STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LOLITA D. AND RICKEY O. D.,
individually and as parents and
natural guardians of RICKEY D.,
a minor,

Petitioners,

vs. Case No. 16-7367MTR

AGENCY FOR HEALTH CARE
ADMINISTRATION,

Respondent.
_____/

FINAL ORDER

A final hearing was held in this case by video teleconference in Tallahassee and Miami, Florida, on December 4, 2018, before Robert L. Kilbride, an 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: Elizabeth A. Teegen, Esquire
Office of the Attorney General
The Capitol, Plaza Level 01
Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

What is the proper amount of Petitioners' personal injury settlement payable to Respondent, Agency for Health Care

Administration ("AHCA"), to satisfy AHCA's $51,130.05 Medicaid lien under section 409.910(17)(b), Florida Statutes.

PRELIMINARY STATEMENT

On December 9, 2016, Petitioners filed a petition with DOAH for a hearing pursuant to section 409.910(17)(b) to contest the amount of AHCA's Medicaid lien.

The case was placed in abeyance while other courts resolved legal issues in various other cases related to section 409.910.

On May 3, 2018, the abeyance was lifted by the undersigned, and the matter was set for hearing on July 10, 2018. However, Petitioners' attorney, Harold Knecht ("Knecht"), withdrew from representation shortly before the hearing, and the hearing was continued.

The final hearing was reset for December 4, 2018. On November 14, 2018, Petitioners filed a Motion for Leave to Amend the Petition, which was granted.

Prior to the December 4, 2018, final hearing the parties filed a Joint Pre-hearing Stipulation ("JPHS"), which included numerous stipulated issues of law and fact. Those stipulated issues of law and fact are adopted and incorporated herein. (Minor changes were made to the parties' stipulated facts to insure consistency herein and to properly identify the parties.)

At the final hearing, one witness was called. Petitioners called attorney Jorge C. Borron ("Borron") as an expert witness.

Petitioners' Exhibits 1 through 9 were admitted. AHCA called no witnesses and offered no exhibits.

Unless otherwise noted, all references to section 409.910 are to the 2014 version of the statute, as agreed by the parties.

A Transcript of the proceedings was filed with DOAH on December 19, 2018. After being granted an extension, the parties timely filed their respective proposed final orders. Both parties' proposed final orders were reviewed and considered by the undersigned in the preparation of this Final Order.

The parties requested that the Final Order be issued without reference to the parties' full names.

FINDINGS OF FACT

Based on the stipulations of the parties, the evidence presented at the hearing, and the record as a whole, the following findings of fact are made:

1. On January 31, 2007, Rickey D. ("Rickey"), who was then four years old, was struck by a car outside an apartment complex. Rickey suffered severe life-threatening injuries, including a fractured femur, fractured skull, and a closed head injury with traumatic brain damage. JPHS, pp. 9 and 10, ¶ 1.

2. Rickey's medical care related to the injury was paid by Medicaid. Medicaid provided $51,130.05 in benefits associated with Rickey's injury. The $51,130.05 constituted Rickey's entire claim for past medical expenses. JPHS, p. 10, ¶ 2.

3. Rickey's parents and natural guardians, Lolita D. and Rickey O.D., brought a personal injury claim against the driver/owner of the car that caused the accident and the apartment complex where the accident occurred ("Defendants"). They sought recovery of all of Rickey's damages associated with his injuries, as well as their own individual damages associated with their son's injuries. JPHS, p. 10, ¶ 3; Pet. Ex. 4.

4. The personal injury action was settled for a lump sum, unallocated amount of $285,000.00, which consisted of $275,000.00 paid by the apartment complex and $10,000.00 in bodily injury/uninsured motorist ("BI/UM") insurance policy limits paid by the driver.[1/]

5. The circuit court in Miami-Dade County approved the minor's settlement by entry of an Order Approving Settlement, dated February 2, 2014.[2/] JPHS, p. 10, ¶ 4 and ¶ 5; Pet. Ex. 5.

6. As a condition of Rickey's eligibility for Medicaid, Petitioners' assigned to AHCA their 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.

7. During the pendency of Petitioners' lawsuit, AHCA was notified of the court action. JPHS, p. 10, ¶ 6.

8. AHCA did not commence a civil action to enforce its rights under section 409.910, or intervene or join in

Petitioners' court action against the Defendants.[3/] JPHS, p. 10, ¶ 7.

