STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GRACE PROVVEDI, deceased, by and through TIMOTHY PROVVEDI as Personal Representative of the Estate of GRACE PROVVEDI; TIMOTHY PROVVEDI, as surviving spouse of GRACE PROVVEDI; B.P., surviving minor child of GRACE PROVVEDI; and KYLE LIMA, surviving child of GRACE PROVVEDI,

Petitioners,

vs. Case No. 18-5813MTR

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

FINAL ORDER

Pursuant to notice, a final hearing in this cause was held in Tallahassee, Florida, on January 17, 2019, before Linzie F. Bogan, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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

For Respondent: Alexander R. Boler, Esquire
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STATEMENT OF THE ISSUE

What amount from Petitioners' settlement proceeds should be paid to satisfy Respondent's Medicaid lien under section 409.910, Florida Statutes (2018)?[1/]

PRELIMINARY STATEMENT

On November 2, 2018, Grace Provvedi, deceased, by and through Timothy Provvedi as personal representative of the Estate of Grace Provvedi; Timothy Provvedi, as surviving spouse of Grace Provvedi; B.P., as surviving minor child of Grace Provvedi, and Kyle Lima, as surviving child of Grace Provvedi (Petitioners), filed with the Division of Administrative Hearings (DOAH) a Petition to Determine Amount Payable to Agency for Health Care Administration in Satisfaction of Medicaid Lien. At the final hearing, Petitioners offered testimony from John Pate, Esquire. The Agency for Health Care Administration (Respondent or AHCA) did not call any witnesses to testify on its behalf.

Petitioners' Exhibits 1 through 10 were admitted into evidence. Respondent did not offer any exhibits into evidence.

A Transcript of the final hearing was filed with DOAH on February 22, 2019. On March 11, 2019, each party filed a proposed order, and the same have been considered in the preparation of this Final Order.

FINDINGS OF FACT

A. Stipulated Facts (near-verbatim)

1. On February 13, 2017, Grace Provvedi (Mrs. Provvedi) underwent an outpatient surgical procedure. Post-surgery, a Fentanyl patch was applied to Mrs. Provvedi's body for the management of pain. Additionally, she was discharged home with a prescription for the oral pain medicines, Lorazepam and Robaxin. Mrs. Provvedi returned for a follow-up doctor's visit on February 15, 2017. That same day, February 15, 2017, Mrs. Provvedi went into cardiopulmonary arrest at home. She was transported to the hospital where she was ultimately diagnosed with anoxic brain injury due to pain medicine overdose. Mrs. Provvedi remained in a vegetative state until her death on March 24, 2017.

2. Mrs. Provvedi was survived by her husband Timothy Provvedi, their four-year-old child, B.P. and an adult child, Kyle Lima.

3. Mrs. Provvedi's medical care related to her injury was paid by Medicaid, and AHCA through the Medicaid program provided $54,071.79 in benefits associated with Mrs. Provvedi's injury. This $54,071.79 represented the entire claim for past medical expenses.

4. Mrs. Provvedi's funeral bill totaled $11,422.97 and was paid by her surviving husband.

5. Timothy Provvedi was appointed the personal representative of the Estate of Grace Provvedi.

6. Timothy Provvedi, as the personal representative of the Estate of Grace Provvedi, brought a wrongful death claim to recover both the individual statutory damages of Mrs. Provvedi's surviving spouse and two surviving children, as well as the individual statutory damages of the Estate of Grace Provvedi against the doctor and physician's group (Defendants) who prescribed the deadly combination of the Fentanyl patch and oral pain medication.

7. Timothy Provvedi, as the personal representative of the Estate of Grace Provvedi, on behalf of Mrs. Provvedi's surviving husband and two children, as well as on behalf of the Estate of Grace Provvedi, compromised and settled the wrongful death claim with the Defendants for the unallocated lump sum amount of $225,000.

