past treatment.

14. Mr. Leeds estimated Petitioner's future medical care expenses at $8 million, based on statistics from the Christopher and Dana Reeves Foundation. Mr. Leeds testified that Petitioner's attendant care costs for her expected lifetime are an additional $9 million.

15. Mr. Leeds' estimate of Petitioner's economic damages is $17.5 million before valuing Petitioner's loss of future earning capacity.

16. Mr. Leeds' opinion on the value of Petitioner's damages is informed by his experience representing children in two separate catastrophic injury cases. In both cases, the children were under five years old and their injuries resulted in paraplegia. In both cases, Mr. Leeds negotiated structured settlements for the children in excess of $20 million in future benefits over the children's lifetime.

17. Mr. Leeds testified, convincingly, that a jury would likely award Petitioner a substantial sum to compensate Petitioner for her non-economic damages, given her life expectancy of over 70 years to endure the consequences of her injury.

18. Mr. Leeds' valuation of Petitioner's combined economic and non-economic damages in excess of $20 million is accepted as credible and reliable, as well as persuasive.

19. Petitioner also presented the testimony of a second expert in valuing damages in catastrophic personal injury cases, R. Vinson Barrett, Jr. Mr. Barrett is a civil trial lawyer who has practiced exclusively in the area of personal injury for the past 30 years. He is a senior partner in the law firm of Barrett, Fasig & Brooks in Tallahassee, Florida.

20. In preparing for his testimony, Mr. Barrett reviewed Petitioner's medical records, the police report filed on the date of Petitioner's injury, Mr. Leeds' demand letter to Harvard House, some discovery documents, the settlement, and the court order approving the settlement. In formulating his opinion as to the value of Petitioner's damages, Mr. Barrett also consulted with colleagues practicing personal injury law in South Florida. According to Mr. Barrett, jury awards vary by region in the state of Florida, with South Florida juries returning high jury verdicts in personal injury cases.

21. Mr. Barrett emphatically agreed that the value of Petitioner's damages are in excess of $20 million.

22. In formulating his opinion, Mr. Barrett reviewed jury verdicts in cases which he considered comparable, or otherwise instructive.

23. In one case, a four-year-old boy rendered a paraplegic in an automobile accident was awarded $19.9 million in damages in 2010. That verdict was rendered in Osceola County. Mr. Barrett testified that a jury verdict in Dade County would be expected to be higher than in Osceola County.

24. In a second case, a jury in Pinellas County awarded over $10 million to a 57-year-old woman who was rendered paraplegic as a result of medical malpractice. The jury award allocated $3 million for future medical expenses and $7 million

for future pain and suffering. Mr. Barrett testified that future pain and suffering awards are generally lower for older plaintiffs, such as this 57-year-old woman, than for younger plaintiffs, like Petitioner, with a much longer life expectancy.

25. Another case to which Mr. Barrett referred involved an adult male construction worker rendered paraplegic in a fall from a steel beam which resulted in a spinal injury similar to Petitioner's. The Hillsborough County jury awarded over $16 million to the plaintiff in that case.

26. The construction worker's life expectancy was shorter than Petitioner's, thus Mr. Barrett believes an award greater than $16 million would be made in Petitioner's case. Mr. Barrett would also expect a higher award in a present-day civil jury trial than this $16-million award which was made in 1995.

27. Mr. Barrett's opinion on the value of Petitioner's damages was both credible and persuasive.

28. Medicaid is to be reimbursed for medical assistance provided if resources of a liable third party become available. Thus, Respondent asserted a Medicaid lien in the amount of $530,258.86 against any proceeds Petitioner received from a third party.

29. Respondent's position is that it should be reimbursed for its Medicaid expenditures on behalf of Petitioner pursuant

to the formula set forth in section 409.910(11)(f). Under the statutory formula, the lien amount is computed by deducting a 25 percent attorney's fee and taxable costs (in this case, $8,704.50) from the $750,000.00 recovery, which yields a sum of $553,795.50, then dividing that amount by two, which yields $276,897.75. That figure establishes the maximum amount that could be reimbursed from the third-party recovery in satisfaction of the Medicaid lien.

