STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KAPITOLA MORGAN, as Personal Representative of the Estate of MALK S. SUNWABEH, DECEASED,

Petitioner,

vs. Case No. 17-6448MTR

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

FINAL ORDER

The final hearing in this matter was conducted before J. Bruce Culpepper, Administrative Law Judge of the Division of Administrative Hearings, pursuant to sections 120.569 and 120.57(1), Florida Statutes (2017),[1/] on February 6, 2018, by video teleconference with sites in Tallahassee and Orlando, Florida.

APPEARANCES

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

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

STATEMENT OF THE ISSUE

The issue in this matter concerns the amount of the money to be reimbursed to the Agency for Health Care Administration for medical expenses paid on behalf of Malk S. Sunwabeh, a Medicaid recipient, following a settlement recovered from a third party by the Personal Representative of the Mr. Sunwabeh's estate.

PRELIMINARY STATEMENT

On November 27, 2017, Petitioner, Kapitola Morgan, as Personal Representative of the Estate of Malk S. Sunwabeh, a Medicaid recipient, filed a Petition to Determine the Amount Payable to the Agency for Health Care Administration in Satisfaction of Medicaid Lien (the "Petition"). Through the Petition, Petitioner challenged the Agency for Health Care Administration's (the "Agency") lien for medical expenses following Petitioner's settlement with a third party on behalf of Mr. Sunwabeh's estate. The Agency calculated its lien using the formula set forth in section 409.910(11)(f), Florida Statutes. Petitioner asserts that reimbursement of a lesser portion of the settlement is warranted under section 409.910(17)(b).

On November 28, 2017, the Division of Administrative Hearings ("DOAH") notified the Agency of Petitioner's Petition for an administrative proceeding to determine the amount payable to the Agency to satisfy the Medicaid lien.

The final hearing was held on February 6, 2018. At the final hearing, Petitioner's Exhibits 1 through 10 were admitted into evidence. Petitioner presented the testimony of Johnny Pineyro, Esquire. The Agency did not offer any evidence or witnesses.

A one-volume Transcript of the final hearing was filed with DOAH on February 27, 2018. At the close of the hearing, the parties were advised of a ten-day timeframe following DOAH's receipt of the hearing transcript to file post-hearing submittals. At the final hearing, Petitioner requested (without objection) an additional 20 days to file its post-hearing submittal. After the Transcript was filed, the parties jointly moved for an additional eight days to file their post-hearing submittals, which was granted.[2/] Both parties filed Proposed Final Orders, which were duly considered in preparing this Final Order.

FINDINGS OF FACT

1. This proceeding determines the amount the Agency should be paid to satisfy a Medicaid lien following Petitioner's recovery of a $275,000 settlement from a third party. The Agency asserts that it is entitled to recover the full amount of its $85,279.65 lien.

2. Malk S. Sunwabeh, the person who received the benefit of the Agency's Medicaid payments, died as a result of a hit-and-run

accident. Petitioner is the duly appointed Personal Representative of Mr. Sunwabeh's estate and is authorized to bring this action on his behalf.

3. The accident that gave rise to this matter occurred on October 29, 2013. Early that morning, in pre-dawn darkness, Mr. Sunwabeh left his residence to walk to his high school. The well-worn path he followed led him to a divided roadway that ran in front of his school. With no crosswalk or intersection nearby, Mr. Sunwabeh walked straight across the road. Just after Mr. Sunwabeh stepped into the road, he was struck from behind by a car driven by another student. As he lay sprawled on the pavement, a second vehicle (a gas truck) ran over his body.

4. After the accident, Mr. Sunwabeh was transported by ambulance to Shands Hospital in Jacksonville. He immediately underwent surgery. Tragically, Mr. Sunwabeh died during surgery. He was 16 years old.

5. The Agency, through the Medicaid program, paid Shands Hospital a total of $85,279.65 for Mr. Sunwabeh's medical care, which was the full amount of his medical expenses following the accident.[3/] All of the expenditures Medicaid spent on Mr. Sunwabeh's behalf are attributed to past medical expenses. No portion of the $85,279.65 Medicaid lien represents future medical expenses.

