

No. 20-1263

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IN THE  
**Supreme Court of the United States**

GIANINNA GALLARDO, AN INCAPACITATED PERSON, BY  
AND THROUGH HER PARENTS AND CO-GUARDIANS PILAR  
VASSALLO AND WALTER GALLARDO,  
*Petitioner,*

v.

SIMONE MARSTILLER, IN HER OFFICIAL CAPACITY AS  
SECRETARY OF THE FLORIDA AGENCY FOR HEALTH  
CARE ADMINISTRATION,  
*Respondent.*

On Writ of Certiorari to the United States  
Court of Appeals for the Eleventh Circuit

**JOINT APPENDIX**

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PETITION FOR WRIT OF CERTIORARI FILED MARCH 9, 2021  
CERTIORARI GRANTED JULY 2, 2021

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The following documents have been omitted from the Joint Appendix because they were reproduced in the Appendix to the Petition for a Writ of Certiorari. The page numbers listed below are the pages where the items are found in the Appendix to the Petition.

Opinion of the United States Court of Appeals for the Eleventh Circuit, June 26, 2020 ..... Pet. App. 1

Order Granting in Part and Denying in Part Motion to Alter or Amend Judgment, United States District Court for the Northern District of Florida, July 18, 2017 ..... Pet. App. 61

Second Amended Judgment, United States District Court for the Northern District of Florida, July 18, 2017 ..... Pet. App. 86

Order on Summary Judgment Motions, United States District Court for the Northern District of Florida, April 18, 2017 .....	Pet. App. 88
Order Canceling Hearing and Placing Case in Abeyance, State of Florida Division of Administrative Hearings, June 14, 2016 .....	Pet. App. 116
Order Denying Rehearing, United States Court of Appeals for the Eleventh Circuit, October 20, 2020 .....	Pet. App. 119

**General Docket  
United States Court of Appeals for the  
Eleventh Circuit, No. 17-13693**

**Court of Appeals Docket #:** 17-13693

**Docketed:** 08/17/2017

**Nature of Suit:** 3440 Other Civil Rights

**Termed:** 06/26/2020

Gianinna Gallardo v. Mary Mayhew

**Appeal From:** Northern District of Florida

**Fee Status:** Fee Paid

**Case type information:**

- 1) Private Civil
- 2) Federal Question
- 3) –

**Originating Court Information:**

**District:** 1129-4 : 4:16-cv-00116-MW-CAS

**Court Reporter:** Megan Hague

**Civil Proceeding:** Mark E. Walker, Chief U.S.  
District Judge

**Secondary Judge:** Charles A. Stampelos, U.S.  
Magistrate Judge

**Date Filed:** 02/22/2016

**Date NOA Filed:**

08/17/2017

**Prior Cases:**

None

**Current Cases:**

None

\* \* \*

08/17/2017	CIVIL APPEAL DOCKETED. Notice of appeal filed by Appellant Justin M. Senior on 08/17/2017. Fee Status: Fee Paid. Awaiting Appellant's Certificate of Interested Persons due on or before 08/31/2017 as to Appellant Justin M. Senior. Awaiting Appellee's Certificate of Interested Persons due on or before 09/14/2017 as to Appellee Giannina Gallardo [Entered: 08/17/2017 04:43 PM]
* * *	
11/29/2017	Appellant's brief filed by Justin M. Senior. (ECF: Andre Bardos) [Entered: 11/29/2017 04:47 PM]
* * *	
12/06/2017	Appendix filed [1 VOLUMES] by Appellant Justin M. Senior. (ECF: Andre Bardos) [Entered: 12/06/2017 04:30 PM]
* * *	
02/12/2018	Supplemental Authority filed by Appellant Justin M. Senior. (ECF: Andre Bardos) [Entered: 02/11/2018 07:28 PM]
02/12/2018	Appellee's Brief filed by Appellee Giannina Gallardo. (ECF: Bryan Gowdy) [Entered: 02/12/2018 06:16 PM]
* * *	
03/28/2018	Reply Brief filed by Appellant Justin M. Senior. (ECF: Andre Bardos) [Entered: 03/28/2018 08:19 AM]

* * *	
05/14/2018	Supplemental Authority filed by Appellant Justin M. Senior. (ECF: Andre Bardos) [Entered: 05/14/2018 12:33 PM]
* * *	
07/11/2018	Supplemental Authority filed by Appellee Gianinna Gallardo. (ECF: Bryan Gowdy) [Entered: 07/11/2018 10:00 AM]
* * *	
08/07/2018	Response to Supplemental Authority (28J) filed by Appellant Justin M. Senior. (ECF: Andre Bardos) [Entered: 08/07/2018 10:40 AM]
* * *	
11/16/2018	MOTION to dismiss appeal as moot filed by Gianinna Gallardo. Opposition to Motion is Unknown. [8622122-1] [17-13693] (ECF: Bryan Gowdy) [Entered: 11/16/2018 11:59 AM]
* * *	
12/13/2018	Oral argument held. Oral Argument participants were Andre V. Bardos for Appellant Justin M. Senior and Bryan Scott Gowdy for Appellee Gianinna Gallardo. [Entered: 12/13/2018 03:36 PM]
* * *	
11/26/2019	Supplemental Authority filed by Appellee Gianinna Gallardo. [17-13693]

	(ECF: Bryan Gowdy) [Entered: 11/26/2019 01:42 PM]
12/05/2019	Response to Supplemental Authority (28J) filed by Appellant Mary Mayhew. [17-13693] (ECF: Andre Bardos) [Entered: 12/05/2019 02:26 PM]
01/14/2020	Supplemental Authority filed by Appellee Gianinna Gallardo. [17-13693] (ECF: Bryan Gowdy) [Entered: 01/14/2020 09:31 AM]
06/26/2020	Opinion issued by court as to Appellant Mary Mayhew. Decision: Reversed and Remanded. Opinion type: Published. Opinion method: Signed. Motion to dismiss appeal as moot filed by Appellee Gianinna Gallardo is DENIED. [8622122-2]. The opinion is also available through the Court's Opinions page at this link <a href="http://www.ca11.uscourts.gov/opinions">http://www.ca11.uscourts.gov/opinions</a> . (Opinion corrected on 6/26/2020.)--[Edited 06/26/2020 by JRP] [Entered: 06/26/2020 01:38 PM]
06/26/2020	Judgment entered as to Appellant Mary Mayhew. [Entered: 06/26/2020 01:41 PM]
07/17/2020	Petition for rehearing en banc filed by Appellee Gianinna Gallardo. [17-13693] (ECF: Bryan Gowdy)[Entered: 07/17/2020 10:47 PM]
* * *	
10/20/2020	PUBLISHED ORDER: No judge in regular active service on the Court



	having requested that the Court be polled on rehearing en banc, the Petition for Rehearing En Banc is DENIED. The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED... (See attached order for complete text). CRW, ELB, RLA; WILSON, dissenting. [9217003-1] [Entered: 10/20/2020 02:39PM]
10/28/2020	Mandate issued as to Appellant Mary Mayhew. [Entered: 10/28/2020 10:54 AM]
* * *	

