



## THE FLORIDA SENATE

### SPECIAL MASTER ON CLAIM BILLS

**Location**

402 Senate Office Building

**Mailing Address**

404 South Monroe Street  
Tallahassee, Florida 32399-1100  
(850) 487-5237

DATE	COMM	ACTION
2/16/07	SM	Fav/1 amendment

February 16, 2007

The Honorable Ken Pruitt  
President, The Florida Senate  
Suite 409, The Capitol  
Tallahassee, Florida 32399-1100

Re: **SB 52 (2007)** – Senator Nan Rich  
**HB 593 (2007)** – Representative Perry Thurston  
Relief of Minouche Noel and her parents and natural guardians,  
Jean & Flora Noel

### SPECIAL MASTER'S FINAL REPORT

THIS IS A CONTESTED EXCESS JUDGMENT CLAIM FOR \$8.5 MILLION AGAINST THE DEPARTMENT OF HEALTH (AS THE SUCCESSOR TO THE DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES D/B/A CHILDREN'S MEDICAL SERVICES) FOR SEVERE AND PERMANENT INJURIES SUSTAINED BY THE CLAIMANT AS A RESULT OF NEGLIGENT MEDICAL CARE PROVIDED BY CHILDREN'S MEDICAL SERVICES IN 1988-89.

#### FINDINGS OF FACT:

A hearing on this claim was held by a Senate Special Master in connection with the bill filed in the 2001 Session. The parties declined the opportunity to appear at another Special Master hearing, opting instead to rely on the record developed by the prior Special Master. As a result, my review of this claim is based upon the prior record and the supplemental information submitted by the parties.

The findings of fact set forth in the reports prepared by the prior Special Master are generally consistent with my de novo review of the record, except as to the issue of damages. Thus, I adopt the bulk of the prior Special

SPECIAL MASTER'S FINAL REPORT – SB 52 (2007)

February 16, 2007

Page 2

Master's findings as my own, as summarized below.

**The Claimants**

Minouche Noel was born on February 15, 1988, and is now 19 years old. She is paralyzed from the waist down and confined to a wheelchair. She wears a diaper and is catheterized daily by her mother because she is bladder and bowel incontinent. She also has scoliosis, pelvic obliquity, and uncontrolled spasms in her legs for which she receives Myobloc injections. Because of her condition, she is more susceptible to skin breakdowns, bladder infections, bowel obstructions, infections, and other related problems.

Minouche graduated from Dillard High School in Ft. Lauderdale in 2006. She received a regular diploma and had a 2.5 GPA. The only special education service that she received was an aide who pushed her wheelchair to class and catheterized her 1-2 times per day.

Minouche lives at home with her parents. She started at Brevard Community College in January 2007 and is taking a full course load. She is not receiving any governmental services at this time. She relies upon her parents for transportation and other necessary services.

Minouche's parents, Jean and Flora Noel, are Haitian immigrants who came to the United States in 1980, and are now United States citizens. Mr. Noel works in the deli at Publix and Mrs. Noel works in a nursing home. The Noels have two other children in addition to Minouche, Alexandra, who is 5 years younger than Minouche, and Junette, who is 5 years older than Minouche.

The Broward County home in which Minouche grew up had not been modified for wheelchair accessibility because the Noels could not afford to make the necessary structural changes. Minouche had to crawl along the floor to move around the house.

The Noels recently moved to Palm Bay where they purchased a new home. Some modifications to the home have been made, but it is not fully accessible. As a result, Minouche still has to crawl along the floor to move around her house.

SPECIAL MASTER'S FINAL REPORT – SB 52 (2007)

February 16, 2007

Page 3

**Medical Care Provided to Minouche**

Minouche was born with a lump on her spine. Dr. Richard McKenzie, a neurologist, was called in to evaluate the lump. Dr. McKenzie was a consultant for Children's Medical Services (CMS), which at the time was operated by the Department of Health and Rehabilitative Services (HRS). The Department of Health (Department) is now responsible for the operation of CMS.