6. Mr. Sunwabeh's aunt, Kapitola Morgan (Petitioner), was appointed Personal Representative of Mr. Sunwabeh's estate. Petitioner brought a wrongful death action to recover both the damages of Mr. Sunwabeh's estate, as well as the individual statutory damages of Mr. Sunwabeh's mother, against both drivers who hit Mr. Sunwabeh.

7. Johnny Pineyro, Esquire, represented Petitioner in the wrongful death lawsuit. On June 10, 2015, Mr. Pineyro negotiated a $275,000 settlement for Petitioner with the second driver.

8. Under section 409.910, the Agency is to be repaid for its Medicaid expenditures out of any recovery from liable third parties. Accordingly, when the Agency was notified of the wrongful death settlement, it asserted a Medicaid lien against the amount Petitioner recovered. The Agency claims that, pursuant to the formula set forth in section 409.910(11)(f), it should collect the full amount of the medical costs it paid on Mr. Sunwabeh's behalf ($85,279.65). The Agency maintains that it should receive the full amount of its lien regardless of the fact that Petitioner settled for less than what Petitioner represents is the full value of the damages. (As discussed below, the formula in section 409.910(11)(f) allows the Agency to collect the full Medicaid lien.)

9. Petitioner, on the other hand, asserts that, pursuant to section 409.910(17)(b), the Agency should be reimbursed a lesser

portion of the settlement than the amount it calculated using the section 409.910(11)(f) formula. Petitioner specifically argues that the Agency's Medicaid lien should be reduced proportionately, taking into account the "true" value of Petitioner's damages. Otherwise, the application of the default statutory formula would permit the Agency to collect more than that portion of the settlement that fairly represents compensation for past medical expenses. Petitioner insists that such reimbursement violates the federal Medicaid law's anti-lien provision (42 U.S.C. § 1396p(a)(1)) and Florida common law. Therefore, Petitioner requests that the Agency's allocation from Petitioner's recovery be reduced to the amount of $9,065.23.

10. To establish the value of Petitioner's damages, Petitioner presented the testimony of Mr. Pineyro. Mr. Pineyro heads the Florida Injury Law Firm in Celebration, Florida. He has practiced law for over 20 years and focuses on personal injury, wrongful death, and aviation law. Mr. Pineyro handles jury trials and cases involving catastrophic injury. In his practice, he regularly reviews accident reports, expert reports, and medical records. Mr. Pineyro stays abreast of jury verdicts. He also discusses jury results with members of his firm and other personal injury attorneys. Mr. Pineyro testified that as a routine part of his practice, he ascertains the value of damages suffered by injured parties, and he explained his process for

making these determinations. Mr. Pineyro was accepted as an expert in the valuation of damages suffered by injured (and deceased) parties.

11. Mr. Pineyro opined that the conservative value of Mr. Sunwabeh's damages, as well as his mother's claim for pain, suffering, and loss of her son's companionship under the Florida Wrongful Death Act, at between $2,500,000 and $5,000,000.[4/] In deriving this figure, Mr. Pineyro considered the accident and homicide reports, the medical examiner's report, and Petitioner's medical records. Regarding Mr. Sunwabeh's mother's damages, Mr. Pineyro described comparable jury verdicts which involved the death of a child.

12. Mr. Pineyro also testified regarding the significant obstacles Petitioner faced to recovering the full amount of damages in the wrongful death lawsuit based on the disputed facts and circumstances of the accident, as well as insurance policy limits. As part of his representation of Petitioner, Mr. Pineyro deposed several fact and expert witnesses and visited the accident scene. Mr. Pineyro conveyed that the first driver who hit Mr. Sunwabeh was not covered by bodily injury insurance, nor did she possess recoverable assets. Therefore, collecting a full damages award against her would prove challenging.