9. Instead, AHCA asserted a $51,130.05 Medicaid lien against Petitioners' cause of action and settlement of that action. JPHS, p. 10, ¶ 6.

10. AHCA did not file a motion to set aside, void, or otherwise dispute Petitioners' settlement with the Defendants. JPHS, p. 10, ¶ 8.

11. The Medicaid program spent $51,130.05 on behalf of Rickey, all of which represents expenditures paid for Rickey's past medical expenses. JPHS, p. 10, ¶ 9.

12. Application of the formula at section 409.910(11)(f) to Rickey's $285,000.00 settlement requires payment to AHCA of the full $51,130.05 Medicaid lien. JPHS, p. 10, ¶ 10.

13. As ordered by the circuit court, Petitioners deposited the full Medicaid lien amount in an interest bearing account for the benefit of AHCA pending an administrative determination of AHCA's rights. This constitutes "final agency action" for purposes of chapter 120, Florida Statutes, pursuant to section 409.910(17). JPHS, p. 11, ¶ 11.

Testimony of Jorge C. Borron, Esquire

14. The only witness called during the hearing was Borron. He has been a trial attorney for 32 years and is a sole

practitioner at his Coral Gables law office, Jorge C. Borron, LLC.

15. The majority of Borron's practice is personal injury litigation with a focus on car accidents. He has handled cases involving injuries to children.

16. He routinely handles jury trials, and depending on the year, will have two to four jury trials each year.

17. Borron stays current regarding personal injury verdicts by reviewing jury verdict reporters and discussing personal injury verdicts and valuations with other attorneys in his geographical area.

18. After taking a case, Borron regularly reviews and studies his client's medical records and deposes/interviews doctors and other experts concerning his client's injuries. Borron testified that as a routine part of his practice he makes assessments concerning the value of personal injury damages suffered by his clients.

19. Petitioners proffered Borron as an expert in the valuation of damages. It is worth noting that AHCA did not voir dire Borron and did not object to his tender as an expert in the valuation of personal injury damages.[4/] The undersigned ruled that he would consider Borron's opinion testimony on the subject of the valuation of damages.[5/]

20. Borron represented Rickey and his family in the underlying personal injury lawsuit. Originally, Attorney Knecht represented Rickey and his family, but Knecht brought Borron into the case in 2013 to handle the jury trial due to Knecht's advanced age.

21. As a part of his representation, Borron reviewed and familiarized himself with the accident report and Rickey's medical records, deposed/interviewed experts and fact witnesses, and met with Rickey and his family numerous times.

Rickey's Accident, Injuries, and Prognosis

22. On January 31, 2007, young Rickey followed his older sister out of the apartment where they lived with their parents. He walked between two cars in the parking lot and darted out in front of a car, which struck him.

23. In the accident, Rickey suffered a compound fracture of his femur, a skull fracture, a traumatic brain injury, and lost consciousness. Rickey was transported to Jackson Memorial Hospital where he received medical treatment until he was discharged on February 22, 2007.

24. At the hospital, his discharge papers diagnosed him with a left comminuted femur fracture and a nondisplaced skull fracture. Pet. Ex. 2.

25. Rickey's injury had a tremendous impact on his life. Besides the adverse physical effects from his femur fracture,

Rickey suffers from the effects of a traumatic brain injury with cognitive deficits, abnormal behavior issues, and an attention deficit disorder.

26. During his representation of Rickey, Borron sent his client to two neurologists. They both separately diagnosed Rickey with problems associated with the executive function in the frontal lobe of his brain.

27. Dr. Jorge A. Herrara issued a detailed report and concluded, among other things, that Rickey's condition points "to the presence of impairments in the executive functions mediated by the frontal lobes (referring to Rickey's brain)." Pet. Ex. 2, p. 14.

28. The other neurologist, Dr. Ross, conducted an electrocardiograph with abnormal results. The uncontroverted evidence revealed that Rickey's traumatic brain injury is permanent and he will suffer its adverse effects and certain health and emotional-related issues for the remainder of his life.

29. Based on his training, experience, and knowledge of the case, it was Borron's opinion that Rickey's personal injury damages had a value of between $1,500,000.00 to $2,500,000.00.