8. During the pendency of the wrongful death claim, AHCA was notified of the action and AHCA asserted a $54,071.79 Medicaid lien against the Estate of Grace Provvedi's cause of action and settlement of that action.

9. By letter, the attorney handling the wrongful death claim notified AHCA of the settlement. This letter requested AHCA to advise as to the amount AHCA would accept in satisfaction of the $54,071.79 Medicaid lien.

10. AHCA has not filed an action to set aside, void, or otherwise dispute the wrongful death settlement.

11. AHCA has not commenced a civil action to enforce its rights under section 409.910.

12. AHCA, through the Medicaid program, spent $54,071.79 on behalf of Mrs. Provvedi, all of which represents expenditures paid for Mrs. Provvedi's past medical expenses.

13. No portion of the $225,000 settlement represents reimbursement for future medical expenses.

14. The formula at section 409.910(11)(f), as applied to the entire $225,000 settlement, requires payment of the full $54,071.79 Medicaid lien and AHCA is demanding payment of $54,071.79 from the $225,000 settlement.

15. The Petitioners have 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 Statutues, pursuant to section 409.910(17).

B. Additional Findings of Fact

16. Mr. Provvedi, as surviving husband, and the two children of Mrs. Provvedi, suffered economic and non-economic damages. The Estate of Mrs. Provvedi suffered economic damages in the form of medical expenses resulting from the Defendant's alleged negligence. Mrs. Provvedi's funeral bill was paid by

Mr. Provvedi. Pursuant to the Florida Wrongful Death Act, burial expenses are generally charged to the estate, unless, as in the present case, such expenses are paid by a surviving spouse and reimbursement of the same is not sought from the estate.

17. Mrs. Provvedi, as a condition of eligibility for Medicaid, assigned to AHCA her right to recover medical expenses paid by Medicaid from liable third parties.

18. Petitioners presented the testimony of Mr. John W. Pate, a trial attorney with the law firm of Haygood, Orr & Pearson in Irving, Texas. Mr. Pate has been a trial attorney for 14 years and he specializes in representing individuals in personal injury, medical malpractice, and wrongful death cases.

19. Mr. Pate testified that during the last several years, his practice has focused extensively on litigating medical malpractice cases involving the wrongful administration of prescription medications, including opioids like Fentanyl, Oxycodone, Hydrocodone, and other drugs which impact an individual's central nervous system (CNS). Such drugs are often referred to as CNS depressant drugs.

20. Mr. Pate routinely conducts civil jury trials, and as a consequence thereof, he stays abreast of jury verdicts by reviewing jury verdict reporters and discussing cases with other trial attorneys. Although Mr. Pate is not a member of the Florida Bar, he represents injured parties in Florida which necessitates

that he stays up-to-date with civil jury verdicts from the State of Florida. Mr. Pate testified that as a routine part of his practice, he makes assessments concerning the value of damages suffered by injured parties and credibly explained his process for making such assessments.

21. Without objection, Mr. Pate was recognized as an expert in the valuation of damages suffered by injured parties.

22. Mr. Pate served as lead attorney in the litigation against the medical providers who treated Mrs. Provvedi. In his capacity as lead attorney, Mr. Pate reviewed Mrs. Provvedi's medical records, consulted with an anesthesiology and pain management expert in North Carolina, consulted with a plastic surgery expert in Miami, met personally with Mr. Provvedi, and spoke with Mrs. Provvedi's children.

23. Mr. Pate, in explaining the circumstances that allegedly led to the death of Mrs. Provvedi, testified that on February 13, 2017, Mrs. Provvedi underwent an outpatient surgical procedure at a plastic surgery center. Soon after the surgery, a Fentanyl patch was applied to Mrs. Provvedi's body for the treatment of pain. Ms. Provvedi was then discharged home with a prescription for Lorazepam and Robaxin, each of which is an oral pain medication.

