STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SHAMARION MANLEY, A MINOR, BY AND THROUGH HIS PARENTS AND NATURAL GUARDIANS, VICTORIA MANLEY AND SHARMANE MANLEY,

Petitioner,

vs. Case No. 16-4655MTR

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_______________________________/

FINAL ORDER

A duly-noticed final hearing was held in this case on October 20, 2016, via video teleconference in Tallahassee and Lauderdale Lakes, Florida, before W. David Watkins, a designated Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

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

For Respondent: Alexander R. Boler, Esquire
Xerox Recovery Services
Suite 300
2073 Summit Lake Drive
Tallahassee, Florida 32317

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 Petitioner, Shamarion Manley, from a personal injury settlement received by Petitioner from a third party.

PRELIMINARY STATEMENT

On August 16, 2016, Petitioner filed a Petition to Determine Amount Payable to Agency for Health Care Administration in Satisfaction of Medicaid Lien, pursuant to section 409.910(17)(b), Florida Statutes. Thereafter, the matter was assigned to the undersigned administrative law judge to conduct a formal administrative hearing and enter a final order.

The matter was set for hearing to commence on October 20, 2016. On October 7, 2016, the undersigned granted Petitioner's Motion for Leave to Amend the Petition, and the First Amended Petition to Determine Amount Payable to Agency for Health Care Administration in Satisfaction of Medicaid Lien was substituted for the original Petition.

Prior to hearing, the parties filed a Joint Prehearing Stipulation (JPHS) which included numerous stipulated and admitted facts. To the extent relevant, those facts have been incorporated herein.

The hearing proceeded as scheduled, with Petitioner calling two witnesses, Scott M. Newmark, Esquire; and R. Vinson Barrett, Esquire. Petitioner's Exhibits 1 through 12 were admitted in evidence. Respondent did not enter in evidence any document or call any witnesses. Petitioner's evidence and testimony was unrebutted.

The one-volume Transcript of the hearing was filed on November 9, 2016. Petitioner and Respondent timely filed Proposed Final Orders on November 16, 2016. Both parties' Proposed Final Orders were considered by the undersigned in the preparation of this Final Order.

All references to the Florida Statutes are to the 2016 version, unless otherwise noted.

FINDINGS OF FACT

Based on the stipulations of the parties, evidence adduced at hearing, and the record as a whole, the following Findings of Fact are made:

1. On June 12, 2010, Shamarion Manley ("Shamarion") suffered a severe left brachial plexus injury, right humerus fracture, neurological injury, and cardiac arrest during his birth. He was hospitalized until July 7, 2010, when he was discharged home to the care of his parents. Due to his severe left brachial plexus injury and other injuries suffered during

birth, Shamarion is unable to use his left arm and hand and suffers from a speech impairment. (JPHS p. 8)

2. Shamarion's past medical expenses related to his injuries were paid in part by Medicaid and Sunshine State Health. Medicaid paid $74,061.27 in benefits and Sunshine State Health paid $106,656.23 in benefits. The amounts paid by Medicaid and Sunshine State Health, together with $22,118 in unpaid medical bills, constituted Shamarion's entire claim for past medical expenses. Accordingly, Shamarion's entire claim for past medical expenses was $202,835.50. (JPHS p. 8-9)

3. Shamarion, or others on his behalf, did not make payments in the past or in advance for Shamarion's future medical care, and no claim for damages was made for reimbursement, repayment, restitution, indemnification, or to be made whole for payments made in the past or in advance for future medical care.

4. Shamarion's parents and natural guardians, Victoria and Sharmane Manley, brought a medical malpractice action to recover all of Shamarion's damages, as well as their individual damages associated with their son's injury, against the medical providers allegedly responsible for Shamarion's injuries ("Defendants"). (JPHS p. 9)

5. Shamarion's parents compromised and settled the medical malpractice lawsuit with the Defendants for the amount of $410,000. (JPHS p. 9)

6. In making this settlement, the settling parties agreed that: 1) the settlement did not fully compensate Shamarion for all his damages; 2) Shamarion's damages had a value in excess of $2,250,000, of which $202,835.50 represented his claim for past medical expenses; and 3) allocation of $36,916.06 of the settlement to Shamarion's claim for past medical expenses was reasonable and proportionate. In this regard the two (2) Releases ("Releases") memorializing the settlement stated:

> Although it is acknowledged that this settlement does not fully compensate Shamarion Manley for all of the damages he has allegedly suffered, this settlement shall operate as a full and complete Release as to RELEASEES without regard to this settlement only compensating Shamarion Manley for a fraction of the total monetary value of his alleged damages. The parties agree that Shamarion Manley's alleged damages have a value in excess of $2,250,000, of which $202,835.50 represents Shamarion Manley's claim for past medical expenses. Given the facts, circumstances, and nature of Shamarion Manley's injuries and this settlement, the parties have agreed to allocate {$36,916.06}[1/] of this settlement to Shamarion Manley's claim for past medical expenses and allocate the remainder of the settlement towards the satisfaction of claims other than past medical expenses. This allocation is a reasonable and proportionate allocation based on the same ratio this settlement

> bears to the total monetary value of all Shamarion Manley's damages.
> Further, the parties acknowledge that Shamarion Manley may need future medical care related to his injuries, and some portion of this settlement may represent compensation for future medical expenses Shamarion Manley will incur in the future. However, the parties acknowledge that Shamarion Manley, or others on his behalf, have not made payments in the past or in advance for Shamarion Manley's future medical care and Shamarion Manley has not made a claim for reimbursement, repayment, restitution, indemnification, or to be made whole for payments made in the past or in advance for future medical care. Accordingly, no portion of this settlement represents reimbursement for future medical expenses.

(JPHS p. 9)

7. Because Shamarion was a minor, court approval of the settlement was required. Accordingly, on December 14, 2015, the Palm Beach County Circuit Court Judge handling the litigation of the medical malpractice action, the Honorable Edward Artau, approved the settlement by entering an Order on Plaintiffs' Petition for Approval of Settlement (Order Approving Settlement). (JPHS p. 10)

8. As a condition of Shamarion's eligibility for Medicaid, Shamarion assigned to AHCA his right to recover from liable third-parties medical expenses paid by Medicaid. See 42 U.S.C. § 1396a(a)(25)(H) and § 409.910(6)(b), Fla. Stat.

9. During the pendency of Shamarion's medical malpractice action, AHCA was notified of the action, and AHCA, through its collections contractor, Xerox Recovery Services, asserted a $74,061.27 Medicaid lien against Shamarion's cause of action and settlement of that action. (JPHS p. 9)

10. By letter of January 5, 2016, AHCA was notified by Shamarion's medical malpractice attorney of the settlement and provided a copy of the executed Releases, Order Approving Settlement, and itemization of $146,540.70 in litigation costs. This letter explained that Shamarion's damages had a value in excess of $2,250,000, and the $410,000 settlement represented only an 18.2 percent recovery of Shamarion's damages. Accordingly, he had recovered only 18.2 percent of his $202,835.50 claim for past medical expenses. This letter requested AHCA to advise as to the amount AHCA would accept in satisfaction of its Medicaid lien. (JPHS p. 10)

11. AHCA did not respond to Shamarion's attorney's letter of January 5, 2016. (JPHS p. 10)

12. AHCA did not file an action to set aside, void, or otherwise dispute Shamarion's settlement with the Defendants. (JPHS p. 10)

13. AHCA has not commenced a civil action to enforce its rights under section 409.910. (JPHS p. 10)

14. The Medicaid program spent $74,061.27 on behalf of Shamarion, all of which represents expenditures paid for Shamarion's past medical expenses. (JPHS p. 10)

15. No portion of the $74,061.27, paid by the Medicaid program on behalf of Shamarion, represents expenditures for future medical expenses, and AHCA did not make payments in advance for medical care. (JPHS p. 10)

16. AHCA has determined that $146,540.70 of Shamarion's litigation costs are taxable costs for purposes of the section 409.910(11)(f) formula calculation. (JPHS p. 11)

17. Subtracting the $146,540.70 in taxable costs and 25 percent in allowable attorney's fees, the section 409.910(11)(f) formula, applied to Shamarion's $410,000 settlement, requires payment of $80,479.65 to AHCA in satisfaction of its $74,061.27 Medicaid lien. Since the $80,479.65 formula amount is more than the $74,061.27 Medicaid lien, AHCA is seeking payment of the full $74,061.27 Medicaid lien from Shamarion's $410,000 settlement. (JPHS p. 11)