Based on his review of X-rays of Minouche's spine and a physical examination, Dr. McKenzie diagnosed Minouche with spina bifida, a possible meningocele, and a questionable other lesion. Dr. McKenzie recommended a full evaluation, including an MRI, and a possible excision to be performed through the CMS neurosurgery clinic in one month. Minouche's parents, followed Dr. McKenzie's orders and took Minouche to the CMS neurosurgery clinic for evaluation and follow-up.

In March 1998, Minouche was seen in the pediatric clinic at CMS by Dr. Sonia Hodge, a pediatrician. Dr. Hodge observed that Minouche was very active, had regular motion in her extremities, no paralysis, and that she had a small raised round lesion on her back, soft and completely covered with skin. Dr. Hodge arranged for Minouche to be seen in the neurology clinic for an evaluation of the lesion. No neurological abnormalities were noted in Minouche's medical records for the treatment she received from birth until May 1988.

An MRI was conducted on Minouche on May 26, 1988. The MRI revealed what appeared to be a myelomeningocele (hernial protrusion of the spinal cord and its membranes through a defect in the vertebral canal) and possible syrinx (an abnormal cavity in the spinal cord in which caviation may slowly occur), tumor, cyst, or other abnormality. Dr. McKenzie examined Minouche in the CMS clinic following the MRI scan and planned to operate on Minouche to: (1) remove the sinus to prevent infection within the spinal cord; (2) untether the spinal cord so that it could migrate in its usual developmental pattern; and (3) explore the spinal cord to determine if what was seen was a cystic tumor or an abnormality.

SPECIAL MASTER'S FINAL REPORT – SB 52 (2007)

February 16, 2007

Page 4

On July 14, 1988, at age 5 months, Minouche was admitted to Broward General Medical Center for surgery. The hospital is owned and operated by the North Broward Hospital District (NBHD).

On admission to the hospital, Minouche was functioning well neurologically and had normal strength in all extremities. The following day, Dr. McKenzie performed a laminectomy from the ninth, tenth, and eleventh, thoracic vertebrae, released a tethered spinal cord and removed a sinus tract.

Immediately following the surgery and during her hospital stay, Minouche had no neurological deficits and was able to move her legs. Minouche walked between October and December 1988. By mid-December, however, she had stopped walking.

On January 2, 1989, Minouche was taken to the Broward General Medical Center emergency room by her mother and admitted to the hospital. The pediatrician who examined Minouche observed that she had weakness in her lower extremities and was unable to walk.

Dr. McKenzie ordered an orthopedic consultation and physical therapy consultation to evaluate the weakness in Minouche's extremities. Dr. Leroy Smith, an orthopedic physician, examined Minouche and diagnosed her condition as a mild right hip subluxation (partial dislocation of a joint) and motor weakness of undetermined etiology. At trial, Dr. Smith testified that he told Dr. McKenzie that the mild condition of her hips could not account for the problems that Minouche was experiencing and that he believed that it was a neurological rather than an orthopedic problem. Minouche was discharged on January 9, 1989, without a diagnosis that explained the cause of the weakness in her lower extremities.

Between January to March 1989, Minouche gradually lost function in her lower extremities and her physicians failed to definitively diagnose the cause for her condition.

Dr. McKenzie; Dr. Hodge; Dr. Alan Watson, an orthopedist; and Dr. Ronald Sirois, an urologist, saw Minouche in the multidisciplinary myelodysplasia clinic at CMS on March 16, 1989 for follow-up. Although Minouche had regained some

SPECIAL MASTER'S FINAL REPORT – SB 52 (2007)

February 16, 2007

Page 5

capacity to walk again, she had a wobbly, unsteady gait as noted by Dr. Hodge. Although Dr. Watson concluded that Minouche did not need anything from an orthopedic perspective, he and the other physicians providing care to Minouche failed to adequately communicate with each other and to investigate the underlying cause of Minouche's symptoms in her lower extremities.

