

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOSIAH DELVA, BY AND THROUGH HIS
PARENTS AND NATURAL GUARDIANS,
JENNIFER PAULINO DELVA AND
JOHNNY DELVA,

Petitioner,

vs.

Case No. 19-1590MTR

AGENCY FOR HEALTH CARE
ADMINISTRATION,

Respondent.

_____ /

FINAL ORDER

Pursuant to notice, a formal administrative hearing was conducted before Administrative Law Judge Mary Li Creasy by video teleconference with locations in Miami and Tallahassee, Florida, on September 17, 2019.

APPEARANCES

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

The issue to be decided is the amount to be paid by
Petitioner to Respondent, Agency for Health Care Administration

("AHCA"), out of his settlement proceeds, as reimbursement for past Medicaid expenditures pursuant to section 409.910, Florida Statutes.

PRELIMINARY STATEMENT

On March 25, 2019, Petitioner filed a "Petition to Determine Amount Payable to Agency for Health Care Administration in Satisfaction of Medicaid Lien," pursuant to section 409.910(17)(b), Florida Statutes (2019). The matter was assigned to the undersigned Administrative Law Judge to conduct a formal administrative hearing and enter a final order.

Prior to the final hearing the parties filed a Joint Pre-hearing Stipulation, which included numerous stipulated and admitted issues of law and fact. Those stipulated issues of law and fact have been incorporated herein.

The final hearing proceeded as scheduled on September 17, 2019. Petitioner, Jennifer Paulino Delva, as mother of Josiah Delva, testified and also presented the testimony of one expert witness, Zarahi Nunez, an expert in life care planning. Petitioner's Exhibits 1 through 3 were admitted into evidence.^{1/} AHCA did not call any witnesses. AHCA's Exhibit A was admitted.

The parties elected not to order a transcript of the final hearing. The parties timely filed their respective proposed final orders which were considered by the undersigned in the

preparation of this Final Order. All references to the Florida Statutes are to the 2018 version unless otherwise stated.

FINDINGS OF FACT

1. On January 1, 2013, Josiah Delva ("Josiah"), who was only 18-months-old, was presented to a hospital with a fever and emesis. He was discharged only one and a half hours later after he was misdiagnosed with a "normal" condition.

2. The following day, Josiah's fever continued, and he began suffering from a purpuric rash on his body and decompensated septic shock. He was taken back to the Emergency Room where he was diagnosed with meningococcal meningitis and meningococcal bacteremia and grew *Moraxella catarrhalis* in his sputum.

3. Josiah was admitted to and remained in the intensive care unit of the hospital for five months. Due to the necrosis, which was caused by the meningococcus, Josiah's left arm below the elbow, his right leg below his knee, and the toes of his left foot were all amputated. In addition, he required bilateral patellectomies (removal of his knee caps).

4. Josiah's medical care related to the injury was paid by AHCA's Medicaid program. Medicaid provided \$237,408.60 of the costs associated with Josiah's injury. The \$237,408.60 paid by Medicaid constituted Josiah's entire claim for past medical expenses.

5. Josiah's parents and natural guardians, Jennifer Paulino Delva and Johnny Delva, brought a medical malpractice suit against the medical providers and staff responsible for Josiah's care ("Defendant medical providers") to recover all of Josiah's damages as associated with his injuries.

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

7. During the pendency of the medical malpractice action, AHCA was notified of the action, and it asserted a \$237,408.60 Medicaid lien against Josiah's cause of action and future settlement of that action.

8. AHCA made payments totaling \$237,408.60 related to Josiah's injuries for which the defendant medical providers are liable.

9. Josiah's lawsuit ultimately settled in December of 2018 or January of 2019 for the gross unallocated sum of \$550,000.00. Petitioner deposited the full Medicaid lien amount in an interest bearing account for the benefit of AHCA pending an administrative determination of AHCA's rights, and this constitutes "final agency action" for purposes of chapter 120, Florida Statutes, pursuant to section 409.910(17).

10. There were \$146,110.61 in attorney's fees and costs incurred to make the recovery. The parties stipulated that operation of the statutory formula to Josiah's settlement would require repayment to AHCA in the amount of \$185,694.69.

Witness Testimony

11. Zarahi Nunez was accepted, with no objection, as an expert in life care planning. She met with the Delva family and consulted with medical professionals regarding the treatment needs and options for Josiah. She also reviewed the appropriate manuals to determine a course of treatment for Josiah. Ms. Nunez developed a life care plan, along with dollar figures for each aspect of treatment totaling \$5,998,080.19.^{2/}

12. Mrs. Delva testified how she noticed that Josiah developed a fever and was vomiting on New Year's Eve (December 31, 2012). After midnight, he vomited again, so Mrs. Delva brought him to the hospital. He was discharged a few hours later around 4:00 a.m. on New Year's Day (January 1, 2013). Josiah was diagnosed with a stomach flu, and was given a prescription to stop vomiting.

