STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ERICA E. ROSS, A MINOR BY AND THROUGH HER MOTHER AND NATURAL GUARDIAN, KIMBERLY S. ROSS,

Petitioner,

vs. Case No. 19-4228MTR

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

FINAL ORDER

On November 4, 2019, Administrative Law Judge Hetal Desai of the Division of Administrative Hearings (DOAH) conducted the final hearing by video teleconference with sites in Tallahassee and St. Petersburg, Florida.

APPEARANCES

For Petitioner: Floyd B. Faglie, Esquire
Staunton and Faglie, P.L.
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For Respondent: Alexander R. Boler, Esquire
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STATEMENT OF THE ISSUE

The issue in this proceeding is how much of Petitioner's settlement proceeds should be paid to Respondent, the Agency for Health Care Administration (AHCA or Agency), to satisfy AHCA's Medicaid lien under section 409.910, Florida Statutes (2019).[1]

PRELIMINARY STATEMENT

On August 12, 2019, Petitioner filed a "Petition to Determine Amount Payable to Agency for Health Care Administration in Satisfaction of Medicaid Lien" (Petition) with DOAH. Shortly thereafter, DOAH notified AHCA of the Petition and assigned it to an Administrative Law Judge.

Petitioner challenges the Medicaid lien asserted by AHCA against her settlement proceeds and asserts it should be reduced because she was not "fully compensated for the full value of her damages and she is only recovering a fraction of the total monetary value of her damages." The Agency argues it must be reimbursed for its Medicaid lien in the amount of $118,705.82, as calculated pursuant to section 409.910(11)(f).

The final hearing was held on November 4, 2019.[2] Petitioner offered the testimony of Jeffery Hensley, Esquire, as an expert in valuation and as a fact witness. Petitioner's Exhibits 1 and 3 through 12 were admitted into evidence without objection. Petitioner's Exhibit 2 was admitted over the Agency's objections. The Agency did not offer any witnesses or exhibits.

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[1] Unless referenced otherwise, all citations to state and federal statutes, rules, and regulations are to the 2019 versions, which were in effect at the time of Petitioner's settlement agreement. *See Cabrera v. Ag. for Health Care Admin.*, Case No. 17-4557MTR, FO at 22, n.1 (Fla. DOAH Jan. 23, 2018)(citing *Suarez v. Port Charlotte HMA*, 171 So. 3d 740 (Fla. 2d DCA 2015)).

[2] The Agency's attorney was almost an hour late to the hearing, and arrived only after DOAH staff contacted the Agency to determine whether it would be participating in the duly noticed hearing.

Although there was no court reporter at the hearing, a transcript of the proceedings was filed on November 26, 2019.[3] At the conclusion of the hearing, the parties requested an extension of an additional 21 days after the filing of the transcript to file proposed final orders (PFOs), and this request was granted. A subsequent Joint Motion for Extension of Time to File the PFOs was submitted and granted on December 17, 2019. Both parties timely filed PFOs on January 8, 2020, and both PFOs have been considered.

FINDINGS OF FACT

The Accident

1. Erica Ross (Petitioner or Ms. Ross) is a 17-year-old female who brings this action by and through her mother and natural guardian, Kimberly Ross (Mrs. Ross).

2. On the night of May 13, 2017, a Cadillac Escalade (a large sports utility vehicle) struck Ms. Ross and a friend while they were crossing the road in front of the Ross home. Ms. Ross suffered a crushed pelvis and severe orthopedic injuries, and was helicoptered from the accident site to the hospital. Her friend died at the scene of the accident or shortly thereafter.

3. At the time of the accident, Ms. Ross was a 15-year-old freshman in an International Baccalaureate (IB) high school program, making the Honor Roll. In addition, she participated in extra-curricular activities including dance and a student medical leadership program.

[3] The Agency failed to obtain a court reporter despite instructions in the Notice of Hearing and agreeing to do so in the Joint Pre-hearing Stipulation: "Respondent agrees to arrange a court reporter for the hearing." *See also* § 120.57 (1)(g), Fla. Stat. ("The agency shall accurately and completely preserve all testimony in the proceeding, and, on the request of any party, it shall make a full or partial transcript available at no more than actual cost."). Given the option of rescheduling the hearing, the parties instead chose to digitally record the hearing on the Agency attorney's mobile smartphone, and then obtain a transcription. This method is less than desirable, especially when the only witness testifies by video teleconferencing, as evidenced by the "unintelligible" notations indicated in Mr. Hensley's answers in the transcript.