**U.S. District Court  
Northern District of Florida (Tallahassee)  
CIVIL DOCKET FOR CASE #:  
4:16-cv-00116-MW-CAS**

GALLARDO v. SENIOR

Assigned to: CHIEF JUDGE MARK E WALKER

Referred to: MAGISTRATE JUDGE CHARLES A  
STAMPELOS

Case in other court: USCA, 17-13693-K

Cause: 42:1983 Civil Rights Act

Date Filed: 02/22/2016

Date Terminated: 04/18/2017

Jury Demand: None

Nature of Suit: 440 Civil Rights: Other

Jurisdiction: Federal Question

\* \* \*

Date Filed	#	Docket Text
02/22/2016	1	COMPLAINT against ELIZABETH DUDEK (Filing fee \$ 400 receipt number AFLNDC-3503297.), filed by GIANINNA GALLARDO. (Attachments: # 1 SUMMONS FOR ELIZABETH DUDEK) (GOWDY, BRYAN) (Entered: 02/22/2016)
* * *		
04/25/2016	5	ANSWER to 1 Complaint by ELIZABETH DUDEK. (BOLER, ALEXANDER) (Entered: 04/25/2016)
* * *		

08/15/2016	10	NOTICE OF FILING EXHIBITS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT by GIANINNA GALLARDO (Attachments: # 1 Exhibit Fourth Amended Complaint, # 2 Exhibit Orders Approving Settlement, # 3 Exhibit Order Canceling Hearing and Placing Case in Abeyance, # 4 Exhibit AHCA Analysis Relating to Proposed Amendment, # 5 Exhibit HB939 Bill Analysis 6_10_2013) (GOWDY, BRYAN) (Entered:08/15/2016)
08/15/2016	11	First MOTION for Summary Judgment by GIANINNA GALLARDO. (Internal deadline for referral to judge if response to summary judgment not filed earlier: 9/6/2016). (GOWDY, BRYAN) (Entered: 08/15/2016)
08/15/2016	12	MEMORANDUM in Support re 11 First MOTION for Summary Judgment filed by GIANINNA GALLARDO. (GOWDY, BRYAN) (Entered: 08/15/2016)
08/16/2016	13	First MOTION for Summary Judgment by ELIZABETH DUDEK. (Internal deadline for referral to judge if response to summary judgment not filed earlier: 9/6/2016). (BOLER, ALEXANDER) (Entered: 08/16/2016)

08/16/2016	14	MEMORANDUM in Support re 13 First MOTION for Summary Judgment filed by ELIZABETH DUDEK. (BOLER, ALEXANDER) (Entered: 08/16/2016)
09/06/2016	15	RESPONSE in Opposition re 13 First MOTION for Summary Judgment filed by GIANINNA GALLARDO. (GOWDY, BRYAN) (Entered: 09/06/2016)
09/06/2016	16	RESPONSE in Opposition re 11 First MOTION for Summary Judgment filed by ELIZABETH DUDEK. (BOLER, ALEXANDER) (Entered: 09/06/2016)
* * *		
09/13/2016	18	REPLY to Response to Motion re 13 First MOTION for Summary Judgment filed by ELIZABETH DUDEK. (BOLER, ALEXANDER) (Entered: 09/13/2016)
09/20/2016	19	REPLY to Response to Motion re 11 First MOTION for Summary Judgment filed by GIANINNA GALLARDO. (GOWDY, BRYAN) (Entered: 09/20/2016)
* * *		
04/18/2017	30	***VACATED PER ECF 85 *** ORDER ON SUMMARY JUDGMENT MOTIONS - Gallardo's Motion for Summary Judgment, ECF No. 11 , is GRANTED. AHCA's Motion for Summary Judgment,

	<p>ECF No. 13 , is DENIED. In its current form, § 409.910, Fla. Stat. (2016), is preempted by federal law; namely, 42 U.S.C. § 1396a, 42 U.S.C. § 1396k, and 42 U.S.C. § 1396p. The Clerk shall enter judgment stating: Gianinna Gallardo, an incapacitated person, by and through her parents and co-guardians, Pilar Vassallo and Walter Gallardo, successfully proved that portions of § 409.910(17)(b), Fla. Stat. (2016) are preempted by federal law. The State of Florida Agency for Health Care Administration is therefore enjoined from enforcing that statute in its current form. It is declared that the federal Medicaid Act prohibits the State of Florida Agency for Health Care Administration from seeking reimbursement of past Medicaid payments from portions of a recipient's recovery that represents future medical expenses. It is also declared that the federal Medicaid Act prohibits the State of Florida Agency for Health Care Administration from requiring a Medicaid recipient to affirmatively disprove Florida Statutes § 409.190(17)(b)'s formula-based allocation with clear and convincing evidence to successfully challenge it where, as here, that allocation is</p>
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		<p>arbitrary and there is no evidence that it is likely to yield reasonable results in the mine run of cases. The Clerk shall close the file. Signed by JUDGE MARK E WALKER on 4/18/2017. (cle) Modified to add vacate language on 11/5/2020 (rcb). (Entered: 04/18/2017)</p>
* * *		
05/03/2017	40	<p>ORDER GRANTING UNOPPOSED MOTION TO CORRECT MISTAKE IN ORDER AND JUDGMENT - Plaintiff's Unopposed Motion to Correct Mistake in Order and Judgment, ECF No. 39, is GRANTED. The Clerk shall enter an amended judgment stating: Gianinna Gallardo, an incapacitated person, by and through her parents and co-guardians, Pilar Vassallo and Walter Gallardo, successfully proved that portions of §409.910(17)(b), Fla. Stat. (2016) are preempted by federal law. The State of Florida Agency for Health Care Administration is therefore enjoined from enforcing that statute in its current form. It is declared that the federal Medicaid Act prohibits the State of Florida Agency for Health Care Administration from seeking reimbursement of past Medicaid</p>

		<p>payments from portions of a recipient's recovery that represents future medical expenses. It is also declared that the federal Medicaid Act prohibits the State of Florida Agency for Health Care Administration from requiring a Medicaid recipient to affirmatively disprove Florida Statutes § 409.910(17)(b)'s formula-based allocation with clear and convincing evidence to successfully challenge it where, as here, that allocation is arbitrary and there is no evidence that it is likely to yield reasonable results in the mine run of cases. Signed by JUDGE MARK E WALKER on 5/3/2017. (cle) (Entered: 05/03/2017)</p>
05/05/2017	41	<p>AMENDED CLERK'S JUDGMENT - re:40 ORDER GRANTING UNOPPOSEDMOTION TO CORRECT MISTAKE IN ORDER AND JUDGMENT. (cle) (Entered: 05/03/2017)</p>
* * *		
05/11/2017	44	<p>MOTION to Alter Judgment ((Internal deadline for referral to judge if response not filed earlier: 5/25/2017).), MOTION to Set Aside Judgment by JUSTIN M SENIOR. (Attachments: # 1 Exhibit A, # 2 Exhibit B) (BARDOS, ANDY) (Entered: 05/11/2017)</p>

