STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AMY LOPEZ, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF A.F., A MINOR,

Petitioner,

vs. Case No. 20-2124MTR

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

FINAL ORDER

On July 16, 2020, an administrative hearing was held in the above-styled case via Zoom technology before Lynne A. Quimby-Pennock, Administrative Law Judge, Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Jason Dean Lazarus, Esquire
Special Needs Law Firm
2420 South Lakemont Avenue, Suite 160
Orlando, Florida 32814

For Respondent: Alexander R. Boler, Esquire
2073 Summit Lake Drive, Suite 330
Tallahassee, Florida 32317

STATEMENT OF THE ISSUE

The issue in this case is the amount that must be paid to Respondent, Agency for Health Care Administration (AHCA or Respondent) from the proceeds of Petitioner's confidential settlement to satisfy Respondent's

Medicaid lien against the proceeds pursuant to section 409.910, Florida Statutes (2019).[1]

PRELIMINARY STATEMENT

On May 6, 2020, Amy Lopez, individually and as parent and natural guardian of A.F., a minor (Ms. Lopez or Petitioner), filed a petition[2] at DOAH pursuant to section 409.910(17)(b), for a determination of the amount payable to AHCA in satisfaction of Respondent's Medicaid lien against the proceeds of a confidential settlement.

The case was assigned to the undersigned. Upon consultation with the parties, the hearing was scheduled for July 16, 2020, via Zoom technology and was completed as planned.

On July 14, 2020, the parties filed a Joint Pre-hearing Stipulation in which they stipulated to nine factual statements.[3] The parties' stipulations are incorporated below, to the extent relevant.

At hearing, Ms. Lopez, as the mother of the minor child A.F., testified, and presented the testimony of three attorneys: Nathan Carter, Esquire;

[1] All citations will be to the 2019 edition of the Florida Statutes unless otherwise indicated.

[2] On July 15, 2020, Ms. Lopez filed an "Amended Petition to Determine Medicaid's Lien Amount to Satisfy Claim Against Personal Injury Recovery by the Agency For Health Care Administration" (Amended Petition) to correct a mathematical error. At the start of the hearing, the Amended Petition was presented and the Amended Petition was allowed.

[3] At the beginning of the hearing, a correction to statement 8 on page 6 of the Joint Pre-Hearing Stipulation was made, changing the initials of the individual named to "A.F.," the minor child of this action.

Troy Rafferty, Esquire; and Kenneth McKenna, Esquire.[4] Petitioner's Exhibits 1 through 8 were received into evidence without objection.

Respondent presented no witnesses. Respondent's Exhibit 1 was received in evidence over objection.[5]

At the conclusion of the hearing, it was agreed that proposed final orders (PFOs) would be due within ten days after the hearing transcript was filed.[6] The one-volume Transcript of the proceeding was filed on August 3, 2020.[7] The PFOs were timely filed. Each PFO has been considered in the preparation of this Final Order.

FINDINGS OF FACT

Paragraphs 1 through 9 are the facts admitted[8] and agreed upon by the parties, and required no proof at hearing.

1. On December 7, 2012, A.F., an eight-year-old female, underwent an initial psychiatric evaluation. Following this assessment, A.F. was started on treatment for Attention-Deficit/Hyperactivity Disorder (ADHD). A.F. was

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[4] Respondent's Proposed Final Order provided that "Petitioner presented two witnesses: Andrew Needle, Esq., and Kenneth Bush, Esq." The undersigned did not hear any testimony from Mr. Needle or Mr. Bush.

[5] Respondent's Exhibit 1, a "Provider Processing System Report," contained a different "Total Claims" amount than the amount of A.F.'s medical expenses paid by AHCA to which the parties stipulated. Without testimony this exhibit is hearsay, and cannot support a finding of fact. As discussed at hearing, the parties agreed to use the stipulated amount: $261,334.61.

[6] Although Petitioner's PFO recites that Petitioner "did not order a transcript of the proceedings," a review of the filed transcript shows otherwise. *See* Hearing Tran, pg. 10, lines 4–7.

[7] The Hearing Transcript was electronically filed with DOAH on August 3, 2020; the hard–copy original Transcript was filed with DOAH on August 14, 2020.

[8] Statement 3 has been reworded for clarity purposes.

prescribed 18mg of the ADHD drug[9] that was the subject of the personal injury litigation.