Petitioner's Damages

4. As a result of the accident, Ms. Ross was hospitalized for approximately ten days and suffered severe physical injuries, including the following: multiple fractures to her pelvis and tibia; process fractures to the L1, L2, L3, and L5 vertebrae; comminuted fracture of the S1 vertebra; renal laceration; closed head injury with brain damage; and a large parietal scalp contusion. Later, Ms. Ross was also diagnosed with cognitive and emotional disorders related to the accident, including the following: post-traumatic stress disorder (PTSD); traumatic brain injury (TBI); post-concussion syndrome; and depression.

5. The parties stipulated that Medicaid provided $118,705.82 toward Petitioner's past medical expenses arising out of the accident.

6. Additionally, there was $4,868 of medical expenses not paid by Medicaid, for a total of approximately $123,573 in medical expenses.

7. The unrebutted evidence established Ms. Ross was bedridden for approximately six weeks after being released from the hospital, and then returned to school using a wheelchair. Ms. Ross can currently walk without assistance, but still has a slight limp in her right leg and has difficulty with prolonged walking or standing. She no longer can participate in dance activities, and is anticipated to have life-long limitations on the length of time she can walk and stand. When she returned to school after the accident, Ms. Ross had trouble concentrating and performing simple tasks; she also had problems with her short-term memory. Ms. Ross's grades dropped and she was no longer eligible for the IB program.

8. As a result of the TBI, Ms. Ross was evaluated by a pediatric brain injury education specialist. The specialist prepared a special education report for Ms. Ross, which establishes the accident caused cognitive issues related to her concentration and memory. As a result of these issues, coupled with the PTSD and depression caused by the death of her friend, Ms. Ross would have difficulty finishing school without special accommodations. Although the

specialist's report noted Ms. Ross could finish a basic college degree with the proper accommodations, it noted that it will more than likely take her longer than the typical four years. The specialist's report also states the cognitive issues will affect the type of employment Ms. Ross will be able to successfully maintain. The Agency did not challenge the specialist's report or the facts underlying the report.

9. According to Petitioner's economist's report, Ms. Ross's cognitive, physical, and mental health issues will have a negative impact on her future wages. The present value of her lost future wages is $1,068,044 if Ms. Ross completes a four-year college degree; the loss is greater if Ms. Ross does not obtain a college degree. Again, the Agency made no objections to the economist's report, and did not challenge the underlying facts or ultimate conclusions.

10. Petitioner also presented a life care plan report, which was admitted into evidence without objection. The life care plan establishes Petitioner will require life-long extensive physical and mental therapy, medication, and future surgeries. The unrebutted evidence established the present value of her future medical expenses at $424,966.

11. The evidence in the various reports was corroborated by Mr. Hensley's testimony. Mr. Hensley was Petitioner's attorney in the personal injury claim against the owner and operator of the Escalade that struck Petitioner. As Petitioner's attorney, Mr. Hensley knew Petitioner, and was familiar with her medical records, life care plan, economist's report, and the special education report.

12. The evidence also established Ms. Ross has suffered non-economic damages as a result of the accident. The injuries will impact her daily life functions and her ability to maintain normal family, social, and work relationships.

The Settlement

13. The parties stipulated that Mrs. Ross pursued a personal injury claim against the owner and operator of the car that struck her daughter to recover damages associated with Petitioner's injuries.

14. AHCA was notified of Petitioner's personal injury action, but did not intervene or join the action. Instead, AHCA asserted a $118,705.82 Medicaid lien against Petitioner's personal injury action and any resulting settlement.

15. The personal injury claim was settled for an unallocated lump sum amount of $1,000,000, and fully executed on June 22, 2019. The taxable costs incurred in securing the $1,000,000 settlement were $130,110.67.

16. Neither the settlement agreement nor any related release was presented at the hearing. The parties have stipulated however, that AHCA was notified of the settlement, and AHCA did not file a motion to set aside, void, or otherwise dispute Petitioner's settlement.

17. Mr. Hensley was also accepted, without any objection by the Agency, as an expert in the valuation of damages. Mr. Hensley has 33 years of legal experience and specializes in handling personal injury litigation involving brain injuries. In addition, he has served on the board of directors for a publically funded organization that works with victims of brain injuries in Florida. Based on his experience and familiarity with other similar cases and verdicts, Mr. Hensley opined as to the total value of Petitioner's damages and the formula used in these types of cases to estimate the amount of non-economic damages.