13. Josiah developed a rash, which concerned Mrs. Delva. Upon talking to medical professionals via phone, Mrs. Delva determined that Josiah's rash would not change with pressure on his skin. This apparently indicated that his white blood cell

count was low. Mrs. Delva immediately rushed Josiah to the hospital upon the doctor's instruction.

14. At the hospital, Josiah bypassed triage as the rash continued to spread and as symptoms of sepsis became apparent. The doctors diagnosed Josiah as having a bacterial meningitis infection and treated him. His organs began shutting down and his body turned colors from the rash.

15. Mrs. Delva vividly explained the horror of: watching multiple physicians rush to her son's bedside; seeing the Emergency Room go into quarantine due to her son's infection; providing the names of all the people Josiah had come into recent contact so that they could be given precautionary antibiotics; having the health department remove all of Josiah's things from the house to prevent the spread of the infection; and seeing her son essentially die on the table and be resuscitated.

16. Josiah was in the hospital from January 1 through May 2, 2013. Due to the lack of blood circulation, Josiah lost multiple body parts. His left hand at the wrist, his right leg at the ankle, and part of his left foot were amputated, and both knee caps were removed. His skin is tough and scarred.

17. According to Mrs. Delva, had the doctor properly diagnosed Josiah when they first arrived after midnight on New Year's Day, he would not have suffered the extent of his

injuries. Mrs. Delva and her husband have four children, including Josiah, and she detailed the extent to which the family facilitates Josiah's needs. Josiah's siblings do not always understand the extra attention needed by Josiah from their parents. She explained every day is a constant struggle, and most notably explained, the need to travel from Miami to Tampa to Shriners' Hospital ten or more times per year for check-ups and to update Josiah's prosthetics.

18. No witness testified to Josiah's or his parents claim for noneconomic damages. While it is clear that the malpractice caused grievous pain and suffering to the family that will last Josiah's entire life, no expert was presented to discuss the valuation of these damages.

19. No testamentary or other evidence was advanced to show how the \$550,000.00 settlement amount should be allocated between past medical expense damages and other elements of damages.

Petitioner's Theory of the Case

20. Petitioner's counsel argues that the total value of the case that Petitioner should reasonably have expected to be awarded by a jury was \$110,735,488.79. Counsel explained that this number represents the past medicals paid by Medicaid, \$6 million for future medicals, \$20 million for past pain and suffering, \$80 million for future pain and suffering, and

\$2 million each (a total of \$4 million) for Mr. and Mrs. Delva's loss of consortium claims.

21. Petitioner argues that the past medicals, as paid by Medicaid in the amount of \$234,408.60, represent 0.0021 percent of the total value of the case of \$110,735,488.79. Petitioner argues that applying this 0.0021 percent times the actual recovery of \$550,000.00 results in Medicaid's pro rata recovery being reduced to \$1,155.00 as the portion of the settlement allocable to past medicals.^{3/}

22. No expert testimony was introduced on the calculation of any element of damages other than future medical expenses.^{4/}

23. In support of the \$110 million dollar plus "total value" of the case, Petitioner provided three jury verdicts to establish comparable pain and suffering awarded in similar circumstances. These cases include: A.H., a minor, et al. v. Trustees of Mease Hospital, Inc., et al., 2018 FL Jury Verdict Rptr. LEXIS 277; Lisa-Marie Carter v. Larry Roy Glazerman, M.D., et al., 2018 FL Jury Verdict Rptr. LEXIS 175; and Cynthia N. Underwood and Stephen R. Underwood v. Katherine Strong, 2017 FL Jury Verdict Rptr. LEXIS 11578.

24. The facts of how the injuries happened and the effects of the injuries, in these cited cases, differ highly from Josiah's case. The first of the three jury verdicts shows a

gross verdict award of \$9,250,000.00. The third of the jury verdicts show a gross award of \$6,132,642.

25. The second of the three jury verdicts shows an award of \$109,760,930. This includes the staggering figure of \$94 million for pain and suffering damages. The undersigned took official recognition of the docket for the Carter case and the Notice of Appeal filed on March 22, 2018, which show that the Carter verdict is on appeal.

26. Unfortunately, these jury verdicts provide no guidance for calculating Josiah's or his parents' claims for noneconomic damages or the total value of the case.

CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case, and has final order authority pursuant to sections 120.569, 120.57(1), and 409.910(17)(b), Florida Statutes.

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

29. 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.

30. By accepting Medicaid benefits, Medicaid recipients automatically subrogate their rights to any third-party benefits

for the full amount of Medicaid assistance provided by Medicaid and automatically assign to AHCA the right, title, and interest to those benefits, other than those excluded by federal law. Section 409.910(6)(c) creates an automatic lien on any such judgment or settlement with a third party for the full amount of medical expenses paid to the Medicaid recipient. However, AHCA's recovery is limited to those proceeds allocable to past medical expenses.

