STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ANA PATRICIA DELGADO, Individually, as mother of ASHLEY NUNEZ, deceased, and as Personal Representative of the Estate of ASHLY NUNEZ; and JOHN D. NUNEZ, Individually, and as father of ASHLY NUNEZ, deceased,

Petitioners,

vs. Case No. 16-2084MTR

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

FINAL ORDER

Pursuant to notice, a final hearing was held in this case via video teleconference between sites in Tallahassee and Miami, Florida, on August 5, 2016, before Garnett W. Chisenhall, Jr., a duly-designated Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Floyd B. Faglie, Esquire
Staunton and Faglie, P.L.
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Monticello, Florida 32344

For Respondent: Alexander R. Boler, Esquire
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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 ("AHCA"), for medical expenses paid on behalf of Ashley Nunez pursuant to section 409.910, Florida Statutes (2016),[1/] from settlement proceeds received by Petitioners from third parties.

PRELIMINARY STATEMENT

On April 18, 2016, Petitioners filed a "Petition to Determine Amount Payable to [AHCA] in Satisfaction of Medicaid Lien," by which they challenged AHCA's lien for recovery of medical expenses paid by Medicaid in the amount of $357,407.05. The basis for the challenge was the assertion that the application of section 409.910(17)(b) warranted reimbursement of a lesser portion of the total third-party settlement proceeds than the amount calculated by AHCA pursuant to the formula established in section 409.910(11)(f).

The final hearing was scheduled for July 26, 2016. In response to a Joint Motion for Continuance filed on May 17, 2016, the undersigned continued the final hearing to August 5, 2016, and the final hearing was held as scheduled.

The parties filed a Joint Pre-hearing Stipulation in which they identified stipulated facts for which no further proof would be necessary. The stipulated facts have been accepted and considered in the preparation of this Final Order.

During the final hearing, Petitioners presented the testimony of Tomas F. Gamba, Esquire, and Herman J. Russomanno, Esquire, and the undersigned accepted Petitioners' Exhibits 1 through 9 into evidence. AHCA presented the testimony of James H.K. Bruner, Esquire, and the undersigned accepted AHCA's Exhibit A into evidence.

The undersigned granted the parties' joint *ore tenus* motion to seal Petitioners' Exhibits 1 and 6, and Respondent's Exhibit A.

The Transcript from the final hearing was filed on September 7, 2016. On September 19, 2016, the parties filed a joint motion requesting that the deadline for their proposed final orders be extended to September 21, 2016. The undersigned granted that joint motion, and the parties timely filed their Proposed Final Orders.

On September 22, 2016, AHCA filed an "Unopposed Motion to Amend Proposed Final Order" along with its Amended Proposed Final Order. Via an Order issued on September 23, 2016, the undersigned granted that motion.

Both of the Proposed Final Orders have been duly considered in the preparation of this Final Order.

FINDINGS OF FACT

Facts Pertaining to the Underlying Personal Injury Litigation and the Medicaid Lien

1. On February 13, 2010, Ashley Nunez ("Ashley"), who was three years old at the time, presented to a hospital emergency room with a fever. A chest X-ray indicated that Ashley had left lobe pneumonia.

2. The hospital ordered no blood work or blood cultures and did not investigate the cause of Ashley's pneumonia.

3. The hospital discharged Ashley with a prescription for Azithromycin.

4. By February 14, 2010, Ashley's fever was 102.9 degrees, and Ashley's mother took her to a pediatrician. Rather than attempting to discover the cause of the fever, the pediatrician instructed Ashley's mother that the prescription needed time to work and instructed her to bring Ashley back if the fever persisted.

5. On February 16, 2010, Ashley's aunt returned her to the pediatrician because Ashley's fever was persisting and she had developed abdominal pain. Due to a concern that Ashley was suffering from appendicitis, the pediatrician referred her to an emergency room.