24. Mr. Pate testified that the federal Food and Drug Administration (FDA) warns against the use of Fentanyl patches

post-surgery, and also warns against the combination of a Fentanyl patch with other CNS depressant drugs, such as Lorazepam and Robaxin. Mr. Pate explained, as to his theory of legal liability against Mrs. Provvedi's medical providers, that over time the prescribed CNS depressants accumulated in Mrs. Provvedi's body which resulted in her being found unresponsive two days after surgery. Mrs. Provvedi was transported by EMS to the hospital, where, upon arrival, the Fentanyl patch was removed. Mrs. Provvedi was diagnosed as having suffered from an acute anoxic brain injury and respiratory failure due to a pain medication overdose. Mrs. Provvedi never regained consciousness, and one month later was discharged from the hospital to hospice care where she died on March 24, 2017.

25. Mr. Pate's undisputed testimony was that his investigation revealed that Mr. and Mrs. Provvedi had a loving and devoted marriage, and that it was emotionally devastating to Mr. Provvedi to watch his wife die over the course of five weeks. Mr. Pate also testified that his investigation revealed that the Provvedi's minor son, B.P., who was five at the time of Mrs. Provvedi's death, was profoundly affected by the loss of his mother and that Ms. Provvedi's adult son, who lived with the Provvedis prior to and at the time of his mother's passing, was similarly devastated by the death of his mother.

26. Mr. Pate credibly testified that based on his training and experience, the wrongful death damages recoverable in Mrs. Provvedi's case had a conservative value of between $3,054,071.79 to $5,054,071.79.

27. According to Mr. Pate's undisputed testimony, Mrs. Provvedi's estate had a claim for damages in the amount of $54,071.79, which is the amount of medical expenses that were paid, and resulted from Mrs. Provvedi's injury and death. Mr. Pate excluded the funeral bill from the estate's damages because the same bill was paid by Mr. Provvedi, as surviving husband. Mr. Pate also testified that the estate likely did not have a viable claim for net accumulations because Mrs. Provvedi did not work outside of the marital home.

28. Mr. Pate testified that a wrongful death claim was brought against the plastic surgeon that operated on Mrs. Provvedi and the surgical facility where the procedure was performed. The basis of the claim was that the doctor violated the standard of care by prescribing the Fentanyl patch to Mrs. Provvedi in clear contravention of the FDA warnings, and it was error to prescribe the other oral pain medicines in conjunction with the Fentanyl patch. Mr. Pate testified that he expected the at-fault parties to dispute causation, but ultimately the main issue was that the alleged at-fault parties had only $250,000 in insurance coverage. Mr. Pate credibly testified that expenses associated with

litigating the wrongful death case would be considerable and would significantly erode any likely net recovery. Given these concerns, the decision was made to settle the case pre-suit for $225,000.

29. Utilizing the conservative value of $3,054,071.79, the $225,000 settlement represents a recovery of only 7.367214 percent of the value of all damages. Thus, only 7.367214 percent of the $54,071.79 claim for past medical expenses was recovered in the settlement, or $3,983.58.

30. Based on the methodology of applying the same ratio the settlement bore to the total monetary value of all the damages to the estate, $3,983.58 of the settlement represents the estate's compensation for past medical expenses. The allocation of $3,983.58 of the settlement to the estate's claim for past medical expenses is reasonable and rational.

31. Petitioners have proven by a preponderance of the evidence that $3,983.58 represents the portion of the $225,000 settlement recovered to compensate the estate for medical expenses necessitated by the alleged negligence of the tortfeasors.

CONCLUSIONS OF LAW

A. Jurisdiction

32. In Delgado v. Agency for Health Care Administration, 43 Fla. L. Weekly D245 (Fla. 1st DCA Jan. 26, 2018), the court found that AHCA, by stipulation, and only as to the issue of DOAH's

jurisdiction, waived its argument that only a "living" recipient of Medicaid could contest the amount of AHCA's lien under the 2016 version of section 409.910(17)(b). Nevertheless, the court opined that DOAH did in fact have subject matter jurisdiction to resolve the dispute because the representative of the estate and the decedent's survivors "independently had standing to file their petition, irrespective of whether or not they were ultimately found to be 'recipient[s]' for purposes of section 409.910(17)(b)." Id. at 11.