18. Petitioner has deposited the full Medicaid lien amount in an interest bearing account for the benefit of AHCA pending an administrative determination of AHCA's rights, and this constitutes "final agency action" for purposes of chapter 120, Florida Statutes, pursuant to section 409.910(17). (JPHS p. 11)

Testimony of Scott M. Newmark

19. Mr. Newmark has been an attorney for 30 years, and during that entire time he has practiced plaintiff personal injury and medical malpractice law. Mr. Newmark testified that he handles jury trials and routinely represents children who have suffered catastrophic injury, particularly at birth. He is a member of the Florida Justice Association, the Palm Beach Justice Association, and the Trial Lawyer Section of the Florida Bar. Mr. Newmark testified that he stays abreast of jury verdicts in his area and that he routinely makes assessments concerning the value of damages suffered by injured parties, explaining his process for these determinations. He testified that he has been accepted as an expert in the valuation of damages suffered by injured parties by DOAH in the past.

20. Mr. Newmark was accepted as an expert in the valuation of damages suffered by injured parties. He represented Shamarion and his parents relative to Shamarion's medical malpractice action. He explained that as part of his representation, he reviewed Shamarion's medical records, met with his doctors, met with experts, reviewed expert reports, and met with Shamarion and his parents many times. Mr. Newmark gave a detailed explanation of the injuries suffered by Shamarion during his birth. He explained that during the birth process, improper force was used and Shamarion suffered a brachial plexus

injury when the nerves in his left shoulder were ripped off the spinal column. As a result of this injury, he is unable to use his left arm and has no grip strength in his left hand.
Mr. Newmark testified that this injury is a permanent neurological injury and for the remainder of his life will continue to have a "tremendously dramatic impact on Shamarion."

21. Mr. Newmark testified that Shamarion's claim for past medical expenses related to his injury was $202,835.50, which consisted of $74,061.27 in Medicaid benefits paid by AHCA, $106,656.23 in benefits paid by Sunshine State Health, and $22,118 in unpaid medical bills.

22. Mr. Newmark testified that Shamarion, or others on his behalf, did not make payments in the past or in advance for future medical care, and no claim was brought to recover reimbursement for past payments for future medical care.

23. Mr. Newmark testified that through his representation of Shamarion, review of Shamarion's file, and based on his training and experience, he had developed the opinion that the value of Shamarion's damages "would be in excess of $2,250,000." He explained that he had discussed Shamarion's case with other experienced attorneys and they concurred in this damage valuation. Further, to supplement his opinion concerning the value of Shamarion's damages, Mr. Newmark outlined that the jury verdicts in Petitioner's Exhibit 12 were comparable to

Shamarion's case. He outlined that the Cherenfant v. Lewis 2016 Broward County $4,821,000 verdict was most supportive.
Mr. Newmark outlined that in Lewis, the same plaintiff and defense experts were used as were used in Shamarion's case, and the facts and injury in Lewis were nearly identical to the facts and injury in Shamarion's case. Mr. Newmark outlined that in Lewis, the jury awarded $3,000,000 in pain and suffering to the child and this underscores that his valuation of all Shamarion's damages at $2,250,000 is extremely conservative.

24. Mr. Newmark explained that Shamarion's medical malpractice lawsuit was brought against the obstetrician who delivered Shamarion and the hospital where the birth took place. He noted that there were many considerations that led to settlement, including most importantly that the primarily responsible party, the obstetrician, was uninsured, and the parents needed the certainty of a settlement over the risk of a defense verdict or verdict that may or may not be collectable. Based on these considerations, the case settled for $410,000.

25. Mr. Newmark testified that the settlement did not fully compensate Shamarion for the full value of his damages. He testified that based on the conservative valuation of all Shamarion's damages of $2,250,000, the settlement represented a recovery of 18.2 percent of the value of Shamarion's damages. Mr. Newmark testified that because Shamarion only recovered

18.2 percent of the value of his damages in the settlement, he only recovered 18.2 percent of his $202,835.50 claim for past medical expenses, or $36,916.06.