6. Later that day, Ashley's mother returned her to the emergency room that had treated Ashley on February 13, 2010.

A second chest x-ray revealed that Ashley's pneumonia had gotten much worse, and the hospital admitted her.

7. Ashley's respiratory condition continued to deteriorate, and blood cultures confirmed that she had streptococcus pneumonia.

8. Two days after her admission, the hospital decided to transfer Ashley to a hospital that could provide a higher level of care.

9. On February 18, 2010, an ambulance transferred Ashley to a second hospital. Even though Ashley's respiratory condition continued to deteriorate, the paramedics and hospital transport team did not intubate her.

10. Upon her arrival at the second hospital, Ashley had suffered a cardiopulmonary arrest and had to be resuscitated with CPR and medication.

11. The lack of oxygen to Ashley's brain and other organs resulted in catastrophic harm leading Ashley to be intubated, placed on a ventilator, fed through a gastric feeding tube, and placed on dialysis.

12. The second hospital discharged Ashley two and a half months later. While she no longer required a ventilator or dialysis, the hypoxic brain injury and cardiopulmonary arrest left Ashley in a severely compromised medical condition. Ashley

was unable to perform any activities of daily living and was unable to stand, speak, walk, eat, or see.

13. Following her discharge from the second hospital, Ashley required continuous care. She was under a nurse's care for 12 hours a day, and Ashley's mother (Anna Patricia Delgado) cared for her during the remaining 12 hours each day.

14. On February 23, 2011, Ashley died due to complications resulting from the hypoxic brain injury.

15. Ashley was survived by her parents, Ms. Delgado and John Nunez.

16. Medicaid (through AHCA) paid $357,407.05 for the medical care related to Ashley's injury.

17. Ashley's parents paid $5,805.00 for her funeral.

18. As the Personal Representative of Ashley's Estate, Ms. Delgado brought a wrongful death action against the first emergency room doctor who treated Ashley, the pediatrician, a pediatric critical care intensivist who treated Ashley after her admission to the first hospital, the two hospitals that treated Ashley, and the ambulance company that transported Ashley to the second hospital.

19. AHCA received notice of the wrongful death action and asserted a Medicaid lien against Ashley's Estate in order to recover the $357,407.05 paid for Ashley's past medical expenses. See § 409.910(6)(b), Fla. Stat. (providing that "[b]y applying

for or accepting medical assistance, an applicant, recipient, or legal representative automatically assigns to [AHCA] any right, title, and interest such person has to any third party benefit . . . .").

20. Ms. Delgado ultimately settled the wrongful death action through a series of confidential settlements totaling $2,250,000. No portion of that settlement represents reimbursements for future medical expenses.

21. AHCA has not moved to set aside, void, or otherwise dispute those settlements.

22. Section 409.910(11)(f) sets forth a formula for calculating the amount that AHCA shall recover in the event that a Medicaid recipient or his or her personal representative initiates a tort action against a third party that results in a judgment, award, or settlement from a third party.

23. Applying the formula in section 409.910(11)(f) to the $2,250,000 settlement, results in AHCA being owed $791,814.84 in order to satisfy its lien.[2/]

24. Because Ashley's medical expenses of $357,407.05 were less than the amount produced by the section 409.910(11)(f) formula, AHCA is seeking to recover $357,407.05 in satisfaction of its Medicaid lien. See § 409.910(11)(f)4., Fla. Stat. (providing that "[n]otwithstanding any provision in this section to the contrary, [AHCA] shall be entitled to all medical

coverage benefits up to the total amount of medical assistance provided by Medicaid.").

Valuation of the Personal Injury Claim

25. Tomas Gamba represented Petitioners during their wrongful death action.

26. Mr. Gamba has practiced law since 1976 and is a partner with Gamba, Lombana and Herrera-Mezzanine, P.A., in Coral Gables, Florida.