* * *		
06/12/2017	51	RESPONSE to Motion re 44 MOTION to Alter Judgment MOTION to Set Aside Judgment filed by GIANINNA GALLARDO. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9) (GOWDY, BRYAN) (Entered: 06/12/2017)
* * *		
06/20/2017	54	MEMORANDUM in Support re 44 MOTION to Alter Judgment MOTION to Set Aside Judgment filed by JUSTIN M SENIOR. (MEROS, GEORGE) (Entered: 06/20/2017)
06/20/2017	55	RESPONSE by GIANINNA GALLARDO re 53 Telephone Conference, Set Deadlines/Hearings,. (Attachments: # 1 Exhibit A, # 2 Exhibit B) (GOWDY, BRYAN) (Entered: 06/20/2017)
* * *		
07/18/2017	59	ORDER GRANTING IN PART AND DENYING IN PART MOTION TO ALTER OR AMEND JUDGMENT - AHCA's Motion to Alter or Amend the Judgment and for Relief from Judgment, ECF No. 44, is GRANTED in part and DENIED in part. AHCA's motion is GRANTED to the extent that it



	<p>seeks an amendment clarifying the injunction's scope. The balance of AHCAs motion is DENIED. The Clerk shall enter a second amended judgment stating: Giannina Gallardo, an incapacitated person, by and through her parents and co-guardians, Pilar Vassallo and Walter Gallardo, successfully proved that portions of § 409.910(11)(f), Fla. Stat. (2016) and § 409.910(17)(b), Fla. Stat. (2016) are preempted by federal law. It is declared that the federal Medicaid Act prohibits the State of Florida Agency for Health Care Administration from seeking reimbursement of past Medicaid payments from portions of a recipient's recovery that represents future medical expenses. The State of Florida Agency for Health Care Administration is therefore enjoined from doing just that: seeking reimbursement of past Medicaid payments from portions of a recipient's recovery that represents future medical expenses. It is also declared that the federal Medicaid Act prohibits the State of Florida from requiring a Medicaid recipient to affirmatively disprove § 409.910 (17)(b)'s formula-based allocation with clear and convincing evidence to successfully</p>
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		challenge it where, as here, that allocation is arbitrary and there is no evidence that it is likely to yield reasonable results in the mine run of cases. Signed by JUDGE MARK E WALKER on 7/18/2017. (cle) (Entered: 07/18/2017)
07/18/2017	60	***VACATED IN ITS ENTIRETY per ECF 85 **** SECOND AMENDED CLERK'S JUDGMENT - re : 59 ORDER GRANTING IN PART AND DENYING IN PART MOTION TO ALTER OR AMEND JUDGMENT. (cle) Modified on 9/21/2017 to reflect 2nd amended (ckm). Modified to add vacate language on 11/5/2020 (rcb). (Entered: 07/18/2017)
* * *		
08/17/2017	64	NOTICE OF APPEAL as to 30 Order on Motion for Summary Judgment, 59 Order on Motion to Alter Judgment, Order on Motion to Set Aside Judgment, 60 Clerk's Judgment by JUSTIN M SENIOR. (Filing fee \$505 Receipt Number AFLNDC-3953401.) (MEROS, GEORGE) (Entered: 08/17/2017)
* * *		
10/28/2020	84	USCA MANDATE of USCA #17-13693-JJ as to 64 Notice of Appeal. It is hereby ordered, adjudged, and decreed that the opinion issued on

		this date in this appeal is entered as the judgment of this Court. 30 Day Exhibit Return Deadline After Appeal Mandate set for 11/27/2020. (rcb) Modified to add language from order on 2/4/2021 (rcb). (Entered: 11/04/2020)
11/04/2020	85	ORDER VACATING 60 JUDGMENT. The Clerk shall annotate the docket to reflect that this Court's Order on the parties' cross-motions for summary judgment, ECF No. 30, is VACATED, and the Clerk's Second Amended Judgment, ECF No. 60 , is VACATED in its entirety. The Clerk shall enter a new judgment stating, Plaintiff's claims against Defendant are dismissed with prejudice." The Clerk shall close the file. Signed by CHIEF JUDGEMARK E WALKER on 11/04/2020. (rcb) (Entered: 11/05/2020)
11/05/2020	86	CLERK'S JUDGMENT re 85 Order Vacating Judgment. 90 Day Exhibit Return Deadline set for 2/3/2021 (rcb) (Entered: 11/05/2020)
* * *		

IN THE UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF FLORIDA

GIANINNA GALLARDO, an  
incapacitated person, by and  
through her parents and co-  
guardians, PILAR VASSALLO  
and WALTER GALLARDO,

Plaintiff,

vs.

Case No.: 4:16-cv-  
116-MW-CAS

ELIZABETH DUDEK, in  
her official capacity as  
Secretary of the STATE OF  
FLORIDA, AGENCY FOR  
HEALTH CARE ADMINI-  
STRATION,

Defendant.

\_\_\_\_\_ /

**COMPLAINT**

Plaintiff, GIANINNA GALLARDO, an incapacitated person, by and through her parents and co-guardians, PILAR VASSALLO and WALTER GALLARDO, brings this action for injunctive, declaratory and other appropriate relief (including costs and attorney's fees) to challenge the refusal of the Defendant, STATE OF FLORIDA AGENCY FOR HEALTH CARE ADMINISTRATION, to comply with federal Medicaid law.

**I. INTRODUCTORY STATEMENT**

1. This is a civil rights action brought pursuant to 42 U.S.C. §1983 seeking injunctive, declaratory and

other appropriate relief (including costs and attorney's fees) as a result of the deprivation of the Plaintiff's rights as secured by 42 U.S.C. §1396p(a) & (b) (known as the "federal Medicaid anti-lien and anti-recovery provisions").

2. In particular, Defendant STATE OF FLORIDA AGENCY FOR HEALTH CARE ADMINISTRATION ("AHCA") has asserted a Medicaid lien against Plaintiff's personal injury settlement and is seeking payment of its lien from beyond that portion of Plaintiff's settlement representing compensation for past medical expenses by requiring in the administrative proceeding filed under section 409.910(17)(b), Florida Statutes, that Plaintiff prove by clear and convincing evidence that both her compensation for past medical expenses and her compensation for future medical expenses is less than the amount required to be paid to AHCA under the formula at section 409.910(11)(f).