13. Furthermore, Mr. Pineyro expressed that Petitioner did not have a strong liability case against the second driver based

on causation and comparative negligence issues. (Mr. Sunwabeh was wearing all black clothes which concealed his fallen body on the road in the early morning gloom.) Mr. Pineyro was prepared to argue a negligence theory asserting that the second driver failed to use reasonable caution and react in time to avoid driving over Mr. Sunwabeh. However, during his testimony, Mr. Pineyro conceded that a defense verdict in favor of the second driver was a real possibility. Consequently, Mr. Pineyro believed that it was in Petitioner's best interests to settle the lawsuit.

14. Based on Mr. Pineyro's testimony that the $275,000 settlement did not fully compensate Ms. Sunwabeh's estate or his mother for their damages, Petitioner argues that a lesser portion of the settlement should be allocated to reimburse Medicaid instead of the full amount of the lien. Petitioner proposes that a ratio should be applied based on the "true" value of Petitioner's damage claim ($2,585,279) compared to the amount that was actually recovered ($275,000). Using these numbers, the settlement represents a 10.63 percent recovery of the total value of Petitioner's damages. In like manner, the amount of the Medicaid lien should also be reduced to 10.63 percent or approximately $9,065.23. Therefore, Petitioner asserts that $9,065.23 is the portion of the third-party settlement that

represents the fair and reasonable reimbursement of the amount Medicaid paid for Mr. Sunwabeh's medical care.

15. The Agency was not a party to the wrongful death lawsuit or Petitioner's settlement. Petitioner was aware of the Medicaid lien and past medical expense damages at the time she settled the lawsuit. No portion of the $275,000 settlement represents reimbursement for future medical expenses.

16. The undersigned finds that Petitioner did not meet her burden of proving that the "true" value of Petitioner's damages from this accident equaled $2,585,279.65. Further, based on the evidence in the record, Petitioner failed to prove, by a preponderance of the evidence, that a lesser portion of Petitioner's total recovery should be allocated as reimbursement for medical expenses than the amount the Agency calculated pursuant to the formula set forth in section 409.910(11)(f). Accordingly, the Agency is entitled to recover $85,279.65 from Petitioner's recovery of $275,000 from a third party to satisfy its Medicaid lien.

CONCLUSIONS OF LAW

17. DOAH has jurisdiction over the subject matter and parties in this proceeding pursuant to sections 120.569, 120.57(1), and 409.910(17)(b). DOAH has final order authority. § 409.910(17)(b), Fla. Stat.

18. The Agency is the Medicaid agency for the state of Florida, as provided under federal law, and administers Florida's Medicaid program. See § 409.901(2), Fla. Stat.

19. The federal 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). While a state's participation is entirely optional, once a state elects to participate in the federal Medicaid program, it must comply with federal requirements governing the program. Id.; and 42 U.S.C. § 1396, et seq.

20. As a condition for receipt of federal Medicaid funds, states are required to seek reimbursement for medical expenses from Medicaid recipients who later recover from legally liable third parties. See Arkansas Dep't of Health & Hum. Servs. v. Ahlborn, 547 U.S. 268, 276 (2006) and 42 U.S.C. § 1396a. To comply with this federal requirement, the Florida Legislature enacted section 409.910, Florida's "Medicaid Third-Party Liability Act," which authorizes and requires the Agency 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. See Smith v. Ag. for Health Care Admin., 24 So. 3d 590 (Fla. 5th DCA 2009). The Legislature expressly set forth in section 409.910(1):

> 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.

21. Accordingly, by accepting Medicaid benefits, Medicaid recipients automatically subrogate their rights to any third-party benefits for the full amount of medical assistance provided by Medicaid and automatically assign to the Agency the right, title, and interest to those benefits, other than those excluded by federal law. See § 409.910(6)(a), (b), Fla. Stat.; see also 42 U.S.C. § 1396k(a)(1) (requiring states participating in the federal Medicaid program to provide, as a condition of Medicaid eligibility, assignment to the state of the right to payment for medical care from any third party); see also Giraldo v. Ag. for Health Care Admin., 208 So. 3d 244 (Fla. 1st DCA 2016).[5/] Section 409.910 creates an automatic lien on any such judgment or settlement with a third party for the full amount of medical

expenses Medicaid paid on behalf of the Medicaid recipient. See § 409.910(6)(c), Fla. Stat.

