

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NAKILA MERRIEX, AS NATURAL
PARENT AND LEGAL GUARDIAN OF
NIVEA MERRIEX,

Petitioner,

vs.

Case No. 15-2563MTR

AGENCY FOR HEALTH CARE
ADMINISTRATION,

Respondent.

_____ /

FINAL ORDER

On September 11, 2015, an administrative hearing in this case was held by video teleconference in Tampa and Tallahassee, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Charles T. Moore, Esquire
Morgan and Morgan, P.A.
One Tampa City Center
201 North Franklin Street, 7th Floor
Tampa, Florida 33602

For Respondent: David N. Perry, Esquire
Xerox Recovery Services, Inc.
2073 Summit Lake Drive, Suite 300
Tallahassee, Florida 32317

STATEMENT OF THE ISSUE

The issue in this proceeding is the amount payable to the Agency for Health Care Administration (Respondent) to satisfy a Medicaid lien under section 409.910, Florida Statutes (2015).^{1/}

PRELIMINARY STATEMENT

On May 11, 2015, Nakila Merriex, as natural parent and legal guardian of Nivea Merriex (Petitioner), filed a Petition for Equitable Apportionment (Petition) with the Division of Administrative Hearings (DOAH).

By Notice of Hearing dated May 21, 2015, the hearing was scheduled for July 28, 2015. Upon motion filed by the Petitioner on July 22, 2015, the hearing was continued, without objection, and subsequently rescheduled for September 11, 2015.

At the hearing, Petitioner's Exhibits 1, 2, and 5 through 10 were admitted into evidence. The Respondent presented no witnesses and offered no exhibits.

The Transcript of the hearing was filed on October 19, 2015. Both parties filed proposed final orders that were reviewed in the preparation of this Order.

FINDINGS OF FACT

1. Nakila Merriex is the natural mother and legal guardian of Nivea Merriex (Nivea).

2. At the time of her birth on November 30, 2011, Nivea suffered a shoulder injury and damage to the brachial plexus nerve.

3. Nivea underwent surgery and subsequent physical therapy to treat the deficit related to the shoulder injury and nerve damage.

4. The Petitioner filed a lawsuit against parties involved in Nivea's birth and recovered monetary damages through settlement of the lawsuit. The terms of the settlement are confidential.

5. Nivea also required speech therapy to treat a disorder wholly unrelated to the shoulder damage and nerve injury.

6. The physical therapy and the speech therapy were delivered by the same provider, Lampert's Home Therapy.

7. For reasons unknown, Lampert's Home Therapy utilized the primary billing diagnosis code of "9534-Brachial Plexus Injury" for both the physical therapy and the speech therapy services in submitting the claims to Medicaid.

8. In calculating the Medicaid lien, the Respondent included all the charges for services rendered by Lampert's Home Therapy. The Medicaid lien at issue in this case is for \$37,679.56.

9. According to the billing records admitted into evidence at the hearing, \$5,603.54 of the charges billed by Lampert's

Home Therapy and paid by Medicaid were solely attributable to speech therapy services.

10. Nivea's speech disorder was not the subject of litigation. The Petitioner has received no award of damages from a third party related to the speech disorder.

11. At the commencement of the hearing, the Petitioner conceded responsibility for satisfying the amount of the Medicaid lien related to charges for physical therapy services provided to treat the shoulder injury and nerve damage.

12. Deducting the charges incurred for speech therapy from the total Medicaid lien results in a remaining lien of \$32,076.02.

CONCLUSIONS OF LAW

13. DOAH has jurisdiction over the parties to, and subject matter of, this proceeding. §§ 120.569, 120.57(1), and 409.910(17), Fla. Stat. (2015).

14. Medicaid is a federal program, established in 1965 by Title XIX of the Social Security Act, which provides medical care to qualified individuals. The federal government provides funds to state Medicaid programs, which use the funds to pay the costs of medical care provided to qualified individuals.

15. Pursuant to section 409.902, the Respondent is the state agency responsible for administering the Florida Medicaid program.

16. States that participate in the federal Medicaid program are required to comply with applicable federal requirements, including a requirement that a state must seek reimbursement for medical expenses incurred on behalf of qualified individuals if such individuals subsequently recover funds from liable third parties. It is often said that Congress wanted Medicaid to be a "payer of last resort, that is, other available resources must be used before Medicaid pays for the care of an individual enrolled in the Medicaid program." S. Rep. No. 99-146, at 312 (1985), reprinted in 1986 U.S.C.C.A.N. 42, 279. See, e.g., Ahlborn v. Arkansas Dep't of Human Servs., 397 F.3d 620, 623 (8th Cir. 2005), aff'd Arkansas Dep't of Health and Human Servs. v. Ahlborn, 547 U.S. 268 (2006).