18. Regarding the value of Petitioner's damages, Mr. Hensley testified that "my thoughtful value would be no less than $3.5 million." This was a conservative valuation of the "full value of all of [Petitioner's] damages." This amount includes total economic damages ($1,616,583), made up of Petitioner's past medical expenses ($123.573), plus future income loss ($1,068,044), plus future medical expenses ($424,966). The remaining amount ($1,883,417) is attributable to non-economic damages such as past and future

pain and suffering. Although the Agency questioned Mr. Hensley, it did not credibly challenge him on these numbers.

19. The non-economic damages, explained Mr. Hensley, are generally 2.85 to three times the amount of economic damages. This is how Mr. Hensley arrived at the $1,883,417 figure for the non-economic damages. Again, the Agency did not convincingly challenge this formula or amount.

Allocation of Past Medical Expenditures

20. The key factual issue in this case is how much of the $1,000,000 settlement funds are available to AHCA for payment of the Medicaid lien. One way to determine this amount is through a default formula set forth in section 409.910(11)(f). The parties stipulated that under this default formula, Petitioner is required to pay AHCA the full amount of the Medicaid lien, $118,705.82.[4]

21. Alternatively, Petitioner can show that a lesser amount than the default amount "should be allocated as reimbursement" for past medical expenses. *See* § 409.910(17)(b), Fla. Stat. Here, Petitioner urges the reduction of the Medicaid lien by the ratio of the actual settlement recovery to the "settlement value" amount.

22. Although the Agency challenged Mr. Hensley on the "pro rata" approach he used to arrive at the amount of the settlement that could be reasonably attributed to past medical expenses, the Agency did not offer an alternative methodology or present evidence why this "pro rata" approach should not be used. Ultimately, the undersigned must accept Mr. Hensley's unrebutted testimony that in this case "there really doesn't seem to be another rational, reasonable way to do it."

23. Petitioner provided evidence supporting the allocations of past lost wages, future lost earnings, and non-economic damages, such as pain and

[4] Section 409.910(11)(f) establishes the Agency's default recovery amount for a Medicaid lien: the default amount is equal to 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.

suffering. Based on the valuation of $3.5 million, Petitioner's $1,000,000 settlement would equal approximately 28.57 percent of Petitioner's full damages. Using a "pro rata" approach, this same percentage applied to the past medical expenses would equal approximately $35,305.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over the subject matter and parties in this case pursuant to sections 120.569, 120.57, and 409.910, Florida Statutes (2019) (the Medicaid Third-Party Liability Act).

25. As explained by the Florida Supreme Court in *Giraldo v. Agency for Health Care Administration*, 248 So 3d 53, 55 (Fla. 2018), Medicaid is a joint governmental program designed to help participating states provide medical treatment for their residents who cannot afford to pay for treatment.[5] In order for the State of Florida to take advantage of federal Medicaid funds for patient care costs, it must comply with the federal regulations requiring it to recover its expenditures for the medical expenses from third-party sources, such as settlement agreements. *See* 42 U.S.C. § 1396a(a)(25)(B); *Ahlborn*, 547 U.S. at 284-85. At the same time, the Medicaid statute limits a state's right to collect reimbursement of expended funds to only those third-party monies that can be allocated for medical care. 42 U.S.C. § 1396p(a)(1); *Ahlborn*, 547 U.S. at 285-86.

26. As mentioned above, the Florida Legislature set forth a "default formula" to determine the amount AHCA may recover for past Medicaid

[5] Although participation in Medicaid is voluntary, all states take advantage of this funding source for the medical needs of its citizens. *See Ark. Dep't of Health & Human Servs. v. Ahlborn*, 547 U.S. 268, 275 (2006) ("States are not required to participate in Medicaid, but all of them do. The program is a cooperative one; the Federal Government pays between 50% and 83% of the costs the State incurs for patient care, and, 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."); *see also Gallardo v. Dudek*, 263 F. Supp. 3d 1247, 1250 (N.D. Fla. 2017), amended on rehearing, 2017 U.S. Dist. LEXIS 112448 (N.D. Fla. 2017), *rev. granted*, Case No. 17-13693 (11th Cir. 2017).