The Noels persistently sought treatment for their daughter's condition from doctors and staff at the CMS clinic, but became desperate and began to seek care in the emergency room of local hospitals. On April 11, 1989, Mr. and Mrs. Noel took Minouche to Broward General Medical Center emergency room because Minouche was unable to stand on her right leg and would not walk. The Noels were referred back to the CMS clinic for evaluation. Two days later, Mrs. Noel called CMS stating that Minouche had been taken to the emergency room of the hospital and complained that Minouche was unable to walk and appeared to be in pain. Despite the urgency of the call, Mrs. Noel was referred back to the CMS clinic for an appointment for Minouche's annual pediatric evaluation on May 9, 1989. Minouche's parents took her to Humana Bennett Hospital emergency room on April 19, 1989, and the emergency room physician determined that Minouche was not bearing weight on either leg but could still move her legs. At this point, Minouche had not used her legs for 3 weeks.

Through the CMS clinic, Minouche was eventually seen on April 24, 1989, by Dr. Lucy Cohen, a pediatric physiatrist, who determined that there was no orthopedic problem and arranged for Minouche to meet Dr. McKenzie at the Broward General Medical Center emergency room as soon as possible that day. On April 26, 1989, Minouche returned to CMS clinic and was seen by Dr. Melvin Grossman, a neurologist. Dr. Grossman diagnosed Minouche with evidence of thoracic myopathy and ordered a stat MRI of the thoracic spine that was scheduled the next day. The April 27, 1989 MRI showed a cystic area which had been progressively widening the cord, which most likely represented a residual syrinx or post-operative arachnoid cyst secondary to adhesions.

Minouche at this point was crippled by the introduction of an infection into her spine by the initial surgery, which went

SPECIAL MASTER'S FINAL REPORT – SB 52 (2007)

February 16, 2007

Page 6

undiagnosed. On May 6, 1989, Mr. and Mrs. Noel took her to Jackson Memorial Hospital emergency room, noting that she was unable to walk. A physical examination of Minouche showed that she had no movement of the lower extremities, decreased tone, and was unable to sit up.

On May 16, 1989, Drs. McKenzie and Stoll re-operated on Minouche's spine, performing a laminectomy from the seventh through the eighth thoracic vertebrae. The surgeons found a spinal cord abscess with purulent appearing fluid. Dr. McKenzie noted that the previously-observed cyst was infected and had enlarged, and had to be completely removed from her spinal cord. Although Dr. McKenzie advised Mr. and Mrs. Noel that Minouche would eventually walk again, she never did.

**Expert Testimony Regarding Negligence**

The expert witnesses presented by the claimants were of the opinion that the MRI taken at age 3 months on May 26, 1988, showed that Minouche had a neural tube defect, a benign condition in the absence of any neurological deficits. This condition, according to the claimants' experts, should have been left alone and monitored for any changes. Stated another way, the claimants' experts were of the opinion that the initial operation should not have been done.

The claimants' experts were also of the opinion that the surgery was negligently performed and allowed Minouche's spine to become infected, and that it was the infection introduced by the initial surgery that caused progressive pressure to increase on Minouche's spinal cord, which ultimately caused her to lose all function in her legs, bladder, and bowel. The claimants' experts further opined that but for the deviations from the standard of care by the CMS physicians, Minouche would not be paralyzed and would be ambulatory.

The Department's expert witness was of the opinion that Minouche's paralysis was caused by a congenital malformation of the spinal cord, and that the paralysis was the natural progression of a pre-existing spinal cord deformity. The Department's expert was also of the opinion that the growth of the cyst in Minouche's spine was wholly unrelated to the initial surgery performed by Drs. McKenzie and Stoll.