33. Almost a year to the day after Delgado was decided, in Ammar Al Batha v. State of Florida, Agency for Health Care Administration, 44 Fla. L. Weekly D236 (Fla. 1st DCA Jan. 14, 2019), the court, with respect to the 2016 version of the statute, held that while the personal representative of the decedent's estate qualifies as a "recipient" under section 409.910(17)(b), the decedent's survivors do not, and although the ALJ erred in dismissing the personal representative's petition it was not error for the ALJ to dismiss the survivor's petition challenging the Medicaid lien. In reaching its decision, the court in Al Batha made no mention of its decision in Delgado.

34. While there appears to be some tension, if not outright conflict, between Delgado and Al Batha as to the question of "standing" of a decedent's survivors to challenge a Medicaid lien under the 2016 version of section 409.910(17)(b), it is

nevertheless clear that the current version of the statute expressly allows for a challenge by "a recipient, or his or her legal representative" in "instances where federal law limits the agency to reimbursement from the recovered medical expense damages."

35. In Al Batha, the court opined that "[e]ven though a person dies, his right to an existing cause of action does not die with him . . . [and] [t]herefore, theoretically[,] a deceased person could file a petition to challenge AHCA's lien if he could file a petition[,] [and,] [u]nder Florida law, the proper person to file a cause of action on behalf of a deceased person is the personal representative." Id. The court went on to opine that "[s]ince a personal representative is the person authorized to prosecute a deceased person's claims, the personal representative qualifies as a 'recipient' providing the deceased person qualifies as a 'recipient.'" Id. Succinctly stated, Al Batha makes it clear that the personal representative stands in the proverbial shoes of the decedent and is entitled to the same rights as the decedent when challenging Medicaid's lien.

36. Although the dissenting opinion in Al Batha relies on Goheagan v. Perkins, 197 So. 3d 112 (Fla. 4th DCA 2016). and Estate of Hernandez v. Agency for Health Care Administration, 190 So. 3d 139 (Fla. 3d DCA 2016), for the proposition that only a living Medicaid recipient, and not, upon death, his or her

personal representative, can challenge a Medicaid lien under section 409.910(17)(b), the court's majority did not embrace the rational of its sister courts. The undersigned finds Al Batha more persuasive than Goheagan and Hernandez because the rationale set forth therein gives appropriate consideration to the long-held rights of a decedent's personal representative as codified in the Florida Wrongful Death Act.

37. While it is true that Al Batha, Goheagan and Hernandez dealt with an earlier version of section 409.910(17)(b), there is no indication that recent changes to Medicaid law now impose restrictions on a recipient's right[s] to challenge a Medicaid lien in a manner different from what was allowed in 2016. Because Al Batha recognizes that a decedent's personal representative qualifies as a "recipient," and is therefore able to challenge a Medicaid lien to the same extent as the decedent, had he/she lived, then, ipso facto, Arkansas Department of Health & Human Services v. Ahlborn, 547 U.S. 268 (2006), Wos v. E.M.A. ex rel Johnson, 133 S. Ct. 1391 (2013), and their progeny, apply to, and indeed control, in the instant dispute.

38. In accordance with Al Batha and the express language of section 409.910(17)(b), Timothy Provvedi, as Personal Representative of the Estate of Grace Provvedi, is a Medicaid "recipient" and is therefore authorized to challenge AHCA's

Medicaid lien to the same extent as Grace Provvedi, had she lived.

39. In accordance with Delgado, Timothy Provvedi, as surviving spouse of Grace Provvedi; B.P., as minor child of Grace Provvedi; and Kyle Lima, as surviving child of Grace Provvedi, are proper parties to this action given that it is reasonable to expect that their substantial interests could be affected, either directly or indirectly, by the outcome of the instant proceeding. See Delgado (citing Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co., 18 So. 3d 1079 (Fla. 2d DCA 2009)).