22. However, the obligation to reimburse the Agency (and Medicaid) following recovery from a third party is not unbounded. Pursuant to 42 U.S.C. §§ 1396a(a)(25)(A), (B), and (H); 1396k(a), and 1396p(a), the Agency may only assert a Medicaid lien against that portion of Petitioner's award from a third party that represents the costs of the medical assistance made available for the individual. See Ahlborn, 547 U.S. at 278; Wos v. E.M.A., 133 S. Ct. 1391, 1396 (2013); Harrell v. State, 143 So. 3d 478, 480 (Fla. 1st DCA 2014); and Davis v. Roberts, 130 So. 3d 164, 266 (Fla. 5th DCA 2013). The federal Medicaid statute's anti-lien provision, 42 U.S.C. § 1396p(a)(1), prohibits a state from attaching a lien for medical assistance on a Medicaid recipient's property other than that portion of a Medicaid recipient's recovery designated as payment for medical care. See also section 409.910(4), (6)(b)1., and (11)(f)4., which provide that the Agency may not recover more than it paid for the Medicaid recipient's medical treatment.[6/]

23. As Ahlborn explains, the anti-lien provision of the federal Medicaid Act circumscribes these obligations by authorizing payment to a state only from those portions of a Medicaid recipient's third-party settlement recovery allocated for payment of medical care. See also E.M.A. ex rel. Plyler v.

Cansler, 674 F.3d 290, 312 (4th Cir. 2012), where the court concluded "[a]s the unanimous Ahlborn Court's decision makes clear, federal Medicaid law limits a state's recovery to settlement proceeds that are shown to be properly allocable to past medical expenses."

24. Section 409.910(11) establishes a formula to determine the amount the Agency may recover for medical assistance benefits paid from a judgment, award, or settlement from a third party.[7/] 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.

25. In short, the section 409.910(11)(f) formula 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).

26. In this matter, using the section 409.910(11)(f) formula, Petitioner's recovery amount ($275,000) is sufficient to pay the full amount due to the Agency to satisfy its Medicaid lien of $85,279.65.[8/]

27. However, 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). Following the U.S. Supreme Court decision in Wos, 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:

> If federal law limits the agency to reimbursement from the recovered medical expense damages, a recipient, or his or her legal representative, 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 designated as recovered medical expenses, the recipient must prove, by clear and convincing evidence, that the portion of the total recovery which should be allocated as past and future medical expenses is less than the amount calculated by the agency pursuant to the formula set forth in paragraph (11)(f). Alternatively, the recipient must prove by clear and convincing evidence that Medicaid provided a lesser amount of medical assistance than that asserted by the agency.*[9/] (emphasis added).

28. Section 409.910(17)(b) establishes that the section 409.910(11)(f) formula constitutes a default allocation of the amount of a settlement that is attributable to medical costs, and sets forth an administrative procedure for an adversarial challenge of that allocation. See Harrell, 143 So. 3d at 480 ("we now hold that a plaintiff must be given the opportunity to seek reduction of the amount of a Medicaid lien established by the statutory formula outlined in section 409.910(11)(f), by demonstrating, with evidence, that the lien amount exceeds the amount recovered for medical expenses").

29. In order to successfully challenge the amount payable to the Agency, the burden is on the Medicaid recipient to prove, by a preponderance of the evidence, that a lesser portion of the total recovery should be allocated as reimbursement for past medical expenses than the amount the Agency calculated. § 409.910(17)(b), Fla. Stat.[10/] In other words, if Petitioner can demonstrate that the portion of the settlement attributed to past medical expense is less than the amount the Agency calculated using the section 409.910(11)(f) formula, the amount Petitioner must reimburse the Agency may be reduced below $85,279.65.