2. On March 30, 2013, at the age of nine, and shortly after her ADHD medication was uptitrated from 18mg to 27mg daily, A.F. attempted suicide by way of hanging with a scarf fastened to her bunk bed. That action detrimentally impeded oxygen flow to A.F.'s brain for a dangerously prolonged period of time, resulting in extensive neurological damage and substantial motor impairment; ultimately leaving A.F. in a permanent vegetative state.

3. Ms. Lopez, on behalf of A.F., brought a product liability and medical malpractice action to recover all of A.F.'s damages related to her prescription of the ADHD drug. This action was brought against various pharmaceutical and medical malpractice defendants.

4. As a result of the alleged medical malpractice and pharmaceutical product liability claims, A.F. suffered a massive hypoxic brain injury. Since this incident and the resulting hypoxic brain injury, A.F. has been in a permanent vegetative state requiring 24/7 skilled nursing care.

5. In 2020, Ms. Lopez, on behalf of A.F., settled her tort action for a limited confidential amount, due to significant liability challenges with her claims; even though she believed that A.F.'s injuries were tens of millions of dollars in excess of the recovery.

6. AHCA was properly notified of A.F.'s lawsuit against the defendants and indicated it had paid benefits related to the injuries from the incident in the amount of $261,334.61. AHCA has asserted a lien for the full amount it paid, $261,334.61, against A.F.'s settlement proceeds.

7. AHCA has maintained that it is entitled to application of section 409.910's formula to determine the lien amount. Applying the statutory

[9] The name of the drug is not being used based on the terms in the confidential settlement.

reduction formula to this particular settlement would result in no reduction of the lien given the amount of the settlement.

8. AHCA paid $261,334.61 on behalf of A.F., related to her claim against the liable third parties.

9. The parties stipulated that AHCA is limited by section 409.910(17)(b) to the past medical expense portion of the recovery and that a preponderance of the evidence standard should be used in rendering this Final Order.

10. There were two settlements regarding A.F.'s care and treatment: one with the doctor(s) who allegedly committed medical malpractice; and the second involving the pharmaceutical maker of the ADHD drug prescribed to A.F. Although AHCA was notified when the medical malpractice case was settled, AHCA did not file a lien on any of the recovery from the medical malpractice settlement. Limited information about the medical malpractice settlement was discussed, but the medical malpractice settlement is not considered in this Final Order.

11. Petitioner's Exhibit 1 is a February 16, 2019, letter (lien letter) from Conduent Payment Integrity Solutions, a subcontractor to Health Management Systems which is an authorized agent of AHCA "to operate the Florida Medicaid Casualty Recover Program." In addition to directing A.F.'s counsel to review section 409.910, to determine the "responsibilities to Florida Medicaid," Mark Lyles, Conduent's case manager and author of this letter also posted the amount of the lien asserted by AHCA: $261,334.61.

12. A.F. lives with her mother, sister, grandmother, and Ms. Lopez's significant other. Everyone in the household can and does provide care and assistance to A.F. when necessary. Ms. Lopez rarely leaves A.F. in someone else's care.

13. A.F. is unable to speak and requires total care. Ms. Lopez described the injuries sustained by A.F. Ms. Lopez also detailed the care she has provided and is continuing to provide to A.F. since the event. A.F.'s activities of daily living (ADLs) must be met with assistance in every aspect of her

being. When A.F. wakes up each morning: she is given all her medications; her diaper is changed; she is fed via a feeding tube; she is given lung treatments each morning; her trachea tube is cleaned and changed at times; and she is turned or moved every two hours to prevent sores forming on her skin. A.F. is on a ventilator at night and every four hours she is catheterized because she stopped urinating. In October 2019, A.F. started having seizures.

14. Ms. Lopez testified that A.F.'s care is mentally and emotionally draining, and very tiring. She further added A.F.'s care is very repetitive and the "best way to describe it [each day] is the movie GROUNDHOG DAY," (Columbia Pictures 1993); the same thing, every day.

15. A.F. is confined to her hospital bed, a wheelchair, or a chair to which she can be secured. Although Ms. Lopez testified that A.F. is "entitled" to skilled nursing care 24/7, Ms. Lopez has learned how to care for A.F. because "they can't staff me" with a skilled nurse (presumably referring to a Medicaid standard for care).

16. Mr. Rafferty is a Florida board-certified civil trial lawyer with 26 years' experience in personal injury law. He concentrates and specializes in pharmaceutical cases, including defective drug cases involving catastrophic injury, throughout Florida and the United States. As part of his ongoing practice, he routinely evaluates the damages suffered by injured clients, and relies on his own experience and his review of other jury verdicts to gauge any likely recovery for non-economic damages. Mr. Rafferty continues to handle cases involving similar injuries suffered by A.F.

