STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ARMANDO R. PAYAS, AS GUARDIAN AD LITEM FOR E.R., A MINOR, JENNETT CAMACHO, INDIVIDUALLY AND ON BEHALF OF E.R., A MINOR,

Petitioners,

vs. Case No. 21-0442MTR

AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_______________________________________/

FINAL ORDER

Pursuant to notice, a hearing was conducted by Zoom Conference in this case, pursuant to sections 120.569 and 120.57(1), Florida Statutes (2020),[1] on April 13, 2021, before Administrative Law Judge ("ALJ") Cathy M. Sellers.

APPEARANCES

For Petitioner: Carlos R. Diez-Arguilles, Esquire
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For Respondent: Alexander R. Boler, Esquire
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[1] All references to chapter 120 are to the 2020 codification.

STATEMENT OF THE ISSUE

The issue to be determined is the amount to be paid, pursuant to section 409.910(17)(b), Florida Statutes, from the proceeds of a third-party settlement, in full satisfaction of the agency's Medicaid lien.[2]

PRELIMINARY STATEMENT

On March 24, 2021, Petitioner Armando Payas, as Guardian Ad Litem for E.R., and Petitioner Jennett Camacho, individually and on behalf of E.R., filed an Amended Petition for Hearing to Allocate the Settlement Recovery and Reduce the Amount of the Lien Asserted by the Agency for Health Care Administration (Medicaid), to determine the amount to be paid to Respondent, the Agency for Health Care Administration ("AHCA"), in full satisfaction of the Medicaid lien that AHCA has asserted against E.R.'s confidential settlement in a medical malpractice action.

A Protective Order was entered on April 13, 2020, keeping confidential Petitioners' Exhibit No. 2, as required by the third-party settlement agreement; and Petitioners' Exhibit Nos. 3, 4, and 10, and Respondent's Exhibit A, which contain personal health information protected from disclosure by federal law.

The final hearing was scheduled for, and held on, April 13, 2020. Petitioners presented the testimony of Maria D. Tejedor and Todd E. Copeland. Petitioners' Exhibit Nos. 1 and 4 were admitted into evidence

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[2] All references to chapter 409 are to the 2020 version, which was in effect at the time that the underlying third-party medical malpractice case settled. AHCA's right to reimbursement from third-party benefits vests when the third-party settlement agreement is executed. The date on which AHCA's right to reimbursement vests, in turn, determines the version of section 409.910 that applies in proceedings to determine the portion of the third-party settlement payable to AHCA in satisfaction of its Medicaid lien. *See Julio Cesar Cabrera v. Ag. for Health Care Admin.*, 2021 WL 1152328, at *2 (Fla. 1st DCA Mar. 26, 2021); *Eady v. State, Ag. for Health Care Admin.*, 279 So. 3d 1249, 1250 n.1 (Fla. 1st DCA 2019)(citing *Suarez v. Port Charlotte HMA, LLC*, 171 So. 3d 740 (Fla. 2d DCA 2015)).

without objection; Petitioners' Exhibit Nos. 2, 3, and 10 were admitted into evidence over objection; and official recognition was taken of Petitioners' Exhibit Nos. 5 through 9. AHCA did not present witnesses or tender exhibits for admission into the record.

The one-volume Transcript was filed at the Division of Administrative Hearings ("DOAH") on April 30, 2021. The parties timely filed their Proposed Final Orders ("PFOs") on May 10, 2021. Both PFOs have been duly considered in preparing this Final Order.

FINDINGS OF FACT

The Parties

1. Petitioner Armando R. Payas is a court-appointed guardian ad litem for E.R., a minor. Petitioner Jennett Camacho is E.R.'s mother.

2. Respondent, AHCA, is the state agency that administers the Medicaid program in Florida. § 409.902, Fla. Stat.

Stipulated Facts

3. In the underlying medical malpractice action, Petitioners alleged that the liable third party negligently failed to provide proper prenatal care, identify and treat prenatal stress, and timely order a Caesarian section delivery. Petitioners asserted that this caused E.R. to suffer severe and permanent brain damage, which, in turn, resulted in substantial expenses being incurred for E.R.'s medical and nursing care.