26. Mr. Newmark testified that the settling parties agreed in the Releases that Shamarion's damages had a value in excess of $2,250,000, as well as the allocation of $36,916.06 of the settlement to past medical expenses. He further testified that the allocation of $36,916.06 of the settlement to past medical expenses was reasonable and rational, as well as "the fair thing to do." Mr. Newmark testified that the allocation of $36,916.06 to past medical expenses was conservative because it was based on a low-end valuation of Shamarion's damages of $2,250,000, and if a higher valuation of the damages was used, the amount allocated to past medical expenses would have been much less.

27. Mr. Newmark testified that because no claim was made to recover reimbursement for past payments for future medical care, no portion of the settlement represented reimbursement for past payments for future medical care. Mr. Newmark testified that the parties agreed in the Releases that no claim was made for reimbursement of past payments for future medical care, and no portion of the settlement represented reimbursement for future medical expenses.

28. Mr. Newmark testified that because Shamarion was a minor, court approval of the settlement was required.

Mr. Newmark testified that the court reviewed the settlement and entered an order approving it.

Testimony of R. Vinson Barrett

29. Mr. Barrett has been a trial attorney since 1977 and has dedicated his practice to handling plaintiff personal injury cases, including medical malpractice, medical products liability, and pharmaceutical products liability. He is the senior partner with the Tallahassee law firm of Barrett, Fasig & Brooks, which exclusively works in the area of plaintiff's personal injury. Mr. Barrett has handled many jury trials and has handled many catastrophic injury cases, including medical malpractice cases involving injury to children. Mr. Barrett testified that he has handled a number of cases involving brachial plexus birth injuries similar to Shamarion's injury. Mr. Barrett testified that he stays abreast of jury verdicts and he daily makes assessments concerning the value of damages suffered by injured parties explaining his process for making these determinations. He testified that he has been accepted as an expert in the valuation of damages by DOAH in Medicaid lien dispute proceedings in other cases. Mr. Barrett was accepted as an expert in the valuation of damages suffered by injured parties.

30. Mr. Barrett testified that he was familiar with Shamarion's injuries and had reviewed Shamarion's medical

records and the exhibits filed in this proceeding. He provided a detailed explanation of Shamarion's brachial plexus birth injury noting that "he's probably never going to be able to have anywhere near a normal childhood or work-hood because of the limitations that he has from this injury."

31. Mr. Barrett testified that based on his review of Shamarion's case, and based on his professional experience and training, Shamarion's damages had a value higher than the $2,250,000 value used by the settling parties. Mr. Barrett testified that Shamarion's damages have a value of $2,500,000. He further testified that Shamarion's "loss of enjoyment of life is going to be huge for him, remember, he is going to have birth to death in actual pain and suffering . . . so with all that in mind, you know, the opinion that I have $2,000,000 wouldn't trouble me as a jury verdict for pain and suffering and loss of enjoyment of life" alone. Mr. Barrett outlined that the jury verdicts in Petitioner's Exhibit 12 were comparable with Shamarion's case and supported his valuation of the damages. Consistent with Mr. Newmark's testimony, Mr. Barrett identified the Lewis $4,821,000 verdict as most relevant and comparable to Shamarion's case.

32. Mr. Barrett testified that he was aware of the settlement amount and he testified that the settlement did not fully compensate Shamarion for the full value of his damages.

He explained that he was aware that the parties had allocated $36,916.06 to past medical expenses based on a valuation of all damages of $2,250,000. Mr. Barrett testified that he believes allocation of $36,916.06 to past medical expenses was reasonable, rational, and conservative. "I think it's conservative because it's based on a total damage number ($2,250,000) which I think is conservative."

33. AHCA did not propose a differing valuation of Shamarion's damages or contest the methodology used by the parties to calculate the $36,916.06 allocation to past medical expenses. Consequently, the testimony and evidence presented concerning the value of Petitioner's damages and the allocation to past medical expense was unrebutted.

34. The Agency was not a party to settlements or written settlement agreements, if any exist, separate and apart from the Releases. Nor were the Defendants signatories to the settlement agreement, apparently accepting the Releases signed by Petitioners in exchange for the settlement payments.

35. No value of Shamarion's future medical expenses was advanced by either party. As noted earlier, both Releases contained the following provision:

> Further, the parties acknowledge that Shamarion Manley may need future medical care related to his injuries, and some

portion of this settlement may represent compensation for future medical expenses Shamarion Manley will incur in the future.