31. Section 409.910(11)(f) establishes the amount of AHCA's recovery for a Medicaid lien to the lesser of its full lien; or 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. In this case, the parties agree the formula results in AHCA recovering \$185,694.69.

32. However, section 409.910(17)(f) provides a method (default allocation) by which a Medicaid recipient may contest the amount designated as recovered Medicaid expenses payable under section 409.910(11)(f). In order to successfully challenge the amount payable to AHCA, the recipient must 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 calculated by AHCA pursuant to the formula. Gallardo v. Dudek, 263 F. Supp. 3d 1247 (N.D. Fla. 2017).

33. As explained in Smith v. Agency for Health Care Administration, 24 So. 3d 590 (Fla. 5th DCA 2009), evidence of all medical expenses must be presented, as AHCA may recover from the entirety of the medical expense portion--not just the portion that represents its lien. Further, section 409.910(17)(b) grants the undersigned power to find "the portion of the total recovery which should be allocated as past . . . medical expenses," and to limit AHCA to that amount. The statute does not authorize a reduction of the Medicaid lien to the Medicaid-only portion of a recipient's recovery.

34. Where uncontradicted testimony is presented by the recipient, there must be a "reasonable basis in the evidence" to reject it. Giraldo v. Ag. for Health Care Admin., 248 So. 3d 53, 56 (Fla. 2018). However, in this case, no evidence was presented to accept it. While the settlement is obviously woefully inadequate to fully compensate Josiah or his parents for the damages wrought by the medical negligence, there simply was no evidence presented upon which to determine what a jury would likely award in this case. The two jury verdicts of under \$10,000,000.00 do not suggest that Petitioner's case could be valued in the \$110,000,000.00 range.

35. In the instant case, Petitioner failed to prove by a preponderance of the evidence the total value of Petitioner's claim or what portion of the \$550,000.00 represents a fair share of past medical expenses. As explained recently in Gray v. State, No. 1D17-355 (Fla. 1st DCA Sept. 3, 2019), "when the plaintiff fails to produce evidence or present testimony showing that the lien amount should be reduced, the plain language of section 409.910(11)(f) requires the ALJ to apply the statutory formula." Therefore, it is concluded that AHCA's full Medicaid lien amount should be reduced by the formula contained in section 409.910(11)(f) to a total of \$185,694.69.

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 \$185,694.69 from Petitioner's settlement proceeds in satisfaction of its Medicaid lien.

DONE AND ORDERED this 7th day of October, 2019, in
Tallahassee, Leon County, Florida.

Mary Li Creasy

MARY LI CREASY
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of October, 2019.

ENDNOTES

^{1/} Josiah, now eight years old, was present at the hearing. At the end of the hearing, the undersigned had a brief conversation with Josiah as a courtesy and to allow him to ask any questions about the hearing process. Josiah was exceptionally well-behaved and courteous at the hearing and deserved to be recognized. Josiah was not placed under oath. The answers provided by Josiah to the undersigned's questions about his new school year were not intended, nor considered, as testimony.

^{2/} The dollar figures in the life care plan are based upon the initial amount the medical providers charge, not upon discounted rates, nor the amount that the medical providers actually receive.

^{3/} Counsel offered different figures in Petitioner's Proposed Final Order ("PFO") than at hearing. The numbers in the PFO are inconsistent with the evidence and the stipulated facts. Petitioner's PFO refers to the \$500,000.00 "lump sum" and also "\$500,000.00 available settlement proceeds."

At the final hearing, and by a simple calculation, the past medicals of \$237,408.60 divided by Petitioner's offered total value of the case (\$110,735,488.79) is 0.0021 percent.

However in Petitioner's PFO, Petitioner states, "[u]sing the conservative estimate of the value of the damages of \$110,735,488.79, the \$500,000.00 available settlement proceeds that Petitioners recovered for all of their injuries represented .45% of the value of their entire medical malpractice case." This percentage does not show how much of the proceeds are allocable to past medicals. Accordingly, the undersigned is using 0.0021 percent for the calculations in this Final Order.

^{4/} When questioned whether any evidence of the manner in which these figures were derived would be presented, counsel for Petitioner offered to provide his own affidavit or suggested that the hearing be held open for a later date so that he could secure an expert to opine on the topic of damages calculations. Counsel did not identify himself as an "expert" or witness who would testify at trial in the Joint Pre-hearing Stipulation. Rule 4-3.7 of the Florida Bar's Rules of Professional Conduct generally prohibits an attorney from testifying in a case in which he is representing a party.

Further, this case was noticed for hearing on April 10, 2019. At no time did counsel seek an extension of time within which to secure an expert, nor did Petitioner's counsel identify any experts prior to hearing. Florida Administrative Code Rule 28-106.210 provides, "[t]he presiding officer may grant a continuance of a hearing for good cause shown. Except in cases of emergency, requests for continuance must be made at least five days prior to the date noticed for the hearing." Counsel's lack of preparation of his case does not constitute "good cause" or an "emergency."

COPIES FURNISHED:

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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.