4. As stated above, Camacho is E.R.'s mother.

Facts Based on Evidence Adduced at the Final Hearing

5. E.R. is a minor child for whom Medicaid paid medical expenses for treatment of a range of substantial and severe injuries and conditions that resulted from inadequate prenatal care, prenatal stress, and birth distress.

6. E.R. is profoundly and permanently disabled. She has hypoxic brain damage; is paralyzed and wheelchair-bound; has a seizure disorder; is

visually impaired; and is hearing impaired. She is unable to verbally communicate, and requires gastric tube feeding, diaper changes, and total assistance with transfers in and out of her wheelchair. She will never be able to live independently, and she is, and will be, completely dependent, at all times, on the care of others for her survival, currently and for the rest of her life.

7. Medicaid first made payments for E.R.'s medical care in 2011, shortly after her birth.

8. Petitioners initiated a medical malpractice action against one or more medical providers which ultimately was settled in 2020, for the total amount of $4,990,000.00.

9. $3,326,833.00 of this settlement was allocated to E.R., with the remainder allocated to Camacho.[3]

10. AHCA has asserted a Medicaid lien, in the amount of $885,738.23, against the portion of the settlement allocated to E.R.[4]

11. If the formula in section 409.910(11)(f) is applied to the $3,326,833.00 in settlement proceeds allocated to E.R., then the full amount of the $885,738.23 Medicaid lien should be paid to AHCA.[5]

12. Maria Tejedor, the lead attorney representing E.R. in the underlying medical malpractice case, testified regarding the value of E.R.'s medical malpractice claim.

13. Tejedor is a Florida Bar Board-certified attorney in civil trial practice with over 20 years of experience in medical malpractice matters,

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[3] This proceeding solely addresses the portion of the settlement allocated to E.R. that should be paid to Medicaid in satisfaction of its lien.

[4] AHCA may assert a lien only on past medical expenses. *Giraldo v. Ag. for Health Care Admin.*, 248 So. 3d 53, 56 (Fla. 2018).

[5] As discussed below, the formula in section 409.910(11)(f) creates a presumptive "default allocation" of the third-party settlement proceeds. This presumptive allocation may be rebutted in an administrative proceeding—such as this proceeding—brought under section 409.910(17)(b), to contest the amount designated as recovered medical expenses under the formula.

focusing primarily on civil actions involving infants and children who have sustained brain damage. She has extensive experience in the valuation of these types of cases.

14. Based on her experience with similar cases involving children who have sustained brain damage as a result of medical malpractice, Tejedor testified that an estimate of $5,000,000.00 for the value of E.R.'s case is very conservative, and that the full value of E.R.'s case is $24,146,546.57.

15. Based on E.R.'s medical history and prognosis, and on her (Tejedor's) experience in valuing medical malpractice cases and allocating settlement amounts, Tejedor testified that the full value of the medical malpractice case would properly be allocated as follows: $17,065,739.00 for future medical expenses; $1,128,000.00 for lost earnings' capacity; $5,000,000.00 for pain and suffering; $885,738.23 for the Medicaid lien; and $67,069.34 for a children's medical services lien.

16. The underlying medical malpractice case settled for substantially less than its full value due to the risks and challenges in going to trial—specifically, the defenses that some of E.R.'s injuries may be attributable to her premature birth, and whether the statute of limitations had expired prior to commencement of the medical malpractice action.

17. The $4,990,000.00 settlement, including the allocation of $3,326,833.00 to E.R., was determined to be fair and reasonable, and was approved by the court in which the medical malpractice action was brought.

18. The $3,326,833.00 settlement amount recovered by E.R. constituted 13.7 percent of the full value of $24,146,546.57 for the case.