36. Given the nature and severity of Shamarion's injury, it can reasonably be expected that Shamarion will incur future medical expenses. Notably, Mr. Newmark testified that Shamarion has suffered a permanent neurological impairment, and has "already had five surgeries down at Miami Children's with Dr. Grossman and Dr. Price." Moreover, the Life Care Plan prepared for Shamarion reflects regular pediatric orthopedist and psychiatric evaluations and treatments to age 18.

37. Mr. Newmark further testified that Shamarion's total damages would be in excess of $2,250,000, which "would take into account his future life care needs, his past medicals, his future earning and earning capacity, benefits, losses."

38. Petitioner offered in evidence a Preliminary Economic Damages Analysis, which presented life care cost computations and earnings capacity losses. A summary of those computations is presented below:

	BASIC INFORMATION		
	Shamarion Manley		
	All Figures are in Present Value		
	LOW	AVERAGE	HIGH
LIFE CARE PLAN:	$556,109.16	$858,606.03	$1,161,102.90
EARNINGS LOSSES:	$262,214.24	$262,214.24	$262,214.24
BENEFIT LOSSES:	$52,442.85	$52,442.85	$52,442.85

Overall Range		
LOW	AVERAGE	HIGH
$870,766.24	$1,173,263.11	$1,475,759.99

39. Mr. Newmark also noted that some portion of the $2,250,000 valuation would be for non-economic (pain and suffering) damages. Mr. Newmark testified that Shamarion's non-economic damages would be factored in "at over a million dollars."

40. Other than the Life Care Plan and Preliminary Economic Damages Analysis, at hearing, Petitioner did not advance a valuation for future medical expenses. However, given the figures contained in the economic damages analysis, it is clear that the vast majority of future economic damages will relate to the costs associated with the life care plan, including future medical expenses.

41. Petitioner has not proven by clear and convincing evidence that $36,916.06 of the settlement represents reimbursement for past medical expenses and payment for future medical expenses.

42. Petitioner has not proven by clear and convincing evidence that a lesser portion of the total recovery should be allocated as reimbursement for past medical expenses than the $74,061.27 amount calculated by Respondent pursuant to the formula set forth in section 409.910(11)(f).

CONCLUSIONS OF LAW

43. 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.

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

45. 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.

46. 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 Ark. Dep't of Health & Human Servs. v. Ahlborn, 547 U.S. 268, 276 (2006).

47. 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 (Fla. 5th DCA 2009). The statute creates an automatic lien on any such judgment or settlement for the medical assistance provided by Medicaid. See § 409.910(6)(c), Fla. Stat.

48. 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).

49. 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 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).

50. 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.

51. 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," and quoting Roberts v. Albertson's, Inc., 119 So. 3d 457, 465-466 (Fla. 4th DCA 2012)).

52. 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:

> [E]ntails 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 Electric Corp. v. Shuler Bros., 590 So. 2d 986, 989 (Fla. 1st DCA 1991).

53. As an alternative to the formula set forth in section 409.910(11)(f), Petitioner urges the application of a formula which compares the amount of past medical expenses (here, the amount of Medicaid's lien) to the total damages, and then an application of that same proportion to the settlement amount, to determine the amount to be reimbursed to the Agency.

54. The fatal shortcoming in Petitioner's case was the failure to include both past and future medical expenses in the application of its alternative formula. As is evident by the life care plan cost computations, in a case where the injuries are catastrophic, and are suffered by a young person, future medical expenses will be significant and will radically alter the product of Petitioner's formula.

55. Petitioner’s position is that it has met its burden of proof by virtue of the settlement agreement provision agreeing that Petitioner’s alleged damages are $2,250,000, and that the amount allocated to past medical expenses is $36,916.06. Petitioner contends that it need not prove the amount allocated to future medical expenses.

56. The interpretation of the following emphasized language in section 409.910(17)(b) has been examined in several DOAH Final Orders:

> 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).