30. In preparation for settlement mediation in the underlying personal injury case, Borron undertook to estimate the value of Petitioners' claim for future medical expenses as well.

31. He consulted with Rickey's neurologists concerning his prognosis to determine what kind of medical treatment he would need in the future. Based on these discussions, Borron estimated that Rickey would need $815,000.00 in medical care from age nine (his age at the time of mediation) until age 22.

32. In Borron's opinion, adding the $815,000.00 for future medical expenses to Rickey's $51,130.05 claim for past medical expenses would constitute Rickey's total economic damages.

33. Borron opined that the claim for economic damages added to Petitioners' claim for noneconomic damages would push the full value of Rickey's personal injury damages to the range of $1,500,000.00 to $2,500,000.00.

34. Had the case not settled and a trial taken place, Borron testified that he would have expected a jury to determine the value of Rickey's damages to be at, or between, $1,500,000.00 to $2,500,000.00.

35. Borron discussed Petitioners' case with Attorney Knecht and consulted with several other attorneys. They concurred that Rickey's personal injury damages had a value of between $1,500,000.00 to $2,500,000.00.

36. Borron testified that using $1,250,000.00 as the estimated value of all Rickey's personal injury damages would be a conservative value.

37. Due to defenses raised and issues of disputed liability with the apartment complex, the case against the apartment complex settled just prior to trial for $275,000.00, plus a $10,000.00 settlement with the insurance company for uninsured motorist coverage, for a total settlement of $285,000.00.

38. The uncontroverted evidence revealed that the combined settlement of $285,000.00 received by Petitioners did not fully compensate Rickey for the value of his damages.

39. Borron opined that in using the value of all Rickey's damages of $1,250,000.00 compared to the $285,000.00 settlement, that the total settlement amount recovered represented a proportional recovery of 22.8 percent of the true value of all Rickey's personal injury damages.

40. Borron testified that because Rickey only recovered 22.8 percent of the true value of his damages in the global settlement, that Petitioners had likewise recovered only 22.8 percent of Rickey's claim for past medical expenses in the settlement agreement, or $11,657.66.

41. Borron testified that an allocation of $11,657.66 of the $285,000.00 settlement as recovery for Rickey's past medical expenses would be a reasonable and fair allocation.

42. Of particular consequence to this case, AHCA did not call any expert witnesses nor did it present any evidence to

rebut Petitioners' presentation, proof, or proposed allocation of $11,657.66 to past medical expenses.

43. AHCA did not dispute or present any persuasive evidence or arguments that Rickey's injuries were overstated or incorrectly described by Borron.

44. On AHCA's cross-examination of Borron, the methodology used by Borron to arrive at his opinion concerning a fair allocation of past medical expenses was not challenged or persuasively overcome by AHCA.

45. Simply put, the amount of $11,657.66 proposed by Petitioners as a fair allocation of past medical expenses from the settlement agreement was unrefuted and unchallenged by AHCA.

46. Petitioners proved by a preponderance of the evidence that $11,657.66 was a fair allocation of the total settlement amount to past medical expenses.

47. There was no basis or evidence in the record to reject Borron's opinion or reach any other conclusion concerning a fair allocation other than the amount of $11,657.66 proposed by Petitioners.

CONCLUSIONS OF LAW

48. The Agency for Health Care Administration is the state agency responsible for administering Florida's Medicaid program. § 409.910(2), Fla. Stat.

49. DOAH has jurisdiction of this matter, pursuant to section 409.910(17)(b), and the proper standard of proof in this proceeding for Petitioners is a "preponderance of the evidence." JPHS, p. 11, ¶ 3(f).

50. "Medicaid is a cooperative federal-state welfare program providing medical assistance to needy people." Roberts v. Albertson's Inc., 119 So. 3d 457 (Fla. 4th DCA 2012). Although state participation in this federal program is voluntary, once a state elects to participate, it must comply with federal Medicaid law. Id.

51. Federal law requires that participating states seek reimbursement for medical expenses incurred on behalf of Medicaid recipients who later recover from legally liable third parties.

52. Under the United States Supreme Court's reasoning in Arkansas Department of Health and Human Services v. Ahlborn, 547 U.S. 268 (2006), the federal Medicaid anti-lien provision at 42 U.S.C. § 1396p(a)(1) would ban a lien on all proceeds from a Medicaid recipient's tort settlement.