SPECIAL MASTER'S FINAL REPORT – SB 52 (2007)

February 16, 2007

Page 7

The experts for both sides agreed that the physicians who treated Minouche in the CMS multidisciplinary clinic deviated from the appropriate standard of care by failing to communicate their findings with each other to provide a diagnosis, including a comprehensive neurological evaluation, that would explain Minouche's loss of function in her lower extremities.

No disciplinary action was taken against any of the physicians involved in the care and treatment of Minouche. Of those physicians, only Dr. Stoll is still an active CMS provider. Dr. McKenzie voluntarily relinquished his medical license in 1998. No known policy changes were made by the Department or CMS as a result of this incident.

**Damages**

The claimants' expert, Dr. Bernard Pettigill, estimated that the present value of Minouche's economic damages would be between \$7.15 and \$8.23 million, depending upon whether her condition deteriorated and she required institutional care. The Department's expert, Dr. Kenneth Clarkson, estimated that the present value of Minouche's economic damages would be only \$1.67 million. The vast majority of both estimates related to future medical needs and maintenance expenses; less than 10 percent of the estimates were attributable to Minouche's lost earning capacity over her lifetime.

The estimated future medical expenses were based upon detailed life care plans prepared by Lawrence Foreman (for the claimants) and Dr. Michael Shahnasarian (for the Department). Thus, in large part, the reasonableness of the life care plans determines the reasonableness of the estimated economic damages.

The life care plans were consistent in many respects, such as the need for rehabilitative therapies, wheelchair modifications, medical supplies, and routine monitoring of Minouche's medical condition by various specialists. However, the life care plan prepared by Mr. Foreman was much more extensive than the plan prepared by Dr. Shahnasarian.

Some of the major items included in the life care plan prepared by Mr. Foreman that were excluded from the life

SPECIAL MASTER'S FINAL REPORT – SB 52 (2007)

February 16, 2007

Page 8

care plan prepared by Dr. Shahnasarian were frequent assessments at a spinal cord injury center; extensive medical care, including multiple surgeries; participation in a three-month spinal cord injury rehabilitation program; various forms of life-time counseling, including marriage counseling; a research assistant and personal companion/coach; full-time, live-in personal care assistants; and funds to purchase and modify a new house.

The life care plan prepared by Dr. Shahnasarian is reasonable and appropriate despite the omission of these items; it included funds for structural modifications to Minouche's existing home (rather than a new home) and daily visits by a home health aide (rather than a full-time live in attendant). Dr. Shahnasarian recognized "potential complications" related to Minouche's condition (e.g., decubitus ulcers, future scoliosis therapies), but those items were not included as elements of the life care plan that he prepared.

In my view, the life care plan prepared by Mr. Foreman significantly overstates Minouche's future medical needs. It appears to be based upon the premise that "money is no object" because Mr. Foreman acknowledged in his trial testimony that the plan is not realistic and would need to be prioritized if money was an object. The life care plan prepared by Dr. Shahnasarian is, in my view, a more realistic and reasonable estimate of Minouche's future medical needs and maintenance expenses.

Evidence was presented at trial regarding the medical expenses incurred by Minouche up to the date of trial. The figure referenced in closing argument by the claimants' attorney was \$200,000 (which was the amount awarded by the jury), but because those expenses were paid by Medicaid, not Minouche's parents, the amount of the Medicaid lien provides a more reliable estimate of the expenses. As noted below, the Medicaid lien is approximately \$160,000.

Minouche's medical expenses since the time of the verdict have not been substantial, which provides further support for the finding that the life care plan developed by Mr. Foreman overstates Minouche's needs. Specifically, the Department reports that since fiscal year 1996-97, Medicaid and CMS

## SPECIAL MASTER'S FINAL REPORT – SB 52 (2007)

February 16, 2007

Page 9

have expended less than \$68,000 on medical services for Minouche. By contrast, the jury awarded \$1.3 million in damages to the parents for Minouche's medical expenses from the time of trial to her 18th birthday.