3. Plaintiff seeks a judgment declaring that AHCA may not recover beyond that portion of her settlement representing compensation for past medical expenses by requiring in the administrative proceeding under section 409.910(17)(b), that Plaintiff prove by clear and convincing evidence that both her compensation for past medical expenses and her compensation for future medical expenses is less than the amount required to be paid to AHCA under the formula at section 409.910(11)(f). Plaintiff also seeks a judgment declaring that section 409.910(17)(b) is unconstitutional under the Supremacy Clause in Article VI of the United States Constitution to the extent that it allows AHCA to recover beyond that portion of Plaintiff's settlement representing compensation for past medical expenses in violation of 42 U.S.C. §1396a(a)(25)(H) and 42 U.S.C. §1396p.

4. Finally, Plaintiff seeks a judgment enjoining AHCA from enforcing section 409.910(17)(b) in a manner that permits AHCA to recover beyond that portion of Plaintiff's settlement representing compensation for past medical expenses in violation of 42 U.S.C. §1396, *et seq.*, Ark. Dept. of Health & Human Services v. Ahlborn, 547 U.S. 268 (2006); and Wos v. E.M.A. 133 S.Ct. 1391 (2013).

## II. JURISDICTION AND VENUE

5. Plaintiff's case arises under the laws and Constitution of the United States, specifically, 42 U.S.C. §1396a, 42 U.S.C. §1396p, and the Supremacy Clause in Article VI of the Constitution.

6. This court has jurisdiction over Plaintiff's claims under 28 U.S.C. §1331, 28 U.S.C. §1343(3), and 28 U.S.C. §1343(4).

7. Plaintiff's lawsuit is authorized by 42 U.S.C. §1983 and 28 U.S.C. §2201.

8. This court has supplemental jurisdiction pursuant to 28 U.S.C. §1367 to resolve all state law claims related to the federal claims asserted herein.

9. Under 28 U.S.C. §1391, venue is proper in this court.

## III. PARTIES

10. Plaintiff, GIANINNA GALLARDO, is an incapacitated person, residing with her parents and co-guardians, PILAR VASSALLO and WALTER GALLARDO, in Lee County, Florida.

11. At all times relevant to this civil action, Plaintiff was a Medicaid recipient and received medical assistance paid through the Medicaid program administered by AHCA.

12. Defendant ELIZABETH DUDEK is sued in her official capacity as the Secretary of the STATE OF FLORIDA AGENCY FOR HEALTH CARE ADMINISTRATION, with an office address of 2727 Mahan Drive, Tallahassee, Florida 32309.

13. AHCA is an agency of the State of Florida responsible for the administration of Florida's Medicaid program in accordance with 42 U.S.C. §1396, *et seq.*

14. AHCA is responsible for enforcing liens and other rights of recovery which may arise by reason of a medical payment made to or on behalf of a Medicaid recipient in accordance with 42 U.S.C. §1396a and 42 U.S.C. §1396p.

15. At all times relevant to this civil action, Florida's Medicaid program received funding from the United States government and AHCA was required to administer the program in accordance with federal law.

#### **IV. LEGAL BACKGROUND – MEDICAID**

16. Congress established the Medicaid Program in 1965 through Title IX to the Social Security Act, 42 U.S.C. §1396, “[f]or the purpose of providing 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). Under this system of “cooperative federalism” if a State agrees to establish a Medicaid plan, the federal government agrees to pay a specified percentage of the total amount the State plans spends on medical assistance. Id. at 308.

17. State participation in the federal Medicaid program is voluntary however, a State that has elected to participate, like Florida, must comply with the federal

Medicaid statutes and regulations. See Wilder v. Virginia Hosp. Asso., 110 S.Ct. 2510 (1990) and Public Health Trust of Dade County v. Dade County Sch. Bd., 693 So.2d 562, 564 (Fla. 3rd DCA 1997).

18. The federal Medicaid program requires every participating State to implement a “third-party liability” provision which requires the State to ascertain the legal liability of a third-party to pay for medical care provided through the Medicaid program. Where such a legal liability is found to exist, the State is to seek reimbursement from the third-party to the extent of the third-party’s legal liability to pay for medical care provided through the Medicaid program. See 42 U.S.C. §1396a(a)(25)(A, B, & C). To facilitate this direction, a State must have “in effect laws under which, to the extent that payment has been made under the State plan for medical assistance for health care items or services furnished to an individual, the State is considered to have acquired the rights of such individual to payment by any other party for such health care items or services.” 42 U.S.C. §1396a(a)(25)(H).

19. The State, after providing Medicaid benefits, may seek reimbursement of “payment(s) that have been made under the State plan for medical assistance for health care items or services furnished to an individual” by “acquiring the rights of such individual to payment by any other party for such health care items or services.” However, there are limitations on the State’s recovery that protect the Medicaid recipient’s property. Specifically, the federal anti-lien statute at 42 U.S.C. §1396p(a)(1) states “[n]o lien may be imposed against the property of any individual prior to his death on account of medical assistance paid,” and the federal anti-recovery statute at §1396p(b)(1) states “[n]o adjustment or recovery of any medical



assistance correctly paid on behalf of an individual under the State plan may be made.”

20. In Ark. Dept. of Health & Human Services v. Ahlborn, 547 U.S. 268 (2006), the Supreme Court reviewed the tension between a Medicaid recipient’s assignment to the State of his right to recover from liable third-parties “payment(s) that have been made under the State plan” in 42 U.S.C. §1396a(a)(25)(H) and the protections of a Medicaid recipient’s property interest in their tort settlement in the federal anti-lien and anti-recovery statutes. The Ahlborn Court outlined that the State’s ability to receive reimbursement under the assignment of a Medicaid recipient’s right to recover medical assistance paid by Medicaid in 42 U.S.C. §1396a(a)(25)(H) is a limited exception to the federal anti-lien statute in 42 U.S.C. §1396p(a), which affirmatively prohibits States from seeking reimbursement from any portion of a Medicaid recipient’s settlement. Accordingly, under federal law as interpreted in Ahlborn, a State is limited to recover from only that portion of a Medicaid recipient’s settlement representing compensation for past medical expenses. See E.M.A. v. Cansler, 674 F.3d 290, 312 (U.S. 4th Cir. 2012)(“*as the unanimous Ahlborn Court’s decision makes clear, federal Medicaid law limits a State’s recovery to settlement proceeds that are shown to be properly allocable to past medical expenses.*”); affirmed Wos v. E.M.A., 133 S.Ct. 1391 (2013).

21. Further, under the U.S. Supreme Court’s decision in Wos v. E.M.A., 133 S.Ct. 1391 (2013) federal Medicaid law preempts State attempts to use a “irrebuttable one-size-fits-all” statutory formula to dictate its payment and a Medicaid recipient must be afforded the opportunity to challenge the payment of a Medicaid lien through an adversarial proceeding. As the

Wos Court stated in relation to the protections afforded Medicaid recipients by federal Medicaid law, “Pre-emption is not a matter of semantics. A State may not evade the pre-emptive force of federal law by resorting to creative statutory interpretation or description at odds with the statute’s intended operation and effect.” 133 S.Ct. at 1397-98.