57. The undersigned is in agreement with Administrative Law Judge Elizabeth W. McArthur, who concluded in Villa v. Agency for Health Care Administration, Case No. 15-4423MTR (Fla. DOAH Dec. 30, 2015), the following:

> 73. The undersigned is persuaded by the logic of those DOAH Final Orders that have interpreted section 409.910(17)(b) to require proof of the amount of the third-party recovery that should be allocated to medical damages (past and future), from which AHCA may satisfy its Medicaid lien consistent with Florida law, Ahlborn, and

> Wos. See, e.g., Savasuk v. Ag. for Health Care Admin., Case No. 13-4130MTR (Fla. DOAH Jan. 29, 2014); Holland v. Ag. for Health Care Admin., 13-4951MTR (Fla. DOAH May 2, 2014); Silnicki v. Ag. for Health Care Admin., Case No. 13-3852MTR (Fla. DOAH July 15, 2014); Goddard v. Ag. for Health Care Admin., Case No. 14-4140MTR (Fla. DOAH March 23, 2015).

(Final Order, p. 36)

58. While there have been other DOAH Final Orders reaching a different conclusion regarding the interpretation of section 409.910(17)(b), a recent decision of Florida's First District Court of Appeal lays the matter to rest. In Giraldo v. Agency for Health Care Administration, 2016 Fla. App. LEXIS 18299 (Fla. 1st DCA 2016),[2/] the court affirmed Judge McArthur's decision, stating:

> Second, we find no error in the ALJ's legal determination relating to AHCA's right to secure reimbursement for payments already made for medical costs from not only that portion of the settlement allocated for past medical expenses but also from that portion of the settlement intended as compensation for future medical expenses. We do so initially because that is precisely what Florida law required the ALJ to do. Section 409.910(11)(f) sets forth the formula for determining that portion of a Medicaid recipient's "recovery" pursuant to a settlement with a third party that must be allocated to satisfy "the total amount" of medical costs Medicaid has provided. § 409.910(11)(f), Fla. Stat. (2014). Specifically, the formula allocates one half of the gross (or entire settlement) recovered (which would include the recipient's recovery for past and future medical costs) less only

attorney's fees and costs as designated to repay the state's Medicaid agency for the medical expenses that it has paid.

Likewise, section 409.910(17)(b), which authorizes a Medicaid recipient to challenge the amount allocated under section 409.910(11)(f), expressly requires consideration of the amounts the Medicaid recipient has "recovered" to reimburse him or her "for past and future medical expenses." § 409.910(17)(b), Fla. Stat. (2014). Section 409.910(17)(b) then requires the Medicaid recipient to prove by clear and convincing evidence that a smaller portion of this recovery should be made available for payment to AHCA than the amount established under section 409.910 (11)(f):

> (17)(b) A [Medicaid] recipient may contest the amount designated as recovered medical expense damages payable to the agency pursuant to the formula in paragraph (11)(f) by filing a petition under chapter 120 . . . . In order to successfully challenge the amount payable to the agency, the [Medicaid] recipient must prove, by clear and convincing evidence, that a lesser portion of the total [settlement] 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). . . .

Id.

Pursuant to prevailing law, Villa was obligated to establish as part of his challenge that portion of his recovery that he claimed was attributable to reimbursement by the third-party tortfeasor for both his

> past and his future medical expenses. Since Villa intentionally introduced no evidence as to the amount recovered for future medical expenses, the ALJ was correct in determining that he failed to satisfy his burden under section 409.910(17)(b) to avoid application of the statutory formula contained in section 409.910(11)(f). (emphasis added).

59. Given the unequivocal pronouncement in Giraldo quoted above, Petitioner's choice not to prove the amount of Petitioner's future medical expense damages (and to include those future expenses in its alternative formula calculation) compels the conclusion that Petitioner failed to meet its burden to rebut the statutory formula's amount designated as recovered medical expense damages.

ORDER

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 $74,061.27 in satisfaction of its Medicaid lien.

DONE AND ORDERED this 28th day of December, 2016, in Tallahassee, Leon County, Florida.

W. DAVID WATKINS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of December, 2016.

ENDNOTES

1/ There were two (2) Releases because there were two separate settlements totaling $410,000. Each Release contained the same language relative to the allocation to past medical expenses. One Release allocated $32,453.68 of the settlement to past medical expenses, and the other Release allocated $4,462.38 of the settlement to past medical expenses. The combined total amount of the $410,000 in settlement allocated to past medical expenses in the two Releases was $36,916.06.

2/ The First District Court of Appeal Case Docket reflects that the Court has granted Appellant's Motion for Extension of Time to File a Motion for Rehearing En Banc and Request for Certification. The Court has extended the time for Appellant to file those motions to January 4, 2017.

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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.