The claimants contend that Minouche's medical expenses since trial are only minimal because the Noels do not have the money to get her the care that she needs. While that may be true as to services that Medicaid does not cover (e.g., physical therapy), it does explain why there have not been more Medicaid expenses for Minouche if she was indeed in need of the extensive medical services (surgeries, etc.) that the \$1.3 million jury award to the parents for future medical expenses was premised upon. Indeed, there is no evidence that there have been any Medicaid-covered services (surgeries, etc.) that Minouche needed but was not provided. Minouche will continue to be eligible for services from CMS until she turns 21.

### **Source of Funds to Pay the Claim**

CMS provides a number of different health care services to children with special health care needs. See generally Ch. 391, F.S. CMS receives a mix of federal and state funds. Its annual budget for fiscal year 2006-07 was approximately \$229.5 million, with approximately \$90 million coming from General Revenue.

Neither CMS nor the Department has funds "earmarked" or otherwise set aside to pay the claim. According to the Department, payment of the claim would put at risk the CMS program and the important health care services that it provides. Thus, an additional appropriation of General Revenue to the Department will be required for this claim to be paid.

### **Protection of Minouche's Funds**

In 2000, Minouche's parents were appointed as her legal guardians by the circuit court in Broward County, and Suntrust Bank was designated as the depository for Minouche's assets. The guardianship terminated when Minouche turned 18, and the funds remaining in the guardianship account at that time (approximately \$75,000) were transferred to Minouche.

SPECIAL MASTER'S FINAL REPORT – SB 52 (2007)

February 16, 2007

Page 10

The prior Special Master recommended the payment of Minouche's share of the claim bill into a special needs trust, instead of into the guardianship account or directly to Minouche, in order to protect the funds and preserve Minouche's Medicaid eligibility. Consistent with that recommendation, this year's bill, as filed, requires payment of Minouche's share of the claim into a special needs trust created for her benefit. Any funds remaining in the trust upon Minouche's death would revert to the General Revenue fund.

The claimants oppose the use of a special needs trust for Minouche's funds, primarily because of the costs associated with the administration of the trust. The special needs trust has not yet been drafted. The Noels do not have the funds needed to do so.

LITIGATION HISTORY:

This case has an extensive history of litigation, which began in October 1990 when Minouche's parents filed suit against CMS, NBHD, and six physicians (and their professional associations) who were involved in the care and treatment of Minouche. The suit was filed in circuit court in Broward County.

Prior to trial, the court granted summary judgment in favor of the physicians and their professional associations. That ruling was ultimately affirmed by the Florida Supreme Court in *Stoll v. Noel*, 694 So. 2d 701 (Fla. 1997), which held that the physicians were agents of the state entitled to sovereign immunity providing services through CMS.

A multi-week jury trial was held in the case in March 1999. The only remaining defendants were NBHD and CMS. The jury found that CMS was negligent and that its negligence was the legal cause of Minouche's injuries. The jury found no negligence on the part of NBHD. The jury awarded total damages of \$8.5 million to Minouche and her parents, broken down as follows: \$6.5 million for Minouche (consisting of \$3.5 million for future medical expenses and lost earning capacity, and \$3 million for past and future pain and suffering) and \$2 million for her parents (consisting of \$1.5 million for Minouche's medical expenses as a minor, and \$500,000 in past and future pain and suffering).

SPECIAL MASTER'S FINAL REPORT – SB 52 (2007)

February 16, 2007

Page 11

A final judgment consistent with the jury verdict was entered against the Department on April 7, 1999. A cost judgment for \$84,000 was also entered against the Department. The Department's post-trial motions for a new trial, remittitur, etc., were denied in November 1999. The Department did not appeal the judgments.

The Department paid \$200,000 in partial satisfaction of the final judgment pursuant to s. 768.28, F.S. In July 2000, the trial court approved a distribution of the initial \$200,000 as follows: \$100,000 for costs; \$20,000 to Minouche's parents; and \$80,000 into a guardianship account for Minouche. No attorney's fees were taken out of the initial \$200,000 payment.