53. However, the provisions in federal law, requiring states to seek reimbursement of their Medicaid expenditures from liable third parties, also create an exception to the anti-lien law and authorize states to seek reimbursement from the medical expense portion of the recipient's tort recovery.

54. The Federal Medicaid Act limits Florida's recovery to certain portions of settlement funds received by the Medicaid recipient. This has been recently interpreted by the Florida Supreme Court to be the amount in a personal injury settlement which is fairly allocable to past (not future) medical expenses. Giraldo v. Ag. for Health Care Admin., 248 So. 3d 53 (Fla. 2018).

55. Petitioners settled the personal injury claim against the third parties liable for the injuries associated with AHCA's Medicaid claim. Accordingly, AHCA has a lien against the past medical expense portion of Petitioners' personal injury settlement.

56. The underlying question in this case, however, is how much is AHCA entitled to recover from Petitioners as payment for past medical services provided to Rickey?

57. Section 409.910(11) establishes a formula to determine the amount AHCA may recover for medical assistance benefits paid from a judgment, award, or settlement from a third party. Section 409.910(11)(f) states, in pertinent part:

> 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.

58. In short, section 409.910(11)(f) establishes that the agency's recovery for a Medicaid lien is limited to the lesser of: (1) its full lien; or (2) one-half of the total award, 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. See Ag. for Health Care Admin. v. Riley, 119 So. 3d 514, 515 n.3 (Fla. 2d DCA 2013).

59. Here, the parties agreed that application of this formula to Petitioners' $285,000.00 settlement requires payment to AHCA of the full $51,130.05 Medicaid lien.[6/] JPHS, p. 10, ¶ 10.

60. Another section, section 409.910(17)(b), provides a method by which a Medicaid recipient may contest the amount designated as recovered medical expenses, payable under section 409.910(11)(f). This is done at an administrative hearing at DOAH. It is to the proof presented at the administrative hearing, and to that proof alone, that a determination concerning the proper allocation of the settlement agreement for past medical expenses must be made.

61. More specifically, following the United States Supreme Court decision in Wos v. E.M.A., 133 S. Ct. 1391, 1396 (2013), the Florida Legislature created an administrative process to determine the portion of the judgment, award, or settlement in a tort action that is properly allocable to medical expenses and, thus, the portion of the recovery that may be used to reimburse the Medicaid lien. Section 409.910(17)(b) states:

> 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.[7/]

62. In simple terms, if Petitioners can demonstrate, by a preponderance of the evidence, that the portion of the settlement agreement fairly allocated as payment for past medical expense is less than the amount the agency seeks, then the amount Petitioners are obligated to pay would be reduced.

63. How to arrive at this amount and fairly allocate the past medical portion of an undifferentiated settlement agreement, has not yet been squarely addressed by the United States Supreme Court:

> A question the Court had no occasion to resolve in Ahlborn is how to determine what portion of a settlement represents payment

> for medical care. The parties in that case stipulated that about 6 percent of respondent Ahlborn's tort recovery (approximately $35,600 of a $550,000 settlement) represented compensation for medical care. Id., at 274, 126 S. Ct. 1752. The Court nonetheless anticipated the concern that some settlements would not include an itemized allocation. It also recognized the possibility that Medicaid beneficiaries and tortfeasors might collaborate to allocate an artificially low portion of a settlement to medical expenses.

Wos, 133 S.Ct. at 1391, 568 U.S. 627, 634.

64. In its recent opinion in Giraldo, the Florida Supreme Court held that future medical expense damages recovered by a Medicaid recipient are not available as a source of reimbursement for Medicaid payments. Rather, only past medical expenses may be considered.

65. Notably, and of particular significance to the proper outcome of this case, the Florida Supreme Court stated:

> Because we hold that the federal Medicaid Act prohibits AHCA from placing a lien on the future medical expenses portion of a Medicaid recipient's tort recovery, we remand with instructions that the First District direct the ALJ to reduce AHCA's lien amount to $13,881.79. Although a factfinder may reject "uncontradicted testimony," there must be a "reasonable [**8] basis in the evidence" for the rejection. Wald v. Grainger, 64 So. 3d 1201, 1205-06 (Fla. 2011). Here, Villa presented uncontradicted evidence establishing $13,881.79 as the settlement portion properly allocated to his past medical expenses, and there is no reasonable

> basis in this record to reject Villa's evidence. For this reason, no further fact finding is required. (Emphasis added).