payments from a judgment, award, or settlement from a third party. *See* § 409.910(11)(f), Fla. Stat. The statute, however, provides Medicaid recipients with a method for challenging this default amount by initiating an administrative proceeding through DOAH. *See* § 409.910(17)(b), Fla. Stat. (providing the procedure by which a Medicaid recipient may contest the amount designated as recovered medical expenses payable under section 409.910(11)(f)). Certain aspects of the default formula statute have been called into question, including (1) what portion of a Medicaid beneficiary's recovery is subject to a lien by AHCA, and (2) what is the proper burden of proof for a Medicaid beneficiary to prove the default formula is inappropriate. S*ee Giraldo*, 248 So. 3d at 54 (holding "federal law allows AHCA to lien only the past medical expenses portion of a Medicaid beneficiary's third-party tort recovery to satisfy its Medicaid lien."); G*allardo*, 263 F. Supp. 3d at 1260 (holding Florida's "clear and convincing" burden in section 409.910(17)(b) is preempted by federal law).[6] Regarding the first issue, AHCA has stipulated it only seeks recovery for past medical expenses, and not the future medical expenses.

27. Regarding the burden of proof, although this issue is currently before the federal 11th Circuit on appeal in the *Gallardo* case, the Agency has stipulated to the preponderance of the evidence default standard under section 120.57(1)(j). Regardless of whether the burden is "clear and convincing" or a "preponderance of the evidence," the burden was on Petitioner--as the Medicaid recipient--to prove that a lesser portion of the

[6] In *Gallardo*, Judge Mark Walker enjoined AHCA from applying the clear and convincing standard in section 409.910(17)(b). *But see Gray v. Ag. for Health Care Admin*., 44 Fla. L. Weekly D3017 (Fla. 1st DCA December 19, 2019)("But the decision in *Gallardo* is not binding on this Court or the Division of Administrative Hearings, even though it may be persuasive authority. And, even if *Gallardo* were binding, the invalidated portion of the statute—the clear and convincing burden of proof—would be replaced with the default burden of proof for administrative hearings under Florida's Administrative Procedure Act. Thus, if *Gallardo* was binding, [the petitioner] would have to show by a preponderance of the evidence that AHCA's lien should be less than the statutory amount." (Citations and quotations omitted)).

total recovery should be allocated as reimbursement for past medical expenses, rather than the amount calculated by AHCA.

28. In *Giraldo*, the court explained "there must be a 'reasonable basis in the evidence' for the [the administrative law judge] to reject uncontradicted testimony supporting the reduction of a Medicaid lien." *Giraldo*, 248 So. 3d at 56. A "reasonable basis" can include "conflicting medical evidence, evidence that impeaches the expert's testimony or calls it into question, such as the failure of the plaintiff to give the medical expert an accurate or complete medical history, conflicting lay testimony or evidence that disputes the injury claim, or the plaintiff's conflicting testimony or self-contradictory statements regarding the injury." *Wald v. Grainger*, 64 So. 3d 1201, 1206 (Fla. 2011).

29. This case is similar to the recent decisions in *Eady v. State*, 279 So. 3d 1249 (Fla. 1st DCA 2019) and *Mojica v. State*, 44 Fla. L. Weekly D3018 (Fla. 1st DCA December 19, 2019). In *Eady*, the Medicaid recipient settled his lawsuit, but the terms of the settlement were confidential. There, as in this case, the petitioner presented unrebutted expert testimony regarding the total value of his damages and the appropriate share of the settlement funds that should be allocated to past medical expenses. *Id.* at 1252-53. The First District Court of Appeal held that despite the ALJ's finding that the expert spoke in "generalities, speculations, and reasonableness as to the settlement in relation to the Medicaid lien," the petitioner had met his burden. Relying on *Giraldo*, the *Eady* court noted that the Agency had not put on any contradictory evidence, and the ALJ could not ignore the expert's testimony establishing the appropriate share of settlement funds properly allocated to past medical expenses.

30. Similarly in *Mojica*, the court held that a pro rata methodology is appropriate where a petitioner presents "unrebutted and unimpeached expert testimony concerning the full value of her damages . . . [and] AHCA did not present any evidence contesting the pro rata methodology used to calculate the [ ] allocation to past medical expenses." *Id.* at D3018 (citations omitted).

31. Because the Agency has not rebutted or impeached the expert testimony, or offered any witnesses or evidence contradicting Petitioner's case, Petitioner has proved that $35,305 represents the amount that can be fairly attributable to past medical expenses and is available to the Agency for repayment on its Medicaid lien.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Agency for Health Care Administration may recover $35,505 from Petitioner's settlement proceeds at issue in this matter in satisfaction of its Medicaid lien.

DONE AND ORDERED this 7th day of February, 2020, in Tallahassee, Leon County, Florida.

HETAL DESAI
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Filed with the Clerk of the
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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.