The parents used their \$20,000 to purchase a reliable vehicle. Minouche's \$80,000 was not spent; it was held in her guardianship account until the guardianship was terminated.

The funds in the guardianship account were transferred to Minouche when she turned 18 and, as noted above, the net amount she received (after interest was added and administrative costs and fees were deducted) was approximately \$75,000. Of that amount, \$5,000 was used to make modifications to the Noels' new home and the remaining \$70,000 was put into a Certificate of Deposit, where it remains.

Cost judgments were entered in favor of NBHD and the physicians who were granted summary judgment. See Noel v. Broward General Medical Center, 725 So. 2d 438 (Fla. 4th DCA 1999). Those judgments amount to \$135,441.82, and have not been satisfied.

The outstanding costs due to the claimants' attorney are \$74,667.47. That figure takes into account the \$100,000 out of the initial payment made by the Department that was applied to costs.

CLAIMANTS' POSITION:

- The jury verdict should be given effect because it is supported by the evidence and is reasonable under the circumstances.

SPECIAL MASTER'S FINAL REPORT – SB 52 (2007)

February 16, 2007

Page 12

DEPARTMENT'S POSITION:

- Minouche's paralysis was the result of her pre-existing condition, not the acts or omissions of the CMS physicians.
- The jury should have apportioned some of the liability for Minouche's injury to NBHD.
- The damage award is excessive.
- If the bill is approved, the claim should be paid from General Revenue funds since the Department and CMS do not have funds available to pay the claim.
- The ability of CMS to provide services would be negatively affected if it was required to pay the claim out of its budget.

CONCLUSIONS OF LAW:

I agree with the conclusion of the prior Special Master as to the Department's negligence being the legal cause of the Minouche's injuries. However, I disagree with the prior Special Master's conclusion that the damages awarded by the jury (and requested in the bill) are reasonable. More specifically, I conclude:

The physicians who treated Minouche through CMS were agents of HRS, the predecessor agency to the Department. See Stoll v. Noel, supra. Thus, the Department is liable for the negligence of the physicians.

The physicians had a duty to provide competent medical care to Minouche. Although it is a close question, I agree with the prior Special Master that the duty was breached and that the injuries suffered by Minouche (and her parents) were a proximate and foreseeable result of that breach. I also agree with the prior Special Master that the allocation of no liability to the NBHD is reasonable under the circumstances since the CMS physicians were primarily responsible for Minouche's treatment and surgeries.

In my view, based upon a de novo review of the record, the amount of damages awarded by the jury is out of proportion with the injuries suffered by Minouche and is excessive in relation to her actual needs. Therefore, as more fully discussed below, I recommend that the claim be reduced.

SPECIAL MASTER'S FINAL REPORT – SB 52 (2007)

February 16, 2007

Page 13

As to the economic damages, the \$3.5 million awarded to Minouche is approximately at the midpoint of the range established by the competing experts, but it is more than double the \$1.67 million calculated by Dr. Clarkson based upon Dr. Shahnasarian's more reasonable life care plan; at most, an award of \$2 million is appropriate for Minouche's economic damages. Furthermore, I do not see any evidentiary basis for the \$1.5 million economic damage award to Minouche's parents; at most an award of \$200,000 is justified, and even that may be slightly overstated in light of the Medicaid lien being only \$160,000.

As to the non-economic damages, it is a closer question. On one hand, it is difficult to place a value the lifetime of hardship that Minouche and her family will endure because of her condition. On the other hand, Minouche graduated from high school with minimal accommodations and, by all accounts, she appears to be making the most out of her situation. On balance, despite the reductions in the economic damages, I conclude that the \$3 million award for Minouche's past and future pain and suffering is reasonable under the circumstances, but that the parents' pain and suffering should be reduced to \$300,000 to correspond to the 1.5 to 1 ratio of Minouche's economic and non-economic damages.