30. The Agency defends Petitioner's claim on three grounds. Each argument has merit as discussed below.

31. Initially, the Agency asserts that Petitioner may not avail herself of the opportunity to reduce the Medicaid lien

because she failed to timely file her Petition. Section 409.910 establishes certain requirements a Medicaid recipient (or his legal representative) must meet before the recipient may challenge the amount payable to the Agency. Section 409.910(17)(a) directs that the recipient "must, within 60 days after receipt of settlement proceeds, pay the agency the full amount of the third-party benefits, . . . or place the full amount of the third-party benefits in an interest-bearing trust account for the benefit of the agency." Thereafter, to contest the amount payable to the Agency, section 409.910(17)(b) requires the recipient to file a petition with DOAH within 21 days. Based on the clear language in section 409.910(17), this timeframe is a specific condition precedent with which a Medicaid recipient must comply in order to challenge the amount payable to the Agency in a chapter 120 hearing.

32. To support its argument that Petitioner's Petition must be dismissed on jurisdictional grounds, the Agency points to the fact that Petitioner settled the wrongful death lawsuit on June 10, 2015. However, Petitioner filed her Petition with DOAH on November 27, 2017, over two years later. The Agency posits that Petitioner received the settlement funds at some point before September 7, 2017 (60 days plus 21 days before November 27, 2017). Therefore, Petitioner missed the statutory

deadline in which to challenge the amount designated as recovered medical expense damages under section 409.910(17)(b).

33. The Agency's jurisdictional argument has merit. Petitioner failed to present any evidence that she placed the "full amount" of the $275,000 settlement in an interest-bearing account within 60 days after receipt as required by section 409.910(17)(a). To challenge the Agency's Medicaid lien, Petitioner bears the burden of establishing the claim under section 409.910(17)(b). Consequently, because Petitioner did not demonstrate that she complied with the filing requirements set forth in section 409.910(17)(a), Petitioner's Petition must be dismissed.

34. Next, the Agency asserts that Petitioner's claim fails because Mr. Sunwabeh died before Petitioner collected the settlement from the third party. Therefore, Petitioner (on behalf of Mr. Sunwabeh) may not avail herself of the protections provided by the federal Medicaid anti-lien statute (42 U.S.C. § 1396p(a)(1)) and argue that the Medicaid lien must be reduced in the proceeding authorized under section 409.910(17)(b).[11/]

35. Several Florida courts have reviewed the interplay between section 409.910(17)(b) and the federal anti-lien statute where a Medicaid recipient dies before the settlement with a third party. These courts held that, in these circumstances, the federal anti-lien statute does not operate to preempt or negate

the applicability of section 409.910(11)(f). Consequently, the default formula governs the portion of the third-party benefits that is to be paid to satisfy a Medicaid lien. In other words, because Mr. Sunwabeh died before the settlement, Petitioner does not have the right under section 409.910(17)(b) to contest or reduce the amount she must pay to the Agency.

36. In the case of Goheagan v. Perkins, 197 So. 3d 112 (Fla. 4th DCA 2016), Medicaid paid the medical costs of a recipient who died from her injuries. After her death, the recipient's estate brought a wrongful death action against the allegedly negligent third party. The estate settled the lawsuit. The Agency then asserted its Medicaid lien. The estate sought to reduce the amount of the lien. Goheagan affirmed the trial court's order that the recipient's estate must repay the full amount of the Medicaid lien. The Goheagan court concluded that:

> [t]he 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.

Goheagan, 197 So. 3d at 120.