27. Mr. Gamba has been Board Certified in Civil Trial Law by the Florida Bar since 1986. Since the mid-1990s, 90 percent of Mr. Gamba's practice has been devoted to medical malpractice. Over the course of his career, Mr. Gamba has handled 60 to 70 jury trials as first chair, including catastrophic injury cases involving children.

28. In 2015, the Florida Chapter of the American Board of Trial Advocates named Mr. Gamba its Trial Lawyer of the Year.

29. Mr. Gamba is a member of several professional organizations, such as the American Board of Trial Advocates, the American Association for Justice, the Florida Board of Trial Advocates, the Florida Justice Association, and the Miami-Dade County Justice Association.

30. Mr. Gamba was accepted in this proceeding as an expert regarding the valuation of damages suffered by injured parties.

31. Mr. Gamba testified that Petitioners elected against proceeding to a jury trial (in part) because of the family's need for closure and the stress associated with a trial that could last up to three weeks.

32. Mr. Gamba also noted that the two hospitals that treated Ashley had sovereign immunity, and (at the time pertinent to the instant case) their damages were capped at $200,000 each. In order to collect any damages above the statutory cap, Petitioners would have had to file a claims bill with the Florida Legislature, and Mr. Gamba testified that "the legislature would be very difficult."

33. As for the three treating physicians who were defendants in the suit, Mr. Gamba testified that Petitioners achieved a favorable settlement by agreeing to accept $2 million when the physicians' combined insurance coverage was only $3 million.

34. The decision to settle was also influenced by the fact that Ashley had a pre-existing condition known as hemolytic uremic syndrome, a blood disorder. During discovery, Mr. Gamba learned that the defense was prepared to present expert testimony that the aforementioned condition made it impossible for the defendants to save Ashley.

35. Finally, Mr. Gamba testified that 75 percent of medical malpractice cases heard by juries result in defense verdicts.

36. As for whether the $2,250,000 settlement fully compensated Ashley's estate and her parents for the full value of their damages, Mr. Gamba was adamant that the aforementioned sum was "a small percentage of what we call the full measure of damages in this particular case."

37. Mr. Gamba opined that $8,857,407.05 was the total value of the damages that Ashley's parents and her Estate could have reasonably expected to recover if the wrongful death action had proceeded to a jury trial.

38. Mr. Gamba explained that Florida's Wrongful Death Act enabled Ashley's parents to recover for the death of their child and for the pain and suffering they incurred from the date of Ashley's injury. According to Mr. Gamba, $4,250,000 represented a "conservative" estimate of each parent's individual claim, and the sum of their claims would be $8,500,000.

39. Mr. Gamba further explained that Ashley's Estate's claim would consist of the $357,407.05 in medical expenses paid by Medicaid, resulting in an estimate for total damages of $8,857,407.05.

40. Mr. Gamba's opinion regarding the value of Petitioners' damages was based on "roundtable" discussions with

members of his firm and discussions with several attorneys outside his firm who practice in the personal injury field.

41. Mr. Gamba's opinion was also based on 10 reported cases contained in Petitioners' Exhibit 9. According to Mr. Gamba, each of those reported cases involve fact patterns similar to that of the instant case. Therefore, Gamba testified that the jury verdicts in those cases are instructive for formulating an expectation as to what a jury would have awarded if Ashley's case had proceeded to trial.

42. In sum, Mr. Gamba testified that the $2,250,000 settlement represents a 25.4 percent recovery of the $8,857.407.05 of damages that Ashley's parents and Ashley's Estate actually incurred. Therefore, only 25.4 percent (i.e, $90,781.30) of the $357,407.05 in Medicaid payments for Ashley's care was recovered.

43. Mr. Gamba opined that allocating $90,781.39 of the total settlement to compensate Medicaid for past medical expenses would be reasonable and rational. In doing so, he stated that, "And I think both – if the parents are not getting their full measure of damages, I don't think the health care provider, in this case Medicaid, that made the payment should get, you know, every cent that they paid out, when mother and father are getting but a small percentage of the value of their claim."