In sum, I conclude that the gross claim should be reduced from \$8.5 million to \$5.5 million, calculated as follows:

**Table 1**

Minouche's economic damages	\$2,000,000
Minouche's pain and suffering	3,000,000
Parents' economic damages	200,000
Parents' pain and suffering	<u>300,000</u>
	<u>\$5,500,000</u>

ATTORNEY'S AND  
LOBBYIST'S FEES:

The claimants' attorney submitted an affidavit stating that the attorney's fees in this case will not exceed the 25 percent cap in s. 768.28(8), F.S. The appellate attorney's fee is 3.125 percent of the gross recovery; the trial attorney's fee is the balance of the 25 percent. No attorney's fees were taken out of the initial \$200,000 payment, which means that

SPECIAL MASTER'S FINAL REPORT – SB 52 (2007)

February 16, 2007

Page 14

the attorneys have effectively not been paid in this case since it commenced in 1990.

The lobbyist's fees are not included in the 25 percent attorney's fee. The lobbyist's fee is an additional 6 percent of the final claim, which would be in excess of \$500,000 if the claim is approved at \$8.5 million, and approximately \$323,000 if the claim is approved at \$5.5 million as recommended above.

The Legislature is free to modify the attorney's fees, lobbyist's fees, or both, as it sees fit. See Gamble v. Wells, 450 So. 2d 850 (Fla. 1984). I am recommending a reduction in the lobbyist's fees, as set forth below.

LEGISLATIVE HISTORY:

This is the seventh year that this claim has been presented to the Senate.

The claim was recommended favorably by the Senate Special Master in 2001 (SB 6), 2002 (SB 4), and 2003 (SB 22). The 2001 bill died on the Calendar. The 2002 bill passed the Senate by a vote of 29 to 5, but died in Messages. The 2003 bill died in committee. No Special Master report was prepared in connection with the bills filed in 2004 (SB 4), 2005 (SB 8), or 2006 (SB 38), and those bills died in committee.

The 2006 House bill (HB 215) passed the House by a vote of 117 to 0, but died in Messages. As passed by the House, HB 215 reduced the total claim to \$6 million, with \$5 million paid into a special needs trust for the benefit of Minouche and \$1 million paid to her parents.

This year's bill incorporates the amendments recommended by the prior Special Master with respect to the source of funds for the bill and the payment of Minouche's portion of the bill into a special needs trust.

The distribution scheme contemplated by this year's bill, after taking into account the partial satisfaction paid by the Department and the cost award entered against the Department, would be as follows:

## SPECIAL MASTER'S FINAL REPORT – SB 52 (2007)

February 16, 2007

Page 15

**Table 2**

Gross amount of the claim	\$8,500,000.00
Add: Cost award against Department	84,000.00
Less: Partial satisfaction	( 200,000.00)
Adjusted gross claim	\$8,384,000.00
Less: Attorney's fees (25%)	( 2,096,000.00)
Less: Lobbyist's fees (6%)	( 503,040.00)
Less: Outstanding costs	( 74,667.47)
Less: Cost judgements in Favor of doctors	( 135,441.82)
Less: Medicaid lien	<u>( 160,878.70)</u>
Net paid to the claimants	\$5,413,972.01
Parents' share	<u>( 2,000,000.00)</u>
Net available for Minouche	<u>\$3,413,972.01</u>

OTHER ISSUES:

The bill should be amended to reflect that Minouche is no longer a minor. She turned 18 on February 15, 2006.

The bill requires repayment of “outstanding medical liens” out of the funds designated for the benefit of Minouche. That language is arguably broad enough to encompass the Medicaid lien, but the bill should be amended to clarify that the repayment of Medicaid is to occur prior to disbursing any funds to the claimants.

The bill does not take into account the \$200,000 paid by the Department in partial satisfaction of the final judgment, or the \$84,000 cost judgment entered against the Department. The net effect of these omissions is a \$116,000 reduction in the amount of the bill.