17. Mr. Rafferty was tendered and without objection was accepted as an expert regarding valuation of personal injury damages.

18. Mr. Rafferty, along with Nathan Carter as co-counsel, represented A.F. and her mother in the civil litigation. He testified to the difficulties associated with pharmaceutical litigation in general, and then focused on the problematic causation and liability issues related to A.F. and her injuries.

19. Mr. Rafferty met with the family; observed A.F. can no longer perform her ADLs; reviewed all of A.F.'s medical information; evaluated how the medication was uptitrated causing A.F.'s injury; analyzed the causation, liability issues, and fault; developed economic damages figures; and valued non-economic damages. Mr. Rafferty credibly testified regarding the evaluations he made regarding A.F.'s injuries and the pharmaceutical product prescribed. The non-economic damages included A.F.'s pain and suffering, both future and past, her loss of capacity to enjoy life, and her mental anguish. Mr. Rafferty explained the importance of assessing all of the elements of damages A.F. suffered as a result of her catastrophic injuries.

20. Mr. Rafferty's unrefuted testimony placed the total full value of A.F.'s damages conservatively in excess of $100,000,000.00.[10] Mr. Rafferty included A.F.'s pain and suffering, mental anguish, and loss of quality of life, plus the economic damages. Further, using the $100,000,000.00 valuation amount and the confidential settlement proceeds, Mr. Rafferty opined that A.F. recovered only 4.75% of the full measure of all her damages. Mr. Rafferty reviewed Petitioner's Exhibit 1, and as an experienced trial attorney understood the letter to contain the "lien for past medical" expenses of $261,334.61. Mr. Rafferty added that he routinely uses this type of approach with lien holders in his practice. Mr. Rafferty's testimony was uncontradicted and persuasive on this point.

21. Mr. Carter is an AV-rated Florida civil trial lawyer with 25 years' experience in personal injury law, with an active civil trial practice. He has always handled plaintiff's medical malpractice, product liability, and car accident-type litigation. As a routine part of his practice, he makes assessments concerning the value of damages suffered by injured clients, including the liability, causation, and possible damages. Mr. Carter

[10] For ease of discussion, the conservative total amount, $100,000,000.00 will be used. All the witnesses agreed that the economic value of the case was above $70 million and the non-economic damages were at least $30 million.

confirmed that it is essential to have every element (liability, causation, and damages) evaluated because these types of cases are expensive in both time and money. Mr. Carter specifically looks at the injuries sustained, who the plaintiff is, how the injuries have affected their life, and the permanency of those injuries. He continues to handles cases with catastrophic injuries. Mr. Carter testified that the injuries suffered by A.F. were "worse than almost, almost any case … handled." He added that A.F.'s damages were "catastrophic" and "one of the worst damage cases [he had] ever seen."

22. Mr. Carter was tendered and without objection was accepted as an expert regarding valuation of medical malpractice damages.[11] Mr. Carter testified that "as a matter of course, [we] put every lienholder on notice as soon as we learn about them" and "then throughout the case." Mr. Carter was in regular contact with Mr. Lyles. The medical malpractice case was settled before the pharmaceutical action. After the medical malpractice case was settled, Mr. Carter understood that AHCA would not negotiate on the medical malpractice settlement. When the "entire case" was completed, Mr. Carter notified Mr. Lyles, and then received the lien letter. As an experienced trial attorney he understood the letter to contain the "final lien figure:" $261,334.61.

23. Mr. Carter also met with the family, reviewed all of A.F.'s medical information and records, and evaluated the medication that was uptitrated. Mr. Carter utilized a similar detailed analysis of A.F.'s injuries and her current condition. Mr. Carter also described the severity of A.F.'s injuries that entered into his decision to pursue the civil case and to testify in this proceeding. Mr. Carter analyzed the causation, liability issues, and fault. He evaluated the economic damages figures and valued non-economic damages

[11] Mr. Carter was offered as an expert in medical malpractice damages. His insight in the combined totality of the medical malpractice and pharmaceutical product litigation warranted consideration, but AHCA's failure to include the medical malpractice settlement precluded any consideration of that settlement. Without a more decisive understanding of what "pretty significant" means, ACHA's attempt to question Mr. Carter's knowledge of A.F.'s past medical expenses is unpersuasive.

such as pain and suffering, both future and past, loss of capacity to enjoy life, scarring and disfigurement, and mental anguish.