17. In compliance with federal requirements, the Florida Legislature adopted section 409.910, the "Medicaid Third-Party Liability Act." Section 409.910(1) provides as follows:

It is the intent of the Legislature that Medicaid be the payor of last resort for medically necessary goods and services furnished to Medicaid recipients. All other sources of payment for medical care are primary to medical assistance provided by Medicaid. If benefits of a liable third party are discovered or become available after medical assistance has been provided by Medicaid, it is the intent of the Legislature that Medicaid be repaid in full and prior to any other person, program, or entity. Medicaid is to be repaid in full

from, and to the extent of, any third-party benefits, regardless of whether a recipient is made whole or other creditors paid. Principles of common law and equity as to assignment, lien, and subrogation are abrogated to the extent necessary to ensure full recovery by Medicaid from third-party resources. It is intended that if the resources of a liable third party become available at any time, the public treasury should not bear the burden of medical assistance to the extent of such resources.

18. The essential concept underlying the Medicaid Third-Party Liability Act is that when a recipient of Medicaid funds recovers damages from a liable third party for injuries that were treated using the Medicaid funds, the Medicaid program should be reimbursed to the extent that such public funds were expended to treat the injuries. Section 409.910(11), which establishes the procedure by which the Respondent seeks reimbursement for Medicaid medical assistance provided to a qualified individual, states as follows:

The agency may, as a matter of right, in order to enforce its rights under this section, institute, intervene in, or join any legal or administrative proceeding in its own name in one or more of the following capacities: individually, as subrogee of the recipient, as assignee of the recipient, or as lienholder of the collateral.

(a) If either the recipient, or his or her legal representative, or the agency brings an action against a third party, the recipient, or the recipient's legal representative, or the agency, or their attorneys, shall, within 30 days after filing the action, provide to the other

written notice, by personal delivery or registered mail, of the action, the name of the court in which the case is brought, the case number of such action, and a copy of the pleadings. If an action is brought by either the agency, or the recipient or the recipient's legal representative, the other may, at any time before trial on the merits, become a party to, or shall consolidate his or her action with the other if brought independently. Unless waived by the other, the recipient, or his or her legal representative, or the agency shall provide notice to the other of the intent to dismiss at least 21 days prior to voluntary dismissal of an action against a third party. Notice to the agency shall be sent to an address set forth by rule. Notice to the recipient or his or her legal representative, if represented by an attorney, shall be sent to the attorney, and, if not represented, then to the last known address of the recipient or his or her legal representative.

(b) An action by the agency to recover damages in tort under this subsection, which action is derivative of the rights of the recipient or his or her legal representative, shall not constitute a waiver of sovereign immunity pursuant to section 768.14.

(c) In the event of judgment, award, or settlement in a claim or action against a third party, the court shall order the segregation of an amount sufficient to repay the agency's expenditures for medical assistance, plus any other amounts permitted under this section, and shall order such amounts paid directly to the agency.

(d) No judgment, award, or settlement in any action by a recipient or his or her legal representative to recover damages for injuries or other third-party benefits, when the agency has an interest, shall be

satisfied without first giving the agency notice and a reasonable opportunity to file and satisfy its lien, and satisfy its assignment and subrogation rights or proceed with any action as permitted in this section.

(e) Except as otherwise provided in this section, notwithstanding any other provision of law, the entire amount of any settlement of the recipient's action or claim involving third-party benefits, with or without suit, is subject to the agency's claims for reimbursement of the amount of medical assistance provided and any lien pursuant thereto.

(f) Notwithstanding any provision in this section to the contrary, in the event of an action in tort against a third party in which the recipient or his or her legal representative is a party which results in a judgment, award, or settlement from a third party, the amount recovered shall be distributed as follows:

1. After attorney's fees and taxable costs as defined by the Florida Rules of Civil Procedure, one-half of the remaining recovery shall be paid to the agency up to the total amount of medical assistance provided by Medicaid.
2. The remaining amount of the recovery shall be paid to the recipient.
3. For purposes of calculating the agency's recovery of medical assistance benefits paid, the fee for services of an attorney retained by the recipient or his or her legal representative shall be calculated at 25 percent of the judgment, award, or settlement.
4. Notwithstanding any provision of this section to the contrary, the agency shall be entitled to all medical coverage benefits up

to the total amount of medical assistance provided by Medicaid. For purposes of this paragraph, "medical coverage" means any benefits under health insurance, a health maintenance organization, a preferred provider arrangement, or a prepaid health clinic, and the portion of benefits designated for medical payments under coverage for workers' compensation, personal injury protection, and casualty.