44. Petitioners also presented the testimony of Herman J. Russomanno.

45. Mr. Russomanno has practiced law since 1976 and is a senior partner with the Miami law firm of Russomanno and Borrello, P.A. Mr. Russomanno has been Board Certified in Civil Trial Law by the Florida Bar since 1986, and he has served as the Chairman of the Florida Bar's Civil Trial Certification Committee. Mr. Russomanno is also certified in Civil Trial Practice by the National Board of Trial Advocates and has taught trial advocacy and ethics for 33 years as an adjunct professor at the St. Thomas University School of Law.

46. Mr. Russomanno is a past president of the Florida Bar and belongs to several professional organizations, such as the Florida Board of Trial Advocates, the American Board of Trial Advocates, the Dade County Bar Association, and the Miami-Dade County Trial Lawyers Association.

47. Since 1980, Mr. Russomanno's practice has been focused on medical malpractice, and he has represented hundreds of children who suffered catastrophic injuries.

48. Mr. Russomanno was accepted in the instant case as an expert in the evaluation of damages suffered by injured parties.

49. Prior to his testimony at the final hearing, Mr. Russomanno reviewed Ashley's medical records, the hospital discharge summaries, and the Joint Pre-hearing Stipulation filed

in this proceeding. He also discussed Ashley's case with Mr. Gamba and reviewed Mr. Gamba's file from the wrongful death action.

50. Mr. Russomanno also viewed videos of Ashley taken before and after her injury so he could gain an understanding of the severity of Ashley's injury and the suffering experienced by her parents.

51. Mr. Russomanno credibly testified that the damages incurred by Ashley's parents were between $4,250,000 and $7,500,000 for each parent.

52. Mr. Russomanno echoed Mr. Gamba's testimony by stating that the $2,250,000 settlement did not fully compensate Ashley's parents and her Estate for their damages.

53. AHCA presented the testimony of James H.K. Bruner.

54. Mr. Bruner has practiced law since 1983 and is licensed to practice law in Florida, New York, Maine, and Massachusetts.

55. Mr. Bruner is a member of professional organizations such as the American Health Lawyers Association and the Trial Lawyers Sections of the Florida Bar.

56. Between 2003 and 2005, Mr. Bruner served as the Department of Children and Families' risk attorney. That position required him to evaluate personal injury actions filed

against the Department and assess the Department's exposure to liability.

57. Based on his experience in evaluating approximately 200 cases for the Department, Mr. Bruner authored the Department's manual on risk management and provided training to Department employees on risk management issues.

58. Mr. Bruner has served as the Director of AHCA's Bureau of Strategy and Compliance. In that position, he dealt specifically with third-party liability collections and Medicaid liens.

59. Beginning in 2008, Mr. Bruner worked for ACS (now known as Xerox Recovery Services) and was engaged in attempting to recover Medicaid liens from personal injury settlements.

60. Over the last several years, Mr. Bruner has spoken at seminars about Medicaid lien resolution and authored publications on that topic.

61. Since April of 2013, Mr. Bruner has been in private legal practice as a solo practitioner. He describes himself as a "jack of all trades" who engages in a "general practice."

62. Over the last 20 years, Mr. Bruner has not handled a jury trial involving personal injury; and, over the last four years, he has not negotiated a personal injury settlement.

63. The undersigned accepted Mr. Bruner as an expert witness for evaluating the cases contained in Petitioners'

Exhibit 9 and pointing out distinctions between those cases and the instant case.

64. Mr. Bruner did not offer testimony regarding the specific value of the damages suffered by Petitioners.

Findings Regarding the Testimony Presented at the Final Hearing

65. Regardless of whether the reported cases in Petitioners' Exhibit 9 are analogous to or distinguishable from the instant case, the undersigned finds that the testimony from Mr. Gamba and Mr. Russomanno was compelling and persuasive. While attaching a value to the damages that a plaintiff could reasonably expect to receive from a jury is not an exact science, Mr. Gamba and Russomanno's substantial credentials and their decades of experience with litigating personal injury lawsuits make them very compelling witnesses regarding the valuation of damages suffered by injured parties such as Petitioners.