22. The Florida Legislature has enacted section 409.910, Florida Statutes, which authorizes AHCA to be reimbursed from a personal injury settlement or verdict money paid by Medicaid for the Medicaid recipient’s “medical care prior to a tort recovery.” Smith v. Agency for Health Care Admin., 24 So. 3d 590, 590 (Fla 5th DCA 2009). The statute creates an automatic lien on any such judgment or settlement for the full amount of medical assistance provided by Medicaid. § 409.910(6)(c), Fla. Stat.

23. The amount AHCA may recover for Medicaid expenditures from a judgment, award, or settlement from a third party is determined by the formula in section 409.910(11)(f), which sets that amount at one-half of the total recovery, after deducting 25 percent for attorney’s fees and deducting taxable costs, up to, but not to exceed, the total amount actually paid by Medicaid on the recipient’s behalf. Agency for Health Care Admin. v. Riley, 119 So. 3d 514, 515, n.3 (Fla. 2d DCA 2013).

24. The Florida appellate courts have recognized that under the U.S. Supreme Court decisions of Ahlborn and Wos, the formula at “section 409.910(11)(f) is preempted by the federal Medicaid statute’s anti-lien provision to the extent it creates an irrebuttable presumption and permits recovery beyond that portion of a Medicaid recipient’s third-party recovery

representing compensation for past medical expenses.” Davis v. Roberts, 130 So. 3d 264, 270 (Fla. 5th DCA 2013); and Harrell v. Agency for Health Care Admin., 143 So.3d 478, 480 (Fla. 1st DCA 2014). As the First District Court of Appeals in Harrell stated:

The decision in *Wos* has undermined the reasoning of the decisions that AHCA and the trial court have previously relied upon, so much so that three of the five district courts in Florida have, when presented with the issue of whether section 409.910(11)(f) has been preempted uniformly changed course by issuing opinions consistent with *Wos*. ... As the Fifth District recently noted, “*Ahlborn* and *Wos* make clear that section 409.910(11)(f) is preempted by the federal Medicaid statute’s anti-lien provision to the extent it creates an irrebuttable presumption and permits recovery beyond that portion of the Medicaid recipient’s third-party recovery representing compensation for past medical expenses.

...

When such evidence is introduced, the trial court must consider it in making a determination on whether AHCA’s lien amount should be adjusted to be consistent with federal law.

Harrell, 143 So. 3d at 480 (citations omitted).

25. Shortly after the Wos decision was issued, the 2013 Florida Legislature amended section 409.910(17), to strip the trial court of jurisdiction to handle the challenge of a Medicaid lien and placed the challenge of a Medicaid lien at the Division of Administrative Hearings (“DOAH”) in Tallahassee. See Section 409.910(17(a–e)), Florida Statutes (2013). In doing so, the Legislature placed the burden of proof in

challenging a Medicaid lien solely on the Medicaid recipient and assigned the heightened standard of proof of “clear and convincing evidence.”

The operative sentence of section 409.910(17)(b), outlining what must be proven by the Medicaid recipient at DOAH to successfully challenge the payment of a Medicaid lien states:

In order to successfully challenge the amount payable to the agency, the recipient must prove, by clear and convincing evidence, that a lesser portion of the total recovery should be allocated as reimbursement for past and future medical expenses than the amount calculated by the agency pursuant to the formula set forth in paragraph (11)(f) or that Medicaid provided a lesser amount of medical assistance than that asserted by the agency.

26. AHCA has not promulgated any administrative rules or issued policy statements relative to its interpretation of section 409.910 or the administrative procedure for challenging a Medicaid lien contained in section 409.910(17)(a–e).

27. In administrative proceedings under section 409.910(17)(b), AHCA has taken the position that it is entitled to recover from both the portion of a Medicaid recipient’s settlement compensating for past medical expenses and the portion of the settlement compensating for future medical expenses. Further, AHCA has taken the position that to successfully challenge the amount payable to AHCA, the Medicaid recipient must prove by clear and convincing evidence that the amount allocable to both past and future medical expenses is less than the formula amount in section 409.910(11)(f).

28. Ahlborn and Wos determined that the federal Medicaid statutes preempt and prohibit State attempts to recover beyond that portion of a Medicaid recipient's settlement representing compensation for past medical expenses. Davis and Harrell recognized that the federal Medicaid statutes preempt section 409.910(11)(f) to the extent it "permits recovery beyond that portion of a Medicaid recipient's third-party recovery representing compensation for past medical expenses." Those statutes have not been amended or altered and are in full force and effect.<sup>1</sup>

## V. FACTUAL BACKGROUND

29. On November 19, 2008, GIANINNA was struck by a truck after being dropped off by her school bus. As a result of this accident, GIANINNA suffered catastrophic physical injury and brain damage leaving her in a persistent vegetative state unable to ambulate, communicate, eat, toilet or care for herself in any manner.

30. As a result of GIANINNA's catastrophic injuries, GIANINNA suffered both economic and non-economic damages. These damages would include, but not be limited to, pain and suffering, disability, disfigurement, mental anguish, loss of capacity for the enjoyment of life, loss of ability to earn money, and past and future medical expenses. Altogether, a

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<sup>1</sup> "It is also true that during all times relevant to the instant proceeding there have been no changes to the anti-lien provision in federal Medicaid law." Gibbons v. AHCA, Case No. 13-4720MTR, 2014 WL 1875794 (DOAH May 7, 2014); see also, Leigh Ann Holland v. AHCA, Case No. 14-2520MTR, 2014 WL 4953240 (DOAH Sept. 29, 2014); Mierzwinski v. AHCA, Case No. 14-3806MTR, 2015 WL 1095841 (DOAH Mar. 6, 2015); and Bryant v. AHCA, Case No.: 15-4651MTR, 2016 WL 681061 (DOAH Feb. 12, 2016).

conservative valuation of all GIANINNA's damages and the value a jury would award in damages (absent any limiting factors such as disputed facts, liability, causation, insolvency of the parties, insurance policy limits, etc.) would be in excess of \$20,000,000.

31. GIANINNA's past medical expenses related to her injuries were paid by WellCare of Florida and Medicaid. WellCare of Florida provided \$21,499.30 in benefits and Medicaid provided \$862,688.77 in benefits. The combined amount of benefits provided to GIANINNA was \$884,188.07 and this \$884,188.07 represented GIANINNA's entire claim for past medical expenses.

32. GIANINNA or others on her behalf, did not make payments in the past or in advance for GIANINNA's future medical care. Accordingly, no claim for damages can be made for reimbursement, repayment, restitution, indemnification, or to be made whole for payments made in the past or in advance for future medical care.

33. GIANINNA's parents, PILAR VASSALLO and WALTER GALLARDO, were appointed her co-guardians and they brought a personal injury action to recover all of GIANINNA's damages against those parties allegedly responsible for her injuries ("Tortfeasors").

34. While GIANINNA's damages have an exceedingly high monetary value in excess of \$20,000,000, there were significant issues of disputed facts, liability, assumption of risk, sovereign immunity, and insurance policy limits that called into question the liability of the Defendants and their ability to pay if a judgement was entered against them.