19. Using the pro rata method to allocate the $3,346,833.00 settlement to future medical expenses, lost earnings, pain and suffering, the children's medical services lien, and the Medicaid lien, 13.7 percent is multiplied by the full value allocated to each of these categories of damages and expenses, as discussed above, to determine the portion of the $3,326,833.00 settlement that is allocated to each of these categories.

20. Pertinent to this proceeding, 13.7 percent of the $885,738.23 Medicaid lien yields $121,346.13. Pursuant to the pro rata allocation method, this is the amount payable to Medicaid in full satisfaction of its Medicaid lien in this case.

21. Tejedor testified, and the case law bears out, that Florida courts and ALJs consistently have accepted the pro rata allocation method as a reasonable, fair, and accurate methodology, consistent with *Arkansas Department of Health and Human Services v. Ahlborn*, 547 U.S. 268 (2006), for allocating the settlement proceeds when the underlying third-party action is settled for less than the full value of the case.

22. Todd Copeland testified as an expert in the valuation of damages in medical malpractice actions and resolution of healthcare liens.

23. Copeland has practiced law for 29 years, representing injured parties in medical malpractice, personal injury, products liability, negligent security, and premises liability cases. He has testified as an expert between 10 and 20 times over the past ten years regarding the valuation of damages and liens in medical malpractice cases.

24. He testified that $24,146,546.57 is a conservative estimate of the full value of the underlying medical malpractice case. In formulating his expert opinion, Copeland relied on the report of Petitioners' non-testifying expert, Dr. Anthony Rodriquez, M.D.; E.R.'s medical records; his own communications with E.R.'s guardian ad litem; Tejedor's opinion regarding the present value of future medical expenses, lost earnings, and E.R.'s pain and suffering in this case; jury verdicts in similar medical malpractice cases; his own professional experience regarding the valuation of medical malpractice cases; and the amount of the Medicaid lien.

25. Copeland confirmed that the pro rata method of allocating the settlement proceeds to each specific category of damages and expenses (i.e., future medical expenses, pain and suffering, lost earnings' capacity, and the Medicaid and children's medical services liens, discussed above) proportional

to the amount allocated to that specific category if the total value of the case had been recovered in the third-party settlement, is a fair and reasonable method for allocating the settlement proceeds. He further confirmed that the pro rata methodology is consistent with that ratified by the U.S. Supreme Court in *Ahlborn*.

26. Copeland opined, based on the application of the pro rata allocation method to this case, that AHCA is entitled to payment of 13.7 percent of the $885,738.23, or $121,346.13, in satisfaction of its Medicaid lien.

CONCLUSIONS OF LAW

27. DOAH has jurisdiction over the parties to, and subject matter of, this proceeding, pursuant to sections 120.569, 120.57(1), and 409.910(17)(b).

28. Petitioners bear the burden of proof, by clear and convincing evidence, to show that the amount payable to AHCA in satisfaction of its Medicaid lien is less than $885,738.23 that would be due if the formula in section 409.910(11)(f) were applied in this proceeding. *Gallardo v. Dudek*, 963 F.3d 1167, 1182 (11th Cir. 2020)(burden of proof is on the party disputing the amount to be paid in satisfaction of a Medicaid lien, by clear and convincing evidence).

29. Medicaid is a joint federal-state cooperative program that helps participating states provide medical services to residents who cannot afford treatment. *Ahlborn*, 547 U.S. at 275. The federal Medicaid Act ("Act") governs regulation of the Medicaid program, and it mandates that states that participate in the program comply with federal Medicaid statutes and regulations. *Id.* at 275. 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 a third party. *Id.* at 276.

30. The Act contains a general anti-lien provision that protects Medicaid recipients by prohibiting state Medicaid agencies from imposing liens against a recipient's property. 42 U.S.C. § 1396p(a)(1).