30. Petitioner's position is that Respondent should be reimbursed $19,884.71 in satisfaction of its Medicaid lien.

31. On August 27, 2014, Petitioner and Harvard House executed a Release of Claims (Release) based upon the settlement of $750,000. In the Release, the parties acknowledge that the settlement "only compensat[es] Tyra Pierre for a fraction of the total monetary value of her alleged damages."

32. The Release does not differentiate or allocate the total recovery among the components of damages, such as economic or non-economic. However, the Release allocates $19,884.71 to Petitioner's claim for past medical expenses, and allocates the "remainder of the settlement towards the satisfaction of claims other than past medical expenses."

33. The Release provides that said "allocation is a reasonable and proportionate allocation based on the same ratio

this settlement bears to the total monetary value of all Tyra Pierre's damages."

34. The settlement amount of $750,000 is 3.75% of the total value of Petitioner's damages.

35. The figure of $19,884.71 is 3.75% of the value of past medical expenses paid by Medicaid on Petitioner's behalf.

36. Respondent was not a party to the settlement. Respondent did not participate in litigation of the claim or in settlement negotiations, and no one represented Respondent's interests in the negotiations. Respondent has not otherwise executed a release of the lien.

37. Petitioner did not introduce the settlement in evidence. However, Petitioner did introduce the circuit court order authorizing the settlement. The order reads, in pertinent part, as follows:

> Given the facts, circumstances, and nature of Tyra's injuries and this settlement, the parties have agree[d] to allocate $19,884.71 of this settlement to Tyra's claim for past medical expenses and allocate the remainder of the settlement towards the satisfaction of claims other than past medical expenses. <u>This allocation is a reasonable and proportionate allocation based on the same ratio the settlement bears to the total monetary value of all Tyra's damages.</u>
>
> * * *
>
> 5. The allocation of damages recited in the previous paragraph and made a material term

> of the settlement, is fair and accurate, and is expressly adopted by this Court.

(emphasis added).

38. Mr. Leeds testified that allocation of $19,884.71 of the settlement proceeds to Petitioner's past medical expenses was fair and accurate, "based upon the analysis of this catastrophic injury and the future 73 years that Tyra Pierre will have and the value of this case[.]"

39. Mr. Barrett testified that allocation of $19,884.71 for past medical expenses was reasonable and rational.

40. Petitioner proved by clear and convincing evidence that a lesser portion of the total recovery should be allocated as reimbursement for past medical expenses than the amount calculated by Respondent pursuant to the formula set forth in section 409.910(11)(f).

CONCLUSIONS OF LAW

41. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties in this case pursuant to sections 120.569, 120.57(1), and 409.910(17), Florida Statutes (2014).[2/]

42. Respondent is the agency authorized to administer Florida's Medicaid program. § 409.902, Fla. Stat.

43. The Medicaid program "provide[s] federal financial assistance to States that choose to reimburse certain costs of

medical treatment for needy persons." Harris v. McRae, 448 U.S. 297, 301 (1980). Though participation is optional, once a State elects to participate in the Medicaid program, it must comply with federal requirements governing the same. Id.

44. As a condition for receipt of federal Medicaid funds, states are required to seek reimbursement for medical expenses incurred on behalf of Medicaid recipients who later recover from legally liable third parties. See Arkansas Dep't of Health & Human Servs. v. Ahlborn, 547 U.S. 268, 276 (2006).

45. Consistent with this federal requirement, the Florida Legislature has enacted section 409.910, which authorizes and requires the State to be reimbursed for Medicaid funds paid for a recipient's medical care when that recipient later receives a personal injury judgment or settlement from a third party. Smith v. Ag. for Health Care Admin., 24 So. 3d 590, 590 (Fla. 5th DCA 2009). The statute creates an automatic lien on any such judgment or settlement for the medical assistance provided by Medicaid. § 409.910(6)(c), Fla. Stat.

46. The amount to be recovered for Medicaid medical expenses from a judgment, award, or settlement from a third party is determined by the formula in section 409.910(11)(f), which sets that amount at one-half of the total recovery, after deducting attorney's fees of 25 percent of the recovery and all taxable costs, up to, but not to exceed, the total amount

actually paid by Medicaid on the recipient's behalf. Ag. For Health Care Admin. v. Riley, 119 So. 3d 514, 515, n.3 (Fla. 2d DCA 2013).