40. DOAH has jurisdiction over the subject matter and the parties pursuant to sections 120.569, 120.57(1) and 409.910(17), Florida Statutes.

B. The Proper Lien Amount

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

42. 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).

43. "The Medicaid program is a cooperative one. The Federal Government pays between 50 percent and 83 percent of the costs a state incurs for patient care. In return, the State pays its portion of the costs and complies with certain statutory

requirements for making eligibility determinations, collecting and maintaining information, and administering the program." Estate of Hernandez v. Ag. for Health Care Admin., 190 So. 3d 139, 141-42 (Fla. 3rd DCA 2016)(internal citations omitted).

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

45. One condition for receipt of federal Medicaid funds requires states to seek reimbursement for medical expenses incurred on behalf of Medicaid recipients who later recover from legally liable third parties. See Ahlborn, at 276.

46. Consistent with this federal requirement, the Florida Legislature enacted section 409.910, designated as the "Medicaid Third-Party Liability Act," which authorizes and requires the state to be reimbursed for Medicaid funds paid for a recipient's medical care when that recipient later receives a personal injury judgment, award, or settlement from a third party. Smith v. Ag. for Health Care Admin., 24 So. 3d 590 (Fla. 5th DCA 2009). 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.

47. 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). Ag. for

Health Care Admin. v. Riley, 119 So. 3d 514, 515 n.3 (Fla. 2d DCA 2013).

48. The parties stipulated that the amount due to the AHCA in satisfaction of its lien pursuant to the formula set forth in section 409.910(11)(f) is $54,071.79. Petitioner, however, asserts that a lesser amount is owed to Respondent.

49. Section 409.910(17)(b) provides as follows:

> 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.

50. The language of section 409.910(17)(b), quoted above, makes it 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")(quoting Roberts v. Albertson's, Inc., 119 So. 3d 457, 465-466 (Fla. 4th DCA 2012), reh'g and reh'g en banc denied sub nom. Giorgione v. Albertson's, Inc., 2013 Fla. App. LEXIS 10067 (Fla. 4th DCA June 26, 2013)).

51. Notwithstanding the language of section 409.910(17)(b), Petitioner's burden in this case is a preponderance of the evidence as directed by Gallarado v. Senior, Case No. 4:16-cv-116-MW-CAS (N.D. Fla. 2017), and stipulation of the parties.

52. Section 409.910(11)(f) provides as follows:

> 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.

53. In the instant case, Petitioner proved by a preponderance of the evidence that the settlement proceeds of $225,000 represents 7.367214 percent of Petitioner's claim valued

at $3,054,071.79 ($225,000/$3,054,071.79). It is concluded that AHCA's full Medicaid lien amount should be reduced by the percentage that Petitioner's recovery represents of the total value of Petitioner's claim. Multiplying AHCA's full Medicaid lien sum of $54,071.79 by 7.367214 percent results in $3,983.58, which constitutes a fair, reasonable, and accurate share of the total recovery for past medical expenses actually paid by AHCA through the Medicaid program. See generally Delgado (accepting formula that AHCA's full Medicaid lien amount should be reduced by the percentage that Petitioner's recovery represents of the total value of Petitioner's claim).

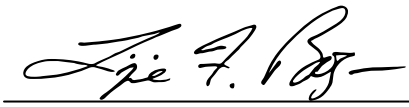
DISPOSITION

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

ORDERED that:

The Agency for Health Care Administration is entitled to $3,983.58 in satisfaction of its Medicaid lien.

DONE AND ORDERED this 9th day of April, 2019, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of April, 2019.

ENDNOTE

[1/] All subsequent references to Florida Statutes will be to 2018, unless otherwise indicated. The parties, by stipulation, agree that the 2018 version of Florida Statutes controls the instant proceeding.

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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.