66. Accordingly, the undersigned finds that Petitioners proved by clear and convincing evidence that $90,781.39 constitutes a fair and reasonable recovery for past medical expenses actually paid by Medicaid. However, and as discussed below, AHCA (as a matter of law) is entitled to recover $357,407.05 in satisfaction of its Medicaid lien.[3/]

CONCLUSIONS OF LAW

67. 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.

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

69. 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).

70. "The Medicaid program is a cooperative one. The Federal Government pays between 50 percent and 83 percent of the costs a state incurs for patient care. In return, the State pays its portion of the costs and complies with certain statutory requirements for making eligibility determinations, collecting and maintaining information, and administering the program." Estate of Hernandez v. Ag. for Health Care Admin., 190 So. 3d 139, 141-42 (Fla. 3rd DCA 2016)(internal citations omitted).

71. Though participation is optional, once a State elects to participate in the Medicaid program, it must comply with federal requirements. Harris, 448 U.S. at 301.

72. One condition for receipt of federal Medicaid funds requires states to seek reimbursement for medical expenses incurred on behalf of Medicaid recipients,[4/] who later recover from legally liable third parties. See Ark. Dep't of Health & Human Servs. v. Ahlborn, 547 U.S. 268, 276 (2006). See also Estate of Hernandez, 190 So. 3d at 142 (noting that one such requirement is that "each participating state implement a third party liability provision which requires the state to seek reimbursement for Medicaid expenditures from third parties who are liable for medical treatment provided to a Medicaid recipient").

73. Consistent with this federal requirement, the Florida Legislature enacted section 409.910, designated as the "Medicaid Third-Party Liability Act," 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, award, or settlement from a third party. Smith v. Ag. for Health Care Admin., 24 So. 3d 590 (Fla. 5th DCA 2009). See also Davis v. Roberts, 130 So. 3d 264, 266 (Fla. 5th DCA 2013)(stating that in order "[t]o comply with federal directives the Florida legislature enacted section 409.910, Florida Statutes, which authorizes the State to recover from a personal injury settlement money that the State paid for the plaintiff's medical care prior to recovery.").

74. Section 409.910(1) sets forth the Florida Legislature's clear intent that Medicaid be repaid in full for medical care furnished to Medicaid recipients by providing that:

> 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.

75. In addition, the Florida Legislature has authorized AHCA to recover the monies paid from any third party, the recipient, the provider of the recipient's medical services, and any person who received the third-party benefits[5/]:

> (7) The agency shall recover the full amount of all medical assistance provided by Medicaid on behalf of the recipient to the full extent of third-party benefits.

> (a) Recovery of such benefits shall be collected directly from:
>
> 1. Any third party;
>
> 2. The recipient or legal representative, if he or she has received third-party benefits;
>
> 3. The provider of a recipient's medical services if third-party benefits have been recovered by the provider; notwithstanding any provision of this section, to the contrary, however, no provider shall be required to refund or pay to the agency any amount in excess of the actual third-party benefits received by the provider from a third-party payor for medical services provided to the recipient; or
>
> 4. Any person who has received the third-party benefits.

See § 409.910(7), Fla. Stat.

76. AHCA's efforts to recover the full amount paid for medical assistance is facilitated by section 409.910(6)(a), which provides that AHCA:

> [I]s automatically subrogated to any rights that an applicant, recipient, or legal representative has to any third-party benefit for the full amount of medical assistance provided by Medicaid. Recovery pursuant to the subrogation rights created hereby shall not be reduced, prorated, or applied to only a portion of a judgment, award, or settlement, but is to provide full recovery by the agency from any and all third-party benefits. Equities of a recipient, his or her legal representative, a recipient's creditors, or health care providers shall not defeat, reduce, or prorate recovery by the agency as to its

> subrogation rights granted under this paragraph.