35. Based on these limiting factors, GIANINNA's personal injury action was compromised and settled in two settlements totaling \$800,000.

36. Although these settlements were in GIANINNA's best interest and appropriate given the significant limiting factors, the settlements do not fully compensate her for all her damages and she is only receiving a fraction of the total monetary value of all her damages. Using the most conservative low-end valuation of all GIANINNA's damages of \$20,000,000, GIANINNA in the settlements is receiving only 4% of the value of her damages and GIANINNA is receiving only 4% of each and every element of her damages including only 4% of her \$884,188.07 claim for past medical expenses, or \$35,367.52.

37. Understanding that the settlements do not fully compensate GIANINNA for all her damages and in the settlements GIANINNA is only receiving a fraction of the total monetary value of all her damages, including only a fraction of her \$884,188.07 claim for past medical expenses, an allocation to GIANINNA's claim for past medical expenses was made as part of the settlement(s). This allocation was based on the calculation of the ratio the settlements bore to the total monetary value of all GIANINNA's damages. Using the conservative valuation of all GIANINNA's damages of \$20,000,000, it was calculated that GIANINNA was receiving 4% of the total monetary value of all her damages in the settlements, and accordingly she was receiving in the settlements 4% of her \$884,188.07 claim for past medical expenses, or \$35,367.52.

38. In making this allocation, the parties agreed that:

a) The settlements do not fully compensate GIANINNA for all the damages she has suffered and the settlements only compensates GIANINNA for a fraction of the total monetary value of all her damages;

b) GIANINNA's damages have a value in excess of \$20,000,000;

c) GIANINNA's claim for past medical expenses was \$884,188.07;

d) Allocation of \$35,367.52 of the settlements to past medical expenses and the remainder of the settlements toward the satisfaction of claims other than past medical expenses is reasonable and proportionate based on the same ratio the settlements bear to the total monetary value of all GIANINNA's damages;

e) GIANINNA or others on her behalf have not made payments in the past or in advance for GIANINNA's future medical care;

f) GIANINNA has not made a claim for reimbursement, repayment, restitution, indemnification, or to be made whole for payments made in the past or in advance for future medical care; and

g) No portion of the settlements represents reimbursement for future medical expenses.

39. The parties memorialized the allocation of \$35,367.52 of the settlements to past medical expenses as well as their agreement concerning the lack of any claim for, or recovery of, reimbursement of future medical expenses in the two (2) Settlement Agreement and Release(s). The respective Releases stated:



Further, the Parties acknowledge that although Gianinna Gallardo's settlement does not fully compensate Gianinna Gallardo for all of the damages she has allegedly suffered, this settlement shall operate as a full and complete Release as to [Releasers] without regard to Gianinna Gallardo's settlement only compensating her for a fraction of the total monetary value of her alleged damages. Plaintiffs believe, and [Releasers] agrees that it is not unreasonable for Plaintiffs to believe, that Gianinna Gallardo's alleged damages have a value in excess of \$20,000,000, of which \$884,188.07 represents Gianinna Gallardo's claim for past medical expenses. Given the facts, circumstances, and nature of Gianinna Gallardo's injuries and Gianinna Gallardo's settlement, the parties have agreed to allocate \$22,104.70 of Gianinna Gallardo's settlement to Gianinna Gallardo's claim for past medical expenses and allocated the remainder of her settlement towards the satisfaction of claims other than past medical expenses. This allocation is a reasonable and proportionate allocation based on the same ratio Gianinna Gallardo's settlement bears to the above-referenced 20,000,000 total monetary value asserted by Plaintiffs of all Gianinna Gallardo's alleged damages. Further, the parties acknowledge that Gianinna Gallardo may need future medical care related to her injuries, and some portion of this settlement may represent compensation for future medical expenses Gianinna Gallardo will incur in the future. However, the parties acknowledge that Gianinna Gallardo, or others on her behalf, have not made payments in the past or in advance for Gianinna

Gallardo's future medical care and Gianinna Gallardo has not made a claim for reimbursement, repayment, restitution, indemnification, or to be made whole for payments made in the past or in advance for future medical care. Accordingly, no portion of this settlement represents reimbursement for future medical expenses.

Although this settlement does not fully compensate First Party for all of the damages being alleged in this lawsuit, this settlement and Full and Final Release shall operate as a full, final and complete Release as to Second Party, without regard to the fact that Gianinna Gallardo's settlement only compensates her for a fraction of the total alleged damages. The Parties agree that Gianinna Gallardo's alleged damages exceed \$20,000,000 of which \$884,188.07 represents Gianinna Gallardo's claim for past medical expenses. Given the facts, circumstances, and nature of Gianinna Gallardo's injuries, First Party has allocated \$13,262.82 of Gianinna Gallardo's settlement to her claim for past medical expenses and allocated the remainder of her settlement towards the satisfaction of claims other than past medical expenses. First Party believes this to be a reasonable and proportionate allocation based upon the same ratio Gianinna Gallardo's settlement bears to the total value of Gianinna Gallardo's damages. Second Party does not object to Plaintiff's allocation; however, should any issue arise with respect to Plaintiff's allocations, such allocations shall not affect the validity of this settlement between the Parties, as this settlement and Full and Final Release shall operate as a full,

final and complete Release as to the Second Party.

Further, the parties acknowledge that Gianinna Gallardo may need future medical care related to her injuries, and some portion of this settlement may represent compensation for future medical expenses which Gianinna Gallardo will incur in the future. However, the parties acknowledge that Gianinna Gallardo, or others on her behalf, have not made payments in the past or in advance for Gianinna Gallardo's future medical care and Gianinna Gallardo has not made a claim for reimbursement, repayment, restitution, indemnification, or to be made whole for payments made in the past or in advance for future medical care. Accordingly, no portion of this settlement represents a reimbursement for advance payment(s) of future medical expenses.

39. Because Gianinna Gallardo was incompetent, Court approval of her settlement was required. Accordingly, by Orders of July 10, 2015 and September 22, 2015, the Honorable Circuit Court Judge John E. Duryea, Jr. approved the settlement of GIANINNA's lawsuit.

40. As stated in paragraph 31 above, GIANINNA's claim for past medical expenses was in the amount of \$884,188.07, of which \$862,688.77 represented the amount paid by AHCA through the Medicaid program.

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

42. During the pendency of GIANINNA's personal injury action, AHCA was notified of the action, and AHCA through its collections contractor, Xerox Recovery Services, asserted a \$862,688.77 Medicaid lien against GIANINNA's cause of action and future settlement of that action.

43. The \$862,688.77 spent by AHCA through the Medicaid program on behalf of GIANINNA represents expenditures paid for GIANINNA's past medical expenses. No portion of the \$862,688.77 paid by AHCA through the Medicaid program on behalf of GIANINNA represent expenditures for future medical expenses, and AHCA did not make payments in the past or in advance for GIANINNA's future medical care.