31. However, the Act also contains a narrow exception to this anti-lien provision which requires states to seek reimbursement for their Medicaid expenditures by pursuing payment from third parties who are legally liable for a Medicaid recipient's medical expenses. *Ahlborn*, 547 U.S. at 284-85. States are preempted from taking any portion of a Medicaid beneficiary's third-party tort judgment or settlement not designated for medical care. *Id.*; *Wos v. E.M.A.*, 568 U.S. 627, 630 (2013).

32. The Act limits the portion of a recipient's tort recovery on which a state can impose a lien to *past medical expenses only*. *Giraldo v. Ag. for Health Care Admin.*, 248 So. 3d 53, 56 (Fla. 2018)("*Giraldo II*")(emphasis added).

33. To comply with the Act's requirement that states seek reimbursement for Medicaid expenditures from judgments or settlements paid by third parties to Medicaid recipients, Florida enacted section 409.910, the Medicaid Third-Party Liability Act.

34. Section 409.910(6)(c) creates an automatic lien, on behalf of AHCA, on a judgment or settlement paid by a third party to a Medicaid recipient for the amount of medical care furnished by Medicaid to the recipient. The lien attaches automatically when a recipient first receives treatment for which AHCA may be obligated to provide medical assistance under the Medicaid program.

35. Section 409.910(11)(f) establishes a formula for determining the amount owed to AHCA in satisfaction of its Medicaid lien. This statute states, in pertinent part:

> (11) The agency may, as a matter of right, in order to enforce its rights under this section, institute, intervene in, or join any legal or administrative proceeding in its own name in one or more of the following capacities: individually, as subrogee of the recipient, as assignee of the recipient, or as lienholder of the collateral.

* * *

> (f) 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:
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> 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.

36. This formula creates a presumptive "default allocation" of third party proceeds subject to a Medicaid lien where, as here, AHCA does not participate in the settlement. *See Roberts. v. Albertson's Inc.*, 119 So. 3d 457, 465-66 (Fla. 4th DCA 2012); *Ag. for Health Care Admin. v. Riley*, 119 So. 3d 514, 516 (Fla. 2d DCA 2013).

37. Consistent with the holding in *Wos* that the Act's anti-lien provision preempts state statutes that create a conclusive presumption regarding the amount of medical expenses for which the state is entitled to reimbursement, the Florida Legislature enacted section 409.910(17)(b), which creates an administrative process under chapter 120 to contest the amount designated as recovered medical expense damages payable to AHCA pursuant to the formula in section 409.910(11)(f). *See Delgado v. Ag. for Health Care Admin.*, 237 So. 3d 432, 435 (Fla. 1st DCA 2018); *Mobley v. Ag. for Health Care Admin.*, 181 So. 3d 1233, 1235 (Fla. 2015).

38. Section 409.910(17)(b) states:

> (b) 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.

39. Pursuant to section 409.910(17)(b), Medicaid recipients who assert that the amount payable to satisfy AHCA's Medicaid lien should be reduced are entitled to present evidence in an administrative forum to show that the lien amount exceeds the amount recovered, in a third party settlement or judgment, for past medical expenses. When such evidence is introduced, the ALJ must consider it in determining whether the Medicaid lien should be reduced. *See Harrell v. Ag. for Health Care Admin.*, 143 So. 3d 478, 480 (Fla. 1st DCA 2014).

40. The First District Court of Appeal, in *Eady v. State, Agency for Health Care Administration*, 279 So. 3d 1249 (Fla. 1st DCA 2019), determined—under circumstances comparable to those in this case, where the Medicaid recipient presented expert testimony regarding the appropriate share of settlement funds to be allocated to past medical expenses and the agency did not present evidence to refute the experts' opinions—that utilizing the pro rata allocation method for determining the amount of the third-party recovery to be allocated to past medical expenses not only was appropriate, but was required under the circumstances. *Id.* at 1259. Citing *Giraldo II*, the court in *Eady* determined, as a matter of law, that the ALJ was not authorized to reject uncontroverted testimony where there is no reasonable basis in the evidence for doing so. *Id.*