37. The court in Hernandez v. Agency for Health Care Administration, 190 So. 3d 139 (Fla. 3d DCA 2016), reached the same conclusion. As in Goheagan, Medicaid paid the medical costs of a recipient who died from her injuries. The recipient's estate settled following a wrongful death lawsuit. The Agency then sought to recover the full amount of the Medicaid lien from the third-party benefits. Hernandez declared that, "[b]y its express terms, the Medicaid Act's anti-lien provision [42 U.S.C. § 1396p(a)(1)] does not apply to a Medicaid lien imposed against the property of a Medicaid recipient after her death." Hernandez, 190 So. 3d at 143. The court then held that "the federal Medicaid Act's anti-lien provision does not preempt Florida's Medicaid Third-Party Liability Act where a Medicaid lien is imposed on a wrongful death settlement." Id.

38. Based on the holdings in Goheagan and Hernandez, the undersigned concludes that the default formula in section 409.910(11)(f) governs the amount of the $275,000 settlement that Petitioner must pay to the Agency to satisfy the Medicaid lien. (As discussed above, section 409.910(11)(f) allows the Agency to collect the full Medicaid lien.) Because this proceeding involves the recovery of third-party benefits after the death of Mr. Sunwabeh (the Medicaid recipient), Petitioner is not afforded the right under section 409.910(17)(b) to challenge the amount of the Agency's recovery.

39. Finally (notwithstanding the above), Petitioner did not prove that the portion of the settlement attributed to past medical care is less than the amount of the Medicaid lien (as calculated using the section 409.910(f)(11) formula). Petitioner argues that the Medicaid lien should be reduced using a ratio that reflects the "true" value of Petitioner's injuries. Petitioner specifically asserts that the Agency should receive only 10.63 percent of the Medicaid lien. Petitioner calculates this lesser portion as follows: Mr. Pineyro's testimony establishes that the value of Petitioner's damages is (conservatively) $2,585,279.[12/] Petitioner recovered $275,000 through the settlement. The settlement amount equals 10.63 percent of the actual value of Petitioner's damages. Applying this percentage to the Medicaid lien, as a matter of fairness, Petitioner proposes that the Agency should only recover $9,065.23 from the settlement funds ($85,279.65 times 10.63 percent).

40. The Legislature, despite establishing a procedure in section 409.910(17)(b) for a Medicaid recipient to contest the amount of a Medicaid lien, did not provide guidance as to how DOAH is to specifically determine what portion of a recovery should be allocated as (past) medical expenses, instead of applying the default formula. However, the Legislature repeatedly emphasizes its desire for Medicaid to "be repaid in

full" from third-party resources if they are available. See § 409.910(1) and (6), Fla. Stat.

41. Petitioner's decision to settle the wrongful death claim at less than its "true" value, rather than pursue the underlying lawsuit to fruition, does not provide a sufficiently persuasive reason to compromise the amount the Medicaid program should recover. To do so is contrary to clear Legislative mandate that, "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." § 409.910(a), Fla. Stat. (emphasis added). And, "[e]quities of a recipient, [or] his or her legal representative . . . shall not defeat, reduce, or prorate recovery by the agency as to its subrogation rights." § 409.910(6)(a), Fla. Stat.[13/]

42. Petitioner's alternative calculation certainly apportions a more equitable portion of the settlement to Petitioner in light of the terribly unfortunate loss of Mr. Sunwabeh's life. However, Petitioner did not prove that the settlement does not include sufficient funds attributed to (past) medical costs which may be used to cover the full amount of the Medicaid lien.

43. The undersigned is also mindful that, "[t]he Medicaid program provides federal and state funding to pay healthcare costs for individuals who cannot afford it." Vestal v. First

Recovery Grp., LLC, 292 F. Supp. 3d 1304, 1310 (M.D. Fla. 2018); see also Roberts v. Albertson's Inc., 119 So. 3d 457, 458 (Fla. 4th DCA 2012); and 42 U.S.C. § 1396a(a)(25)(A)-(B). "The federal government pays a substantial portion of Medicaid costs." Vestal, 292 F. Supp. 3d at 1310. In light of this fact, as expressed in Giraldo:

> To keep the Medicaid program viable, Congress recognized that it is necessary to obtain reimbursement when a third party makes payment to the Medicaid beneficiary for medical care already paid for by Medicaid. Roberts, 119 So. 3d at 459. As Roberts explains, the goal of the reimbursement provision of the Medicaid Act was at least in part to protect tax dollars. 119 So. 3d at 459 (citing Tristani v. Richman, 652 F.3d 360, 373 (3d Cir. 2011)). This, no doubt, is at least in part so that other "needy people" may secure the care they so desperately require.