(g) In the event that the recipient, his or her legal representative, or the recipient's estate brings an action against a third party, notice of institution of legal proceedings, notice of settlement, and all other notices required by this section or by rule shall be given to the agency, in Tallahassee, in a manner set forth by rule. All such notices shall be given by the attorney retained to assert the recipient's or legal representative's claim, or, if no attorney is retained, by the recipient, the recipient's legal representative, or his or her estate.

(h) Except as otherwise provided in this section, actions to enforce the rights of the agency under this section shall be commenced within 5 years after the date a cause of action accrues, with the period running from the later of the date of discovery by the agency of a case filed by a recipient or his or her legal representative, or of discovery of any judgment, award, or settlement contemplated in this section, or of discovery of facts giving rise to a cause of action under this section. Nothing in this paragraph affects or prevents a proceeding to enforce a lien during the existence of the lien as set forth in subparagraph (6)(c)9.

19. Section 409.910(17) establishes the procedure by which a recipient can contest the medical expense damages payable to the agency and provides as follows:

(a) A recipient or his or her legal representative or any person representing, or acting as agent for, a recipient or the recipient's legal representative, who has notice, excluding notice charged solely by reason of the recording of the lien pursuant to paragraph (6)(c), or who has actual knowledge of the agency's rights to third-party benefits under this section, who receives any third-party benefit or proceeds for a covered illness or injury, must, within 60 days after receipt of settlement proceeds, pay the agency the full amount of the third-party benefits, but not more than the total medical assistance provided by Medicaid, or place the full amount of the third-party benefits in an interest-bearing trust account for the benefit of the agency pending an administrative determination of the agency's right to the benefits under this subsection. Proof that such person had notice or knowledge that the recipient had received medical assistance from Medicaid, and that third-party benefits or proceeds were in any way related to a covered illness or injury for which Medicaid had provided medical assistance, and that such person knowingly obtained possession or control of, or used, third-party benefits or proceeds and failed to pay the agency the full amount required by this section or to hold the full amount of third-party benefits or proceeds in an interest-bearing trust account pending an administrative determination, unless adequately explained, gives rise to an inference that such person knowingly failed to credit the state or its agent for payments received from social security, insurance, or other sources, pursuant to s. 414.39(4)(b), and acted with the intent set forth in s. 812.014(1).

(b) 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. (Emphasis supplied).

20. The Medicaid Third-Party Liability Act does not provide that a Medicaid lien may include medical expenses unrelated to those underlying the basis for recovery of damages from a liable third party. The title of section 409.910 is "[r]esponsibility for payments on behalf of Medicaid eligible persons when other parties are liable." In specifically

designating the benefits that must be reported to the Respondent by a recipient of such benefits, section 409.910(17)(a) identifies the benefits as those "in any way related to a covered illness or injury for which Medicaid had provided medical assistance."

21. The evidence in this case establishes by clear and convincing evidence that Medicaid provided a lesser amount of medical assistance related to injuries for which third-party liability has been determined than the total included within the Medicaid lien.

22. Medicaid expended \$32,076.02 to treat the shoulder damage and nerve injury that resulted from the birth process. The Petitioner litigated a medical malpractice case against third parties involved in the birth and obtained a financial settlement. Medicaid is entitled to be reimbursed for the funds expended to treat the deficit resulting from the shoulder damage and nerve injury.

23. The disorder which resulted in Medicaid expenditures for speech therapy services is unrelated to the medical malpractice case. There has been no determination of third-party liability related to a speech disorder. The Medicaid Third-Party Liability Act does not support inclusion within the Medicaid lien of the \$5,603.54 expended for speech therapy services.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED that the Agency for Health Care Administration is entitled to reimbursement from the Petitioner in the amount of \$32,076.02 in satisfaction of its Medicaid lien.

DONE AND ORDERED this 9th day of November, 2015, in Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 9th day of November, 2015.

ENDNOTE

^{1/} All statutory references are to Florida Statutes (2015), unless otherwise indicated.

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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.