STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LILLIAN HENDERSON AND NICKY RAINES,
ON BEHALF OF AND AS PARENTS AND
NATURAL GUARDIANS OF J.R., A MINOR,

Petitioners,

vs. Case No. 22-0704MTR

AGENCY FOR HEALTH CARE
ADMINISTRATION,

Respondent.
_____/

FINAL ORDER

An administrative hearing was held in this case on May 10, 2022, by Zoom conferencing, before James H. Peterson III, Administrative Law Judge with the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioners: 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 300
Tallahassee, Florida 32317

STATEMENT OF THE ISSUE

The issue to be determined is the amount payable to the Agency for Health Care Administration (AHCA or Respondent) towards satisfaction of its $73,245.59 Medicaid lien asserted against personal injury settlement proceeds received by J.R., a minor, by and through his parents and natural guardians, Lillian Henderson and Nicky Raines (Petitioners).

PRELIMINARY STATEMENT

On March 3, 2022, Petitioners filed a petition entitled "Petition to Determine Medicaid's Lien Amount to Satisfy Claim Against Personal Injury Recovery by the Agency for Health Care Administration" (Petition) pursuant to section 409.910(17)(b), Florida Statutes (2022).[1] Thereafter, the final hearing was scheduled and held on May 10, 2022.

At the final hearing, Petitioners presented the testimony of two witnesses, Mark A. Avera, Esquire, and Donald M. Hinkle, Esquire, each of whom was accepted as an expert in valuation of damages in personal injury cases. Petitioners' Exhibits P-1 through P-5 were received into evidence. The parties' Joint Motion for Protective Order to maintain the confidentiality of Exhibits P-4 and P-5 was granted, and those exhibits were placed in an envelope marked confidential and are not available for viewing on DOAH's public website. Other than cross-examination of Petitioners' witnesses, AHCA did not present testimony and did not submit any exhibits.

The proceedings were recorded and a transcript was ordered. The parties were given 10 days from the filing of the transcript within which to file proposed final orders. The one-volume Transcript of the proceedings was filed on June 13, 2022. Thereafter, the parties timely filed their respective Proposed Final Orders, both of which were considered in rendering this Final Order.

[1] Unless otherwise noted, all statutory references to section 409.910 and other statutes are to current versions, which have not substantively changed since 2021 when Petitioners' medical malpractice case settled.

FINDINGS OF FACT[2]

1. On October 23, 2019, Lillian Henderson, J.R.'s mother, was admitted to North Florida Regional Medical Center in Gainesville, Florida, at more than 40 weeks pregnant for an induction of labor. After more than 24 hours in labor, the defendant doctor attempted to deliver J.R. by forcep extraction. Using forceps, the defendant doctor pulled on J.R.'s skull three times, which failed to deliver J.R.

2. After the failed forceps delivery, J.R. was delivered via a cesarean section. At birth, nurses noted that J.R. presented with a weak cry and poor tone and color. J.R. was transferred from the normal newborn nursery to the neonatal intensive care unit (NICU) due to indications of a skull fracture and seizures. J.R. was noted to have a left parietal depression, indicative of a depressed skull fracture.

3. On October 25, 2019, J.R. was transported from the NICU at North Florida Regional Medical Center to Shands Hospital where he was diagnosed with a skull fracture and underwent pediatric neurosurgical intervention.

4. As a result of the alleged negligence of the defendants, J.R. suffered a depressed skull fracture, seizures, and other physically-disabling conditions.

5. In November of 2020, J.R.'s parents brought a medical malpractice personal injury action to recover damages related to the alleged malpractice. This action was brought against several defendants. Thereafter, a Neurological Injury Compensation Association petition to determine eligibility for benefits was filed in April of 2021.