47. Respondent correctly asserts that it is not automatically bound by any allocation of damages set forth in a settlement between a Medicaid recipient and a third party that may be contrary to the formulaic amount, citing section 409.910(13). See also, § 409.910(6)(c)7., Fla. Stat. ("No release or satisfaction of any . . . settlement agreement shall be valid or effectual as against a lien created under this paragraph, unless the agency joins in the release or satisfaction or executes a release of the lien."). Rather, in cases such as this, where Respondent has not been provided prior notice and has not participated in or approved the settlement, the administrative procedure created by section 409.910(17)(b) is the means for determining whether a lesser portion of a total recovery should be allocated as reimbursement for medical expenses in lieu of the amount calculated by application of the formula in section 409.910(11)(f).

48. Section 409.910(17)(b) provides that

> A recipient may contest the amount designated as recovered medical expense damages payable to the agency pursuant to the formula specified in paragraph (11)(f) by filing a petition under chapter 120 within 21 days after the date of payment of funds to the agency or after the date of

> placing the full amount of the third-party benefits in the trust account for the benefit of the agency pursuant to paragraph (a). The petition shall be filed with the Division of Administrative Hearings. For purposes of chapter 120, the payment of funds to the agency or the placement of the full amount of the third-party benefits in the trust account for the benefit of the agency constitutes final agency action and notice thereof. Final order authority for the proceedings specified in this subsection rests with the Division of Administrative Hearings. This procedure is the exclusive method for challenging the amount of third-party benefits payable to the agency. In order to successfully challenge the amount payable to the agency, the recipient must prove, by clear and convincing evidence, that a lesser portion of the total recovery should be allocated as reimbursement for past and future medical expenses than the amount calculated by the agency pursuant to the formula set forth in paragraph (11)(f) or that Medicaid provided a lesser amount of medical assistance than that asserted by the agency.

49. Section 409.910(17)(b) thus makes clear that the formula set forth in subsection (11) constitutes a default allocation of the amount of a settlement that is attributable to medical costs, and sets forth an administrative procedure for adversarial testing of that allocation. See Harrell v. State, 143 So. 3d 478, 480 (Fla. 1st DCA 2014)(adopting the holding in Riley that petitioner "should be afforded an opportunity to seek the reduction of a Medicaid lien amount established by the statutory default allocation by demonstrating, with evidence, that the lien amount exceeds the amount recovered for medical

expenses")(quoting Roberts v. Albertson's, Inc., 119 So. 3d 457, 465-466 (Fla. 4th DCA 2012), reh'g and reh'g en banc denied sub nom. Giorgione v. Albertson's, Inc., 2013 Fla. App. LEXIS 10067 (Fla. 4th DCA June 26, 2013)).

50. Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). The clear and convincing evidence level of proof

> entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy.
>
> > Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994)(quoting, with approval, Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)); see also In re Henson, 913 So. 2d 579, 590 (Fla. 2005). "Although [the clear and convincing] standard of proof may be

met where the evidence is in conflict, it seems to preclude evidence that is ambiguous." Westinghouse Elec. Corp. v. Shuler Bros., 590 So. 2d 986, 989 (Fla. 1st DCA 1991).

Proof as to Reimbursement for Past Medical Expenses

51. The evidence in this case is clear and convincing that the allocation for Petitioner's past medical expenses in the amount of $19,884.71 as set forth in the settlement agreement, and approved by the circuit judge, and incorporated into the court order approving the settlement, constitutes a fair, reasonable, and accurate share of the total recovery for those past medical expenses actually paid by Medicaid.

52. Petitioner has proven, by clear and convincing evidence, that $19,884.71 of the total third-party recovery represents that share of the settlement proceeds fairly attributable to expenditures that were actually paid by Respondent for Petitioner's medical expenses.

CONCLUSION

Upon consideration of the above Findings of Fact and Conclusions of Law, it is hereby

ORDERED that:

The Agency for Health Care Administration is entitled to $19,884.71 in satisfaction of its Medicaid lien.

DONE AND ORDERED this 14th day of April, 2015, in Tallahassee, Leon County, Florida.

SUZANNE VAN WYK
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of April, 2015.

ENDNOTES

[1/] Ms. Benjamin also sought damages in a separate civil action for loss of consortium with her daughter, which she settled for $250,000.

[2/] All references to the Florida Statutes are to the 2014 version, unless otherwise specified herein.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, 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 of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.