See also § 409.910(6)(b)2., Fla. Stat. (providing that AHCA "is a bona fide assignee for value in the assigned right, title, or interest, and takes vested legal and equitable title free and clear of latent equities in a third person. Equities of a recipient, the recipient's legal representative, his or her creditors, or health care providers shall not defeat or reduce recovery by the agency as to the assignment granted under this paragraph").

77. AHCA's efforts are also facilitated by the fact that AHCA has "an automatic lien for the full amount of medical assistance provided by Medicaid to or on behalf of the recipient for medical care furnished as a result of any covered injury or illness by which a third party is or may be liable, upon the collateral, as defined in s. 409.901." § 409.910(6)(c), Fla. Stat.

78. This Medicaid lien is iron-clad. For example, section 409.901(13) provides that no settlement impairs the lien:

> No action of the recipient shall prejudice the rights of the agency under this section. No settlement, agreement, consent decree, trust agreement, annuity contract, pledge, security arrangement, or any other device, hereafter collectively referred to in this subsection as a "settlement agreement," entered into or consented to by the recipient or his or her legal representative shall impair the agency's rights. However,

> in a structured settlement, no settlement agreement by the parties shall be effective or binding against the agency for benefits accrued without the express written consent of the agency or an appropriate order of a court having personal jurisdiction over the agency.

79. Federal law gives living Medicaid recipients protection from the Medicaid lien. 42 U.S.C. § 1396p(a)(1), the "anti-lien statute," provides that "[n]o lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan," except under limited circumstances. (emphasis added).

80. However, that protection does not extend to the estate of a Medicaid recipient or to a beneficiary in a wrongful death action. As recently explained by the Fourth District Court of Appeal in Goheagan v. Perkins, 197 So. 3d 112, 120 (Fla. 4th DCA 2016):

> The plain language of section 1396p(a)(1) clearly reflects Congress' intent that the anti-lien statute apply only to recoveries by Medicaid recipients who are *living* when the settlement or judgment against the third party is obtained, and not to recoveries made by an estate or beneficiary in a wrongful death action. The anti-lien statute does not apply to preempt the state statute in all cases, and thus does not prohibit a state from imposing a lien against the *deceased* recipient's

> recovery from third parties for the full amount paid for medical expenses.

(emphasis in original).

81. As for why Congress may have chosen to limit the anti-lien statute's protection to living Medicaid recipients, the Goheagan court opined that:

> We can envision several valid reasons why a different recovery framework might be applied to a survival action as opposed to a wrongful death action. In a survival action, the need to provide greater protection to a Medicaid recipient's personal assets could be based upon a desire to maximize the recipient's available assets received from third parties available to pay non-medical or other needs. This would further a legitimate government interest by allowing such recipients to keep more of their property, including any payments from third parties received during their lifetime, with the goal of helping them maintain their standard of living as long as possible without the need to rely on additional forms of public assistance. Such concerns do not apply when assets or third party payments are received by an estate or its beneficiaries rather than by a living person.
>
> Also, while a recipient is still alive, they may incur unexpected or uncovered medical expenses in the future. Allowing recipients to keep more unencumbered property increases the likelihood that those needs can be met from the recipient's available resources. Upon death, a recipient no longer incurs medical or non-medical expenses, and the amount of expenditures will be fixed.
>
> The plain wording of the anti-lien statute evinces Congress' intent to protect the needs of living Medicaid recipients rather

> than various third parties. By allowing states to recover these expenditures, Congress also clearly intended to protect the public fisc over any derivative interests that might inure to the benefit of estates, beneficiaries, or survivors of a decedent. As the Court has stated in the past, the judiciary's "task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, 'that language must ordinarily be regarded as conclusive.'" Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570, 102 S. Ct. 3245, 73 L. Ed. 2d 973 (1982) (quoting Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108, 100 S. Ct. 2051, 64 L. Ed. 2d 766 (1980)). Our decision today gives effect to Congress' will, in which the state's financial resources were clearly a major consideration, just as they are for state courts on such issues as well.