6. In December of 2021, after the suit was filed, Petitioners agreed to settle J.R.'s medical malpractice claim.

7. AHCA was properly notified of J.R.'s lawsuit against the defendants and indicated it had paid benefits related to the injuries from the incident in

[2] Findings of Fact 1 through 11 are derived from the parties' Statement of Admitted and Stipulated Facts in their Joint Pre-Hearing Stipulation.

the amount of $73,245.59. AHCA has asserted a lien for the full amount it paid, $73,245.59, against J.R.'s settlement proceeds.

8. AHCA, through its Medicaid program, provided $73,245.59 in payment for J.R.'s medical care related to his injuries. This $73,245.59 represents J.R.'s entire claim for past medical expenses.

9. No portion of the $73,245.59 paid through the Medicaid program on behalf of J.R. represents expenditures for future medical expenses, and Medicaid did not make payments in advance for medical care.

10. Given the amount of the settlement, applying the statutory reduction formula set forth in section 409.910(11)(f) to this particular settlement would result in no reduction of the $73,245.49 Medicaid lien.

11. Petitioners have deposited the full Medicaid lien amount of $73,245.49 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).

12. At the final hearing, Mark A. Avera, Esquire, who represented Petitioners in the underlying medical malpractice action, and Donald M. Hinkle, Esquire, were both accepted, without objection, as experts in the valuation of damages suffered by injured parties. Both Mr. Avera and Mr. Hinkle are members of several trial attorney associations and stay abreast of jury verdicts relative to birth injuries, and ascertain the value of damages suffered by injured parties as a routine part of their practices.

13. According to both Mr. Avera and Mr. Hinkle, J.R.'s damages have a value $1,500,000.

14. AHCA did not call any witnesses, present any evidence as to the value of Petitioners' claim, or propose a differing valuation of the damages. Based upon the unrebutted evidence presented by Petitioners' experts, it is found that a reasonable value of Petitioners' claim is $1,500,000.

15. Although the evidence convincingly demonstrated that the value of Petitioners' damages claim is $1,500,000, the evidence as to what portion of that claim represents past and future medical expenses was less than clear. Rather than giving a particular figure for economic damages, Mr. Avera indicated that non-economic damages were 75 to 80 percent of Petitioners' claim. Mr. Hinkle indicated that non-economic damages were in the range of 80 to 90 percent of the claim.

16. Without stating the dollar amount of Petitioners' settlement,[3] both Mr. Avera and Mr. Hinkle testified that Petitioners' settlement represents only a 16.67 percent recovery of Petitioners' damages.

17. Neither Mr. Avera nor Mr. Hinkle included past medical expenses in valuing Petitioners' claim. If Medicaid's past payment of $73,245.59 is added to 25 percent of the settlement estimated by Mr. Avera to represent the high end of economic damages, the result, after reducing the amount to 16.67 percent of the value of Petitioners' claim, is more than sufficient to pay AHCA's Medicaid lien in full, as follows: [(25% x $1,500,000) + 73,245.49] x 16.67% = $74,722.52.

18. Further, a life care plan detailing the costs of J.R.'s medical expenses because of his injuries was never prepared. According to Mr. Avera, the life plan portion is 20 to 30 percent of the value of Petitioners' claim, for a range of $300,000 to $450,000.

19. Even without adding past medical expenses, 16.67 percent of Mr. Avera's estimated $300,000 to $450,000 range for future medical expenses results in $50,010 to $75,015 of economic damages attributable to future medical expenses. If past medical expenses paid by Medicaid are added, the range for future plus past medical expenses becomes $373,245.49 to $523,245.49, which, when multiplied by 16.67 percent, results in a range of

[3] While the amount was not revealed for confidentiality purposes, the settlement amount can be readily determined by applying the recovery percentage to the value of the claim.

proportional sums from $62,220.02 to $87,225.02 in settlement proceeds available to satisfy AHCA's Medicaid lien.

20. In sum, the evidence, as outlined in the Findings of Fact, above, does not support reduction of AHCA's Medicaid lien.