The gross amount of the bill should be reduced to \$5,384,000, which is the \$5.5 million recommended above (see Table 1) less the \$116,000 referenced in the preceding paragraph. If the bill is amended in that regard (and no other changes are made), the net amount paid to the claimants would be approximately \$3.34 million, with \$2.84 million going to Minouche, calculated as follows:

## SPECIAL MASTER'S FINAL REPORT – SB 52 (2007)

February 16, 2007

Page 16

**Table 3**

Gross amount of the claim	\$5,500,000.00
Add: Cost award against Department	84,000.00
Less: Partial satisfaction	( <u>200,000.00</u> )
Adjusted gross claim	\$5,384,000.00
Less: Attorney's fees (25%)	( 1,346,000.00)
Less: Lobbyist's fees (6%)	( 323,040.00)
Less: Outstanding costs	( 74,667.47)
Less: Cost judgments in Favor of doctors	( 135,441.82)
Less: Medicaid lien	( 160,878.70)
Net paid to the claimants	\$3,343,972.01
Parents' share	( <u>500,000.00</u> )
Minouche's share	<u>\$2,843,972.01</u>

However, there are two additional modifications to the bill that, in my view, are necessary to provide a more equitable distribution of the net funds and to maximize the funds distributed to Minouche.

First, the Medicaid lien and any other “outstanding medical liens” should be paid out of the parents’ share of the claim because the jury’s economic damage award to the parents was premised upon the parents being responsible for paying Minouche’s medical bills while she was a minor. The liens relate to those medical bills, which in fact were paid by Medicaid rather than Minouche’s parents. As a result, the net amount that will be paid to the parents will be \$339,121.30 (*i.e.*, \$500,000 less \$160,878.70).

Second, the lobbyist’s fees should be reduced to no more than \$200,000. A fee in that amount is more reasonable than the \$323,040 fee calculated above and the \$503,040 fee that would be due on an \$8.5 million claim (*see* Table 2). A \$200,000 lobbyist’s fee is still quite generous in my view, but it is not entirely unreasonable based upon the number of years that this claim has been before the Legislature.

## SPECIAL MASTER'S FINAL REPORT – SB 52 (2007)

February 16, 2007

Page 17

The net effect of taking the medical liens out of the parents' share of the claim and reducing the lobbyist's fee is that Minouche's share of the claim will be increased to \$3.28 million, calculated as follows:

**Table 4**

Gross amount of the claim	\$5,500,000.00
Add: Cost award against Department	84,000.00
Less: Partial satisfaction	( <u>200,000.00</u> )
Adjusted gross claim	\$5,384,000.00
Less: Attorney's fees (25%)	( 1,346,000.00)
Less: Lobbyist's fees	( 200,000.00)
Less: Outstanding costs	( 74,667.47)
Less: Cost judgments in Favor of doctors	( 135,441.82)
Subtotal	\$3,627,890.71
Parents' share	( <u>339,121.30</u> )
Minouche's share	<u>\$3,288,769.41</u>

It is noteworthy that under my recommended distribution scheme, Minouche will receive approximately the same net amount even though the gross amount of the claim was reduced by approximately \$3 million. Compare Table 2 (\$3.41 million to Minouche out of an \$8.5 million claim) with Table 4 (\$3.28 million to Minouche out of a \$5.5 million claim).

On that point, the Senate should address the disparity between the gross claim and the net amount paid for the benefit of Minouche even if it rejects my recommendation that the claim be reduced. In my view, the distribution scheme contemplated by the bill, as filed (see Table 2), is inequitable and unreasonable because it directs that the outstanding fees and costs be paid from the funds designated for the benefit of Minouche, rather than the funds paid to her parents. This means that Minouche's parents would receive the full \$2 million awarded to them by the jury, but Minouche would receive only \$3.4 million of the \$6.5

SPECIAL MASTER'S FINAL REPORT – SB 52 (2007)

February 16