Giraldo, 208 So. 2d at 18.

44. In sum, the Petition is dismissed for failure to comply with section 409.910(17)(a) which requires Petitioner to place the full amount of the third-party benefits in an interest-bearing trust account for the benefit of the agency "within 60 days after receipt of settlement proceeds."

45. Further, the federal anti-lien statute does not apply in this case because the Agency did not impose the Medicaid lien on Petitioner's settlement until after Mr. Sunwabeh's death. Accordingly, as a matter of law, Petitioner is not entitled to

reduce the amount it must pay to the Agency as determined by the formula in section 409.910(11)(f).

46. Finally, Petitioner failed to meet its burden of proving that $9,065.23 is the total portion of the $275,000 settlement that should be allocated as (past) medical costs, instead of the amount the Agency calculated using the section 409.901(11)(f) formula. Petitioner did not demonstrate that its alternative methodology appropriately calculates the share of the settlement that should be allotted to satisfy the Medicaid lien. Accordingly, the Agency is entitled to the full amount of its Medicaid expenditures ($85,279.65) from Petitioner's third-party recovery.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that Petitioner, Kapitola Morgan, as Personal Representative of the Estate of Malk S. Sunwabeh, Deceased, shall pay to Respondent, Agency for Health Care Administration, the sum of $85,279.65 in satisfaction of its Medicaid lien.

DONE AND ORDERED this 14th day of June, 2018, in Tallahassee, Leon County, Florida.

J. BRUCE CULPEPPER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of June, 2018.

ENDNOTES

[1/] All references to the Florida Statutes are to the 2014 version, unless otherwise noted. Petitioner settled the wrongful death lawsuit on June 10, 2015. The Agency obtained its right to reimbursement from third-party benefits on that date. Accordingly, the 2014 version of the governing statute (section 409.910) controls DOAH's jurisdiction. See Suarez v. Port Charlotte HMA, LLC, 171 So. 3d 740, 742 (Fla. 2d DCA 2015). (Petitioner suggests that the 2013 version of section 409.910 applies. The undersigned notes that the language in the relevant portions of section 409.910 is the same in both the 2013 and 2014 version.)

[2/] By requesting a deadline for filing post-hearing submissions beyond ten days after the final hearing, the 30-day time period for filing the Recommended Order was waived. See Fla. Admin. Code R. 28-106.216.

[3/] Shands Hospital initially presented a bill totaling $149,520.50 for Mr. Sunwabeh's medical care. Later, Shands Hospital elected to accept a reduced amount of $85,279.65 from Medicaid.

[4/] The Florida Wrongful Death Act authorized Mr. Sunwabeh's estate to pursue a claim on behalf of Mr. Sunwabeh's mother for her pain and suffering, loss of companionship, as well as funeral expenses. (Mr. Sunwabeh's mother paid $15,207.06 for his funeral.) The $85,279.65 medical bill was also recoverable as an element of the estate's individual claim for damages. See Section 768.21(6), Florida Statutes, which states, in pertinent part:

> The decedent's personal representative may recover for the decedent's estate the following:
>
> * * *
>
> (b) Medical or funeral expenses due to the decedent's injury or death that have become a charge against her or his estate or that were paid by or on behalf of decedent. . . .

Accordingly, Petitioner asserts that the total monetary value of Petitioner's claim equals between $2,585,279.65 and $5,085,279.65.

[5/] Giraldo is currently on appeal to the Florida Supreme Court. See Giraldo v. Ag. for Health Care Admin., No. SC17-297, 2017 Fla. LEXIS 1826 (Sep. 6, 2017).