CONCLUSIONS OF LAW

21. DOAH has jurisdiction over the subject matter and parties in this case pursuant to sections 120.569, 120.57(1), and 409.910(17).

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

23. 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.*

24. As a condition for receipt of federal Medicaid funds, states are required to seek reimbursement for medical expenses incurred on behalf of Medicaid recipients who later recover from legally-liable third parties. *See Ark. Dep't of Health & Human Servs. v. Ahlborn*, 547 U.S. 268, 276 (2006).

25. Consistent with this federal requirement, 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). The statute creates an automatic lien on any such judgment or settlement for the medical assistance provided by Medicaid. *See* § 409.910(6)(c), Fla. Stat.

26. The amount to be recovered for Medicaid medical expenses from a judgment, award, or settlement from a third party is determined by the

formula in section 409.910(11)(f). *Ag. for Health Care Admin. v. Riley*, 119 So. 3d 514, 515 n.3 (Fla. 2d DCA 2013).

27. Application of the formula in section 409.910(11)(f) to Petitioners' settlement proceeds in this case requires payment to AHCA of its full $73,245.49 Medicaid lien.

28. Respondent correctly asserts that it is not automatically bound by any allocation of damages set forth in a settlement between a Medicaid recipient and a third party that may be contrary to the formulaic amount, citing section 409.910(13). *See also* § 409.910(6)(c)7., Fla. Stat. ("No release or satisfaction of any . . . settlement agreement shall be valid or effectual as against a lien created under this paragraph, unless the agency joins in the release or satisfaction or executes a release of the lien."). Rather, in cases such as this, where Respondent has not participated in or approved the settlement, the administrative procedure created by section 409.910(17)(b) is the means for determining whether a lesser portion of a total recovery should be allocated as reimbursement for medical expenses in lieu of the amount calculated by application of the formula in section 409.910(11)(f).

29. Section 409.910(17)(b) provides:

> (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.

30. Petitioners proved that the settlement proceeds represent only 16.67 percent of Petitioners' claim, which is valued at $1,500,000.

31. While, in the past, Medicaid recipients have successfully argued that the percentage reduction (in this case 16.67 percent) should be applied only to Medicaid's lien for *past* medical expenses, the recent United States Supreme Court's decision in *Gallardo v. Marstiller*, 596 U.S._, 2022 U.S. LEXIS 2683, 2022 WL 1914096 (June 6, 2022), made it clear that Medicaid's lien extends to the amount of a claim attributed to past and *future* medical expenses.

32. In this case, evidence that AHCA's Medicaid lien should be reduced was less than clear and convincing. Rather than showing that the proportional sum of the value of Petitioners' claim to pay past and future medical expenses was less than AHCA's full Medicaid lien of $73,245.49, the evidence showed a range of $62,220.02 to $87,225.02 from settlement proceeds available to pay the lien. The top of that range is more than sufficient to pay the full lien and the evidence was otherwise insufficient to demonstrate that the lien should be reduced.

33. Therefore, it is concluded that Respondent is not entitled to less than the full amount of $73,245.49 in satisfaction of AHCA's Medicaid lien.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED and Determined that the Agency for Health Care Administration is entitled to recover 100 percent of its lien, and is hereby awarded the full amount of $73,245.49 from Petitioners.

DONE AND ORDERED this 11th day of July, 2022, in Tallahassee, Leon County, Florida.

JAMES H. PETERSON, III
Administrative Law Judge
Division of Administrative Hearings
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of July, 2022.

COPIES FURNISHED:

Alexander R. Boler, Esquire
Suite 300
2073 Summit Lake Drive
Tallahassee, Florida 32317

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

Josefina M. Tamayo, General Counsel
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308

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

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

Simone Marstiller, Secretary
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 1
Tallahassee, Florida 32308

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

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 one copy of a Notice of Administrative Appeal with the agency clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the appellate district where the party resides. The Notice of Administrative Appeal must be filed within 30 days of rendition of the order to be reviewed.