44. By letter of October 8, 2015, GIANINNA's attorney notified AHCA of the settlement and provided AHCA with a copy of the executed Release(s) and signed Orders approving GIANINNA's settlements. This letter explained that GIANINNA's damages had a value in excess of \$20,000,000 and the settlement represented only a 4% recovery of GIANINNA's \$884,188.07 claim for past medical expenses, or \$35,367.52. This letter requested AHCA to advise as to the amount AHCA would accept in satisfaction of the \$862,688.77 Medicaid lien.

45. AHCA did not respond to GIANINNA's attorney's letter of October 8, 2015.

46. AHCA did not file an action to set-aside, void, or otherwise dispute GIANINNA's settlement with the Tortfeasors.

47. The formula at section 409.910(11)(f) as applied to GIANINNA's entire \$800,000 settlement requires payment to AHCA of approximately \$300,000.

48. Pursuant to section 409.910(17)(a) GIANINNA deposited the (11)(f) formula amount into an interest bearing account and filed a Petition with DOAH under section 409.910(17)(b) to determine the amount of her settlement payable to AHCA in satisfaction of its Medicaid lien. See *GIANINNA GALLARDO v. AHCA*, DOAH Case No.: 15-6960MTR (“*Gallardo v. AHCA*”).

49. In the administrative proceeding *Gallardo v. AHCA*, AHCA is seeking recovery beyond that portion of GIANINNA’s settlement representing compensation for past medical expenses, and AHCA is seeking recovery from that portion of GIANINNA’s settlement representing compensation for future medical expenses.

50. In the administrative proceeding *Gallardo v. AHCA*, AHCA has taken the position that it is entitled to recover from both the portion of GIANINNA’s settlement compensating her for past medical expenses and the portion of her settlement compensating her for future medical expenses.

51. In the administrative proceeding *Gallardo v. AHCA*, AHCA’s position is that in order for GIANINNA to successfully challenge the amount payable to AHCA, she must prove by clear and convincing evidence that both her compensation for past medical expenses and her compensation for future medical expenses is less than the amount required to be paid to AHCA under the formula at section 409.910(11)(f).

52. The Administrative Law Judge DOAH assigned to the case of *Gallardo v. AHCA* has previously agreed with AHCA’s position relative to section 409.910(17)(b), and ruled that under section 409.910(17)(b) AHCA may recover its past payments

from the portion of a settlement compensating a Medicaid recipient for future medical expenses.

53. AHCA's position that it is entitled to recover from both the portion of GIANINNA's settlement compensating her for past medical expenses and the portion of her settlement compensating her for future medical expenses is a violation of federal Medicaid law, Ahlborn and Wos, and the Florida decisions that have held that this federal law preempts section 409.910(11)(f) "to the extent it permits recovery beyond that portion of the Medicaid recipient's third-party recovery representing compensation for past medical expenses."

54. AHCA's position that under section 409.910(17)(b) GIANINNA must prove that both her compensation for past medical expenses and her compensation for future medical expenses is less than the formula amount in order to successfully challenge the Medicaid lien is contrary to the language of section 409.910(17)(b), which states the Medicaid recipient must prove the amount allocated as "reimbursement for past and future medical expenses" is less than the formula amount. But most importantly, AHCA's position permits AHCA to recover beyond that portion of GIANINNA's "third-party recovery representing compensation for past medical expenses" in violation of federal law, Supreme Court case law, and Florida decisions holding that this federal law preempts section 409.910(11)(f) "to the extent it permits recovery beyond that portion of the Medicaid recipient's third-party recovery representing compensation for past medical expenses."

55. To the extent that section 409.910(17)(b) permits AHCA to recover beyond that portion of

GIANINNA's settlement representing compensation for past medical expenses it is a violation of federal Medicaid law and is preempted.

#### **VI. COUNT I**

#### **Declaratory, Injunctive and all other appropriate Relief**

56. Paragraphs 1 through 55, are restated and incorporated herein as true and accurate.

57. Plaintiff request declaratory relief that AHCA may not recover beyond that portion of her settlement compensating for past medical expenses in violation of federal Medicaid law.

58. Plaintiff request declaratory relief that section 409.910(17)(b) violates federal Medicaid law insofar as it permits AHCA to recover beyond that portion of her settlement representing compensation for past medical expenses by requiring her to prove by clear and convincing evidence the amount of her settlement allocable as both compensation for past medical expenses and compensation for future medical expenses is less than the amount required to be paid to AHCA under the formula at section 409.910(11)(f).

59. Plaintiff request all appropriate injunctions against AHCA to prevent AHCA from recovering beyond that portion of her settlement compensating her for past medical expenses.

60. Plaintiff request all other appropriate relief including attorney's fees and costs authorized by 42 U.S.C. §1988.

WHEREFORE, Plaintiff, GIANINNA GALLARDO, an incapacitated person, by and through her parents and co-guardians, PILAR VASSALLO and

WALTER GALLARDO, request that this Honorable Court:

A. Issue an appropriate judgement declaring that under federal Medicaid law AHCA is prohibited from recovering beyond that portion of Plaintiff's settlement representing compensation for past medical expenses;

B. Issue an appropriate judgement declaring that section 409.910(17)(b) violates federal law in so far as it permits AHCA to recover beyond that portion of Plaintiff's settlement representing compensation for past medical expenses by requiring Plaintiff to prove by clear and convincing evidence the amount of her settlement allocable to both compensation for past medical expenses and compensation for future medical expenses is less than the amount required to be paid to AHCA under the formula at section 409.910(11)(f);

C. Issue an appropriate injunction prohibiting Defendant, ELIZABETH DUDEK, in her official capacity as Secretary of the STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION from seeking recovery beyond that portion of Plaintiff's settlement representing compensation for past medical expenses;

D. Grant Plaintiff's attorney fees, costs and expenses authorized by 42 U.S.C. 1988; and

E. Grant such further relief as this Court deems just and proper.

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION

GIANINNA GALLARDO, an  
incapacitated person, by and  
through her parents and co-  
guardians, PILAR VASSALLO  
and WALTER GALLARDO,

Plaintiff,

vs.

Case No.: 4:16-cv-  
116-MW-CAS

ELIZABETH DUDEK, in  
her official capacity as  
Secretary of the STATE OF  
FLORIDA, AGENCY FOR  
HEALTH CARE ADMINI-  
STRATION,

Defendant.

\_\_\_\_\_ /

**ANSWER**

Defendant ELIZABETH DUDEK, in her official capacity as Secretary of the STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION (“Agency,” or “AHCA”), by and through undersigned counsel, hereby files this Answer, stating:

1. Paragraphs 1, 2, 5-15, 26, 27, 29, 31, 33, 40, 42, 43-47, 49, and 52 are admitted.
2. Paragraphs 30, 32, 34, 36-39, and 48 are denied.
3. Paragraphs 3, 4, 16-25, 28, 53-55, and 57-60 are argument or legal conclusion, and are denied.