[6/] In cases where a Medicaid recipient only recovers a limited amount, section 409.910 protects the Medicaid recipient's interest in the non-medical expense portion of the judgment, award, or settlement. In this matter, however, Petitioner's recovery ($275,000) is sufficient to fully satisfy the Agency's Medicaid expenditures ($85,279.65). Therefore, the Agency was not required to reduce the Medicaid lien pursuant to the formula established in section 409.910(11)(f).

[7/] "Third-party benefit" is broadly defined to include any settlement between a Medicaid recipient and a third party for any Medicaid-covered injury, including costs of medical services related thereto, for personal injury or for death of the recipient. § 409.901(28), Fla. Stat.

[8/] Petitioner recovered $275,000 in settling the wrongful death action. Using the section 409.910(11)(f) formula to calculate the portion of the settlement funds available to satisfy the Medicaid lien, first, 25 percent ($68,750) is subtracted from the

full settlement amount, which leaves $206,250. One-half of that remaining recovery is $103,125. Therefore, up to $103,125 is available to pay the Agency for the medical assistance Medicaid provided. This pool of money is sufficient to cover the full amount of the Medicaid lien ($85,279.65).

Further, the undersigned is mindful that the issue of whether a Medicaid lien may be imposed on both "past and future medical expenses," as section 409.910(17)(b) states, is currently unresolved in Florida appellate courts. See Willoughby v. Agency for Health Care Administration, 212 So. 3d 516, 521 (Fla. 2d DCA 2017), which holds that a Medicaid lien can only be satisfied from settlement funds allocable to past medical expenses because the Agency cannot impose its "lien upon settlement proceeds which are not 'designated as payments for medical care,' as those [nonmedical] proceeds qualify as a recipient's property." (citing Goheagan v. Perkins, 197 So. 3d 112, 116 (Fla. 4th DCA 2016)); *contra* Giraldo, 208 So. 3d at 248 ("we find no error in the ALJ's legal determination relating to [the Agency'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.").

However, it is undisputed that no portion of the $275,000 settlement represents future medical expenses. (Mr. Sunwabeh is deceased.) Therefore, the settlement includes sufficient funds to satisfy the full Medicaid lien.

[9/] Recent federal case law directs that "clear and convincing evidence" is not the appropriate standard of proof by which to determine whether a Medicaid recipient rebuts the default formula in section 409.910(11)(f). See Gallardo v. Dudek, 263 F. Supp. 3d 1247, 1256 (N.D. Fla. 2017); and Gallardo v. Senior, No. 4:16cv116-MW/CAS, 2017 U.S. Dist. LEXIS 112448, at *24 (N.D. Fla. July 18, 2017). Therefore, the undersigned applies the preponderance of evidence standard to Petitioner's challenge under section 409.910(17)(b). See § 120.57(1)(j), Fla. Stat.

Further, collection of settlement funds has been limited to the amount allocated in the settlement for past (not future) medical expenses. See endnote 8 above and Gallardo v. Dudek, 263 F. Supp. 3d at 1253.

[10/] See endnote 9 above.

[11/] Title 42 U.S.C. § 1396p(a) (the federal anti-lien statute) states:

> Imposition of lien against the property of an individual on account of medical assistance rendered to him under a State plan.
>
> (1) No 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. (emphasis added).

[12/] In addition to the other impediments to Petitioner's claim described herein, as stated above, Petitioner did not prove, by a preponderance of the evidence, that Petitioner would have recovered the "true" amount of its damages in the wrongful death lawsuit. Therefore, the undersigned does not find that the actual value of Petitioner's damages equals $2,585,279.65. Consequently, Petitioner failed to prove that some lesser portion of the $275,000 settlement represents "past medical expenses."

[13/] See Giraldo, 208 So. 3d at 247 (Fla. 1st DCA 2016); see also section 409.910(13), which states:

> 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.

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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.