Giraldo, 248 So. 3d at 53.

66. In this case there was no evidence presented by AHCA to contest or contradict the amount of $11,657.66 presented by Petitioners' expert as the fair and reasonable allocation due.

67. Counsel for AHCA cross-examined Petitioners' expert, but elicited no information or evidence assailing his opinion that the fair allocation was $11,657.66.

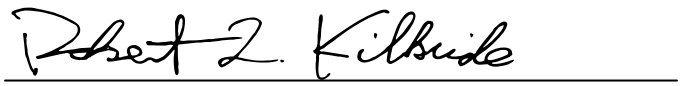
68. In short, Petitioners' expert testimony concerning a fair allocation of the settlement agreement was unchallenged by AHCA without any countervailing or contrary facts or evidence in the record.

69. As such, and based on this record, the undersigned is constrained to conclude under the Florida Supreme Court's observations in Giraldo, that $11,657.56 is the amount due to AHCA. See also Scott R. Brown v. Ag. for Health Care Admin., Case. No. 18-1844MTR (Fla. DOAH Sept. 20, 2018).[8/]

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Agency for Health Care Administration is entitled to payment of $11,657.56 from the amount recovered in Petitioners' personal injury matter.

DONE AND ORDERED this 1st day of February, 2019, in Tallahassee, Leon County, Florida.



ROBERT L. KILBRIDE
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of February, 2019.

ENDNOTES

[1/] As used herein, the term "unallocated" means that the settlement agreement did not specify how much of the total settlement amount was payment for Rickey's past medical expenses.

[2/] Among other things, the court ordered that AHCA's lien of $51,130.05 be held in trust pending further action, but the order did not address or rule on the merits of AHCA's Medicaid lien amount.

[3/] As a result, AHCA did not "institute, intervene in, or join in" the personal injury action to enforce its rights as permitted in section 409.910(11), or participate in the litigation of the personal injury action against the Defendants.

[4/] Additionally, during cross-examination, AHCA's counsel did not persuasively attack or question his expertise in this area.

[5/] Borron had offered similar expert testimony in an unrelated court case.

[6/] Nonetheless, and by way of this proceeding, Petitioners contest this amount and seek to pay a lower amount.

[7/] The parties agreed that the proper standard for Petitioners' burden of proof under section 409.910(17)(b) is by a preponderance of the evidence.

[8/] Until the matter is squarely resolved by the Florida Legislature or interpreted by Florida courts as such, this Final Order is not intended to endorse the proportionality test used by Petitioners as the proper or only method of determining a fair allocation of past medical expenses in an unallocated personal injury settlement. See generally Smith v. Ag. for Health Care Admin., 24 So. 3d 590, 591 (Fla. 5th DCA 2009). Rather, the outcome in this case is driven solely by this record, and the conclusion that the expert testimony presented by Petitioners as to the proper allocation of $11,657.66 was unchallenged, unrefuted and not persuasively impeached by AHCA. Giraldo, 248 So. 3d at 53.

COPIES FURNISHED:

Kim Annette Kellum, Esquire
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308
(eServed)

Alexander R. Boler, Esquire
2073 Summit Lake Drive, Suite 300
Tallahassee, Florida 32317
(eServed)

Ashley E. Davis, Esquire
Office of the Attorney General
The Capitol, Plaza Level 01
Tallahassee, Florida 32399
(eServed)

Elizabeth A. Teegen, Esquire
Office of the Attorney General
The Capitol, Plaza Level 01
Tallahassee, Florida 32399
(eServed)

Timothy L. Newhall, Esquire
Office of Attorney General
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050
(eServed)

Floyd B. Faglie, Esquire
Staunton and Faglie, P.L.
189 East Walnut Street
Monticello, Florida 32344
(eServed)

Thomas M. Hoeler, Esquire
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 1
Tallahassee, Florida 32308
(eServed)

Shena Grantham, Esquire
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308
(eServed)

Richard J. Shoop, Agency Clerk
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308
(eServed)

Stefan Grow, General Counsel
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308
(eServed)

Mary Mayhew, Secretary
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 1
Tallahassee, Florida 32308

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.