4. Paragraph 35 is admitted to the extent that GIANINNA's personal injury action was settled in two settlements totaling \$800,000. Otherwise, denied.

5. Paragraph 41 is admitted to the extent that as a condition of GIANINNA's eligibility for Medicaid, GIANINNA assigned to AHCA her right to recover from liable third-parties. Denied to the extent that the right assigned is limited to medical expenses paid by Medicaid.

6. Paragraph 50 is denied. AHCA has not yet taken such a position; AHCA has not responded to the petition, nor made argument in a hearing or proposed final order.

7. Paragraph 51 is admitted to the extent that the described means of successfully challenging the amount payable to AHCA is one means available to the Plaintiff. Denied to the extent that AHCA's position is that the described means is the exclusive means.

8. Paragraph 56 is admitted to the extent the referenced paragraphs have been admitted, and is denied to the extent the referenced paragraphs have been denied.

9. Defendant admits that Plaintiff seeks the relief granted in sub-paragraphs A-E of the "wherefore" paragraph, but denies that Plaintiff is entitled to such relief, or that it is appropriate.

WHEREFORE, Defendant ELIZABETH DUDEK, in her official capacity as Secretary of the STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION, requests that this Honorable Court:

A. Deny Plaintiff's requests for relief; and

B. Grant such further relief as this Court deems just and proper.

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION

GIANINNA GALLARDO, an  
incapacitated person, by and  
through her parents and co-  
guardians, PILAR VASSALLO  
and WALTER GALLARDO,

Plaintiff,

vs.

Case No.: 4:16-cv-  
116-MW-CAS

ELIZABETH DUDEK, in  
her official capacity as  
Secretary of the STATE OF  
FLORIDA, AGENCY FOR  
HEALTH CARE ADMINI-  
STRATION,

Defendant.

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**MEMORANDUM SUPPORTING PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT**

\* \* \*

**II. Statement of Undisputed Facts**<sup>1</sup>

1. In November 2009, a truck struck Plaintiff after her school bus dropped her off. (Comp. ¶ 29.) She suffered catastrophic physical injuries and brain damage. (Id.) She remains in a persistent vegetative state and

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<sup>1</sup> References to "Comp. ¶ \_\_" are to paragraphs of the Complaint, Doc. 1, that AHCA admitted as true in its Answer, Doc. 5.

is unable to ambulate, communicate, eat, toilet, or care for herself. (Id.)

2. Medicaid and Wellcare paid \$862,687.77 and \$21,499.30, respectively, for Plaintiff's past medical expenses. (Comp. ¶ 31.) The combined amount (\$884,188.07) represented Plaintiff's entire claim for past medical expenses in her suit against the tortfeasors. (Id.)

3. Plaintiff's parents brought an action in state court to recover her damages against the tortfeasors allegedly responsible for her injuries. (Comp. ¶ 33.) This action sought recovery of Plaintiff's past medical expenses, as well as her damages for bodily injury, pain and suffering, disability, disfigurement, mental anguish, loss of capacity for the enjoyment of life, lost ability to earn money in the future, and future medical expenses. (Id.) Her parents sought damages for loss of consortium. (Id.; Ex. 1 (D.E. 10-1).)

4. Plaintiff's personal-injury action was resolved in two settlements totaling \$800,000. (Comp. ¶35.) Court approval was required due to her incapacity; the court approved the settlements. (Id.; Ex. 2 (D.E. 10-2).)

5. AHCA was notified of Plaintiff's personal-injury action and asserted a \$862,688.77 Medicaid lien against her cause of action and future settlement. (Comp. ¶ 42.)

6. AHCA's Medicaid lien represents expenditures paid for Plaintiff's past medical expenses. (Comp. ¶ 43.) AHCA has not made payments in the past or in advance for Plaintiff's future medical care. (Id.) No portion of the lien represents expenditures for Plaintiff's future medical expenses. (Id.)

7. By letter, Plaintiff's attorney notified AHCA of the settlement. (Comp. ¶ 44.) The letter explained that Plaintiff's damages had a value exceeding \$20,000,000 and that the settlement represented only a 4% recovery of her \$884,188.07 claim for past medical expenses, or \$35,367.52. (Id.) The letter asked AHCA to advise as to the amount it would accept in satisfaction of its \$862,688.77 Medicaid lien. (Id.)

8. AHCA did not respond to the letter or file an action to set aside, void, or otherwise dispute Plaintiff's settlement. (Comp. ¶¶ 45-46.)

9. The formula at section 409.910(11)(f), Florida Statutes (2016) requires payment to AHCA of approximately \$300,000. (Comp. ¶ 47.)

10. Because only \$35,367.52 of the settlement represented compensation for past medical expenses, Plaintiff disagreed that payment of approximately \$300,000 to AHCA was appropriate or lawful. However, under section 409.910(17)(b), the only method of challenging the amount payable to AHCA in satisfaction of a Medicaid lien is to deposit the full amount into an interest-bearing account and initiate an administrative proceeding at the Division of Administrative Hearings in Tallahassee (DOAH). Accordingly, Plaintiff deposited \$300,000 in an interest-bearing account and filed a petition with DOAH: Gianinna Gallardo v. AHCA, DOAH Case No. 15-6960MTR ("Gallardo v. AHCA").

11. In administrative proceedings under section 409.910(17)(b), AHCA has taken the position that : (i) it is entitled to recover its past Medicaid payments from the portions of a Medicaid recipient's settlement representing compensation for both past and future medical expenses; and (ii) to successfully challenge

the amount payable to it, the Medicaid recipient must prove by clear and convincing evidence that the amount of the settlement allocable to both past and future medical expenses is less than the formula amount in section 409.910(11)(f). (Comp. ¶ 27.)

12. In the administrative proceeding, AHCA is seeking recovery of its past Medicaid payments from beyond that portion of Plaintiff's settlement representing compensation for past medical expenses. (Comp. ¶49.)

13. On June 14, 2016, the Administrative Law Judge granted the parties' motion to abate proceedings and placed the case in abeyance pending resolution of the legal question presented in this case. (Ex. 3 (D.E. 10-3).)

\* \* \*

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION

GIANINNA GALLARDO, an  
incapacitated person, by and  
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guardians, PILAR VASSALLO  
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Plaintiff,

vs.

Case No.: 4:16-cv-  
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ELIZABETH DUDEK, in  
her official capacity as  
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FLORIDA, AGENCY FOR  
HEALTH CARE ADMINI-  
STRATION,

Defendant.

\_\_\_\_\_ /

**RESPONSE TO PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT**

Defendant ELIZABETH DUDEK, in her official ca-  
pacity as Secretary of the STATE OF FLORIDA,  
AGENCY FOR HEALTH CARE ADMINISTRATION  
("Agency"), files this Response to Plaintiff's Motion for  
Summary Judgment, stating:

1. As explained by the Plaintiff, the material facts  
are undisputed. The parties' dispute arises from the  
legal analysis, instead.

\* \* \*