24. Mr. Carter opined A.F.'s damages could have easily been in excess of $100,000,000.00. Mr. Carter further opined that A.F.'s non-economic damages were "very significant" and "could have driven the total value of damages in excess of the $100,000,000.00." However, Mr. Carter testified he used $100,000,000.00 in order to resolve the Medicaid lien. Mr. Carter used the same mathematical approach he has used in other lien issues: he divided the confidential settlement amount by the conservative full value of damages ($100,000,000.00) and arrived at a recovery of 4.75% of the full measure of her damages. Mr. Carter's testimony was uncontradicted and persuasive on this point.

25. Mr. McKenna is a board-certified, AV-rated Florida civil trial lawyer with 25 years' experience in personal injury law, who maintains an active civil trial practice. He has always practiced plaintiff's work, and has tried between 40 and 50 cases to verdict. In the last 15 years, Mr. McKenna testified that "at least half … focused on … catastrophic cases either from the medical malpractice arena or from general liability trucking arena." Mr. McKenna has reviewed thousands of personal injury cases relative to damages, and provided a detailed explanation of how he evaluates damages of catastrophic injury cases. He further provided that half of his cases were wrongful death cases and the other half were physical or brain injury cases. Mr. McKenna also provided the various resources he uses to keep abreast of personal injury verdicts and settlements.

26. Mr. McKenna was tendered as "an independent expert attorney as to valuation of damages." Mr. McKenna was not involved in the underlying civil litigation, but became A.F.'s guardian ad litem, appointed by the trial judge, to offer his "opinions regarding the reasonableness of the potential medical malpractice settlement, and ... the pharmaceutical settlement" which is the

subject of this Final Order. Respondent did not object to Mr. McKenna's tender and he was accepted as an expert in the valuation of damages.

27. Mr. McKenna testified that he reviewed the facts and circumstances of both the medical malpractice and the pharmaceutical sides and the chronologies of A.F.'s medical records. He acquired an "intimate understanding" of A.F's on going care and treatment in light of the injuries she sustained. Mr. McKenna agreed with Messrs. Rafferty and Carter that the non-economic damages in this case were very significant, and he agreed with their conservative $100,000,000.00 valuation of her total damages.

28. Further, Mr. McKenna testified that the normal course for resolving liens in Florida was to look at the total value of damages in relation to the recovery to get a ratio by which to reduce the lien amount. Based on his past experiences in resolving Medicaid liens, other courts have resolved such liens using the formula from the *Arkansas Department of Health & Human Services. v. Ahlborn*, 547 U.S. 268 (2006), with the only other alternative formula found in section 409.910.

29. The testimony of Petitioner's three experts regarding the total value of damages was credible, unimpeached, and unrebutted. Petitioner proved that the confidential settlement does not fully compensate A.F. for the full value of her damages.

30. As testified to by the experts, A.F.'s recovery represents only 4.75% of the total value of her claim.

31. AHCA did not call any witnesses, present any evidence as to the value of damages, or propose a different valuation of the damages. In short, Petitioner's evidence was unrebutted. AHCA did, however, contest the methodology used to calculate the allocation of past medical expenses, but was unpersuasive.

32. The parties stipulated to the value of the services provided by Florida Medicaid as $261,334.61. It is logical and rational to conclude that this figure is the amount expended for A.F.'s past medical expenses.

33. Applying the 4.75% pro rata ratio to $261,334.61 equals $12,413.39, which is the portion of the settlement representing reimbursement for past medical expenses and the amount recoverable by AHCA for its lien. Petitioner proved by a preponderance of the evidence as set forth in section 409.910(11)(f) that AHCA should be reimbursed at the lesser amount: $12,413.39.

CONCLUSIONS OF LAW

34. DOAH has jurisdiction over the subject matter and the parties in this case, and final order authority pursuant to sections 120.569, 120.57(1), and 409.910(17)(b), Florida Statutes. The parties acknowledged that Petitioner's standard of proof in this proceeding is a preponderance of the evidence.

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

36. 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). Though participation is optional, once a State elects to participate in the Medicaid program, it must comply with federal requirements governing the same. *Id.*

37. As a condition for receipt of federal Medicaid funds, states are required to seek reimbursement for medical expenses incurred on behalf of beneficiaries who later recover from third-party tortfeasors. *Arkansas*, 547 at 276.