41. Since *Eady*, Florida courts consistently have held that where a Medicaid recipient presents unrebutted competent substantial evidence to show that the pro rata allocation method supports a reduction of the Medicaid lien as calculated under the formula in section 409.910(11)(f), it is reversible error for an ALJ to reject the use of such methodology in determining the amount of the Medicaid lien pursuant to

section 409.910(17)(b), unless there is a reasonable basis in the evidentiary record for doing so. *See, e.g., Bryan v. Ag. for Health Care Admin.*, 291 So. 3d 1033, 1036 (Fla. 1st DCA 2020); *Mojica v. Ag. for Health Care Admin.*, 285 So. 3d 393, 398 (Fla. 1st DCA 2019); *Larrigui-Negron v. Ag. for Health Care Admin.*, 280 So. 3d 550 (Fla. 1st DCA 2019).

42. The pro rata allocation method also consistently has been applied in Medicaid third-party reimbursement challenges brought at DOAH under section 409.910(17)(b), to reduce the amount of AHCA's Medicaid lien. *See, e.g.*, *Shirley McBride, as Personal Representative of the Estate of Robin McBride v. Ag. for Health Care Admin.*, Case No. 20-5259MTR (Fla. DOAH Mar. 9, 2021); *Gregory McElveen, through the Personal Representative of his Estate, Daniel Hallup v. Ag. for Health Care Admin.*, Case No. 20-4223MTR (Fla. DOAH Feb. 2, 2021); *Misty Mobley and Tavarius Sanders, Individually and on Behalf of Tavarion Sanders, a Minor v. Ag. for Health Care Admin.*, Case No. 20-4033MTR (Fla. DOAH Dec. 21, 2020); *Mitchell Miller v. Ag. for Health Care Admin.*, Case No. 20-3511MTR (Fla. DOAH Oct. 19, 2020); *Mary Bishop, by and through Guardian Nicole Milstead v. Ag. for Health Care Admin.*, Case No. 20-1526MTR (Fla. DOAH Sept. 23, 2020); *Amy Lopez, Individually and as Parent and Natural Guardian of A.F., a Minor v. Ag. for Health Care Admin.*, Case No. 20-2124MTR (Fla. DOAH Sept. 3, 2020); *Valeria Alcala, a Minor, by Yobany E. Rodriguez-Camacho and Manuel E. Alcala, as Natural Guardians and Next Friends v. Ag. for Health Care Admin.*, Case No. 20-0605MTR (Fla. DOAH Aug. 18, 2020).

43. Here, the competent substantial evidence establishes that the pro rata allocation method is a fair and reasonable methodology for allocating Petitioners' third-party settlement proceeds, including the amount payable to AHCA in satisfaction of its Medicaid lien. As noted above, AHCA did not present any countervailing evidence at the final hearing. Thus, there is no evidentiary basis in the record for rejecting Petitioners' evidence, which, as found above, credibly and persuasively shows that the pro rata allocation

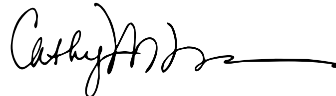
method is a fair and reasonable method for determining Petitioners' past medical damages, for purposes of determining the amount payable to satisfy AHCA's Medicaid lien. Pursuant to *Eady* and other case law cited above, it would be reversible error for the undersigned to reject application of the pro rata allocation method to Petitioners' third-party settlement recovery in this case, for purposes of the amount of the settlement proceeds payable to AHCA in satisfaction of its Medicaid Lien.

44. Based on the foregoing, it is concluded that AHCA is entitled to a payment of $121,346.13 in satisfaction of 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 is entitled to payment of $121,346.13 from Petitioners' third-party settlement proceeds in satisfaction of its Medicaid lien.

DONE AND ORDERED this 1st day of June, 2021, in Tallahassee, Leon County, Florida.



CATHY M. SELLERS
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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.