Goheagan, 197 So. 3d at 121-22.

82. The amount to be recovered by AHCA from a judgment, award, or settlement from a third party is determined by the formula in section 409.910(11)(f). Ag. for Health Care Admin. v. Riley, 119 So. 3d 514, 515 n.3 (Fla. 2d DCA 2013).

83. Section 409.910(11)(f) provides:

> 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.

84. In the instant case, applying the formula in section 409.910(11)(f) to the $2,250,000 settlement results in AHCA being owed $791,814.84 in order to satisfy the lien. However, because Ashley's medical expenses of $357,407.05 were less than the $791,814.84, AHCA is seeking to recover $357,407.05 in satisfaction of its Medicaid lien. See § 409.910(11)(f)4., Fla. Stat.

85. As noted above, section 409.910(6)(a) and (b)2., prohibits the Medicaid lien from being reduced because of

equitable considerations. However, when AHCA has not participated in or approved a settlement, the administrative procedure created by section 409.910(17)(b) serves as a 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).

86. Section 409.910(17)(b) provides, in pertinent part, 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) . . . . 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 added).

87. 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)(stating 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").

88. However, the plain language of section 409.910(17)(b) clearly indicates that this administrative procedure 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), is only available to "a recipient." See § 409.910(17)(b), Fla. Stat. (providing 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)"). See also Lee Cnty. Elec. Coop. v. Jacobs, 820 So. 2d 297, 303 (Fla. 2002)(stating that "[w]hen a statute is clear and unambiguous, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent.").

89. This conclusion is supported by the fact that the Florida Legislature expressly made section 409.910(17)(a) applicable to people other than the Medicaid recipient. See § 409.910(17)(a), Fla. Stat. (providing that "[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.")(emphasis added).

90. "It is a general canon of statutory construction that, when the legislature includes particular language in one section of a statute but not in another section of the same statute, the omitted language is presumed to have been excluded intentionally." State v. E.M., 141 So. 3d 682, 685 (Fla. 4th DCA 2014)(concluding that "[t]he legislature specifically

mentioned the two methods for a student to qualify for a potential waiver of discipline, but in describing the scenario in which a student's statements become inadmissible, the legislature referred only to the scenario in which the information divulged leads to the arrest and conviction of the person who supplied the controlled substance, which would be someone other than the student. Therefore, the plain meaning of the statute indicates that students who would qualify for a potential waiver of discipline under method two (admitting to his or her own unlawful possession or use of drugs) do not receive the same protection (inadmissibility of incriminating statements) as students who would qualify under method one (giving information that leads to the arrest and conviction of another.")).

91. Because Ashley is deceased and neither Ms. Delgado nor Mr. Nunez is a "recipient" within the meaning of chapter 409, the administrative procedure 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) is not available in the instant case.

92. Also, given that Petitioners' $2,250,000 settlement amounts to a "third-party benefit," within the meaning of section 409.901(28), and section 409.910(7), empowers AHCA to

recover third-party benefits from "[a]ny person who has received the third-party benefits," AHCA is thus entitled to recover all of the $357,407.05 paid for Ashley's past medical expenses.

93. Similar results were recently reached by the Third and Fourth District Courts of Appeal in cases involving deceased Medicaid recipients. See Goheagan, 197 So. 3d at 122 (holding that "the trial court correctly ruled that AHCA is entitled to recover the full amount of its Medicaid lien because the federal Medicaid Act's anti-lien statute applies only to living Medicaid recipients"); Estate of Hernandez, 190 So. 3d at 145 (holding that in cases where a Medicaid lien is imposed against a wrongful death settlement, a personal representative does not have the right to allocate the settlement funds in a manner that causes AHCA to receive less than the full amount of its expenditures for medical assistance).