38. The Florida Legislature has enacted section 409.910, 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 or settlement from a third party. *Smith v. Ag. for Health Care Admin.*, 24 So. 3d 590 (Fla. 5th DCA 2009).

39. The Florida Supreme Court has determined that the state's recovery of certain portions of settlement funds received by a Medicaid recipient to be the

amount in a personal injury settlement fairly allocable to past medical expenses. *Giraldo v Ag. for Health Care Admin.*, 248 So. 3d 53, 56 (Fla. 2018).[12]

40. Section 409.910(6) provides in pertinent part:

> When the agency provides, pays for, or becomes liable for medical care under the Medicaid program, it has the following rights, as to which the agency may assert independent principles of law, which shall nevertheless be construed together to provide the greatest recovery from third-party benefits:
>
> * * *
>
> (c) The agency is entitled to, and has, an automatic lien for the full amount of medical assistance provided by Medicaid to or on behalf of the recipient for medical care furnished as a result of any covered injury or illness for which a third party is or may be liable, upon the collateral, as defined in s. 409.901.

41. AHCA's recovery is limited to those proceeds allocable to past medical expenses. Respondent's argument that the past medical expenses have not been established is disingenuous as the parties stipulated that AHCA's lien was for a specific amount: $261,334.61. That Respondent would not seek all that it claims to be entitled to is novel, and unfounded. By its own choice, AHCA choose not to file a lien on the medical malpractice settlement, and cannot now claim the asserted lien amount is incorrect.

[12] The Eleventh Circuit Court of Appeals determined that amounts in a settlement agreement fairly allocable to both past and future medical expenses are subject to the agency's lien. *Gallardo v Dudek*, 963 F 3d 1167 (11th C.A. 2020). This is contrary to the Florida Supreme Court's holding in *Giraldo*. Generally, state courts are not required to follow the decisions of intermediate federal appellate courts on questions of federal law. As a result, the undersigned has limited her inquiry to that portion of A.F.'s settlement allocable to past medical expenses.

42. Section 409.910(11)(f) provides:

> 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.

43. Section 409.910(11)(f) provides a presumptive formula for AHCA's recovery for a Medicaid lien as one-half of the total award, after deducting attorney's fees of 25% of the recovery and all taxable costs, up to, 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).

44. Pursuant to the formula, the amount payable to AHCA is $261,334.61, as the parties stipulated.

45. The administrative procedure created by section 409.910(17)(b) provides a means by which a Medicaid recipient may contest the amount designated as recovered Medicaid expenses. Section 409.910(17)(b), provides in pertinent part:

> 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.

46. Where uncontradicted testimony is presented, there must be a "reasonable basis in the record" to reject it. *Giraldo*, 248 So. 3d at 56. Here, the testimony was clear, concise, credible, and uncontradicted: there is no reasonable basis to reject that testimony.

47. In the instant case, the past medical expenses are $261,334.61.

48. Ms. Lopez proved by a preponderance of the evidence that the settlement proceeds represented only 4.75% of the claim valued conservatively at $100,000,000.00. Therefore, it is concluded that AHCA's full Medicaid lien amount should be reduced by the percentage that Ms. Lopez's recovery represents of the total value of Ms. Lopez's claim.

49. The application of the 4.75% ratio to the total past medical expenses of $261,334.61 results in $12,413.39. This amount represents that share of the settlement proceeds fairly and proportionately attributable to expenditures that were actually paid by AHCA for A.F.'s past medical expenses.

ORDER

Based on of the forgoing Findings of Fact and Conclusions of Law, it is hereby ORDERED that the Agency for Health Care Administration is entitled to $12,413.39 in satisfaction of its Medicaid lien.

DONE AND ORDERED this 3rd day of September, 2020, in Tallahassee, Leon County, Florida.

LYNNE A. QUIMBY-PENNOCK
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us
Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of September, 2020.

COPIES FURNISHED:

Alexander R. Boler, Esquire
2073 Summit Lake Drive, Suite 330
Tallahassee, Florida 32317
(eServed)

Shena L. Grantham, Esquire
Agency for Health Care Administration
2727 Mahan Drive, Building 3, Room 3407B
Tallahassee, Florida 32308
(eServed)

Jason Dean Lazarus, Esquire
Special Needs Law Firm
2420 South Lakemont Avenue, Suite 160
Orlando, Florida 32814
(eServed)

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

Mary C. Mayhew, Secretary
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 1
Tallahassee, Florida 32308
(eServed)

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

Thomas M. Hoeler, Esquire
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308
(eServed)

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.