94. While this outcome may seem inequitable, the Florida Legislature has clearly indicated that equity cannot serve as a basis for reducing the Medicaid lien. See § 409.910(6)(a) & (6)(b)2., Fla. Stat.

95. Also, the undersigned is not at liberty to rewrite section 409.910, in order to reach a desired result. See generally State v. Jett, 626 So. 2d 691, 693 (Fla. 1993) (stating "[w]e agree with the majority below that this language is unambiguous. It is a settled rule of statutory construction

that unambiguous language is not subject to judicial construction, however wise it may seem to alter the plain language. While the dissent's view below has much to commend it, we find that the decision whether or not to engraft that view into the Florida Statutes is for the legislature. We trust that if the legislature did not intend the result mandated by the statute's plain language, the legislature itself will amend the statute at the next opportunity."); Weber v. Dobbins, 616 So. 2d 956, 959-60 (Fla. 1993)(explaining that "[t]he reason for the rule that courts must give statutes their plain and ordinary meaning is that only one branch of government may write laws. Just as a governor who chooses to veto a bill may not substitute a preferable enactment in its place, courts may not twist the plain wording of statutes in order to achieve particular results. Even when courts believe the legislature intended a result different from that compelled by the unambiguous wording of a statute, they must enforce the law according to its terms. A legislature must be presumed to mean what it has plainly expressed, and if an error in interpretation is made, it is up to the legislature to rewrite the statute to accurately reflect legislative intent.")(Barkett, C.J., dissenting)(citations omitted).[6/]

ORDER

Consistent with the above Findings of Fact and Conclusions of Law, it is hereby

ORDERED that the Agency for Health Care Administration is entitled to $357,407.05 in satisfaction of its Medicaid lien.

DONE AND ORDERED this 30th day of November, 2016, in Tallahassee, Leon County, Florida.

Garnett Chisenhall

G. W. CHISENHALL
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of November, 2016.

ENDNOTES

[1/] Unless stated otherwise, all statutory references will be to the 2016 version of the Florida Statutes.

[2/] AHCA determined that $103,870.32 of the costs incurred in litigating the wrongful death action were taxable costs for purposes of the section 409.910(11)(f) calculation.

[3/] As discussed in the Conclusions of Law section, the undersigned concludes that Petitioners cannot utilize the administrative procedure in section 409.910(17)(b) for determining whether a lesser portion of a total recovery should be allocated as reimbursement for medical expenses. If that conclusion is ultimately appealed and reversed, then a remand

will be unnecessary given the undersigned's finding that $90,781.39 constitutes a fair, reasonable, and accurate share of the total recovery for past medical expenses actually paid by Medicaid

[4/] Section 409.901(19) defines "Medicaid recipient" or "recipient" as "an individual whom the Department of Children and Families, or, for Supplemental Security Income, by the Social Security Administration, determines is eligible, pursuant to federal and state law, to receive medical assistance and related services for which the agency may make payments under the Medicaid program. For the purposes of determining third-party liability, the term includes an individual formerly determined to be eligible for Medicaid, an individual who has received medical assistance under the Medicaid program, or an individual on whose behalf Medicaid has become obligated."

[5/] Section 409.901(28) defines "third-party benefit," in pertinent part, as "any benefit that is or may be available at any time through contract, court award, judgment, settlement, agreement, or any arrangement between a third party and any person or entity, including, without limitation, a Medicaid recipient, a provider, another third party, an insurer, or the agency, for any Medicaid-covered injury, illness, goods, or services, including costs of medical services related thereto, for personal injury or for death of the recipient . . . ."

[6/] The dispute in the instant case has focused on section 409.910(17)(b), and the aforementioned subsection was added during the 2013 legislative session. See Ch. 2013-150, Fla. Stat. (2013). However, even if the instant case were to be governed by the law in effect prior to the 2013 amendment, Goheagan and Estate of Hernandez indicate that the outcome of the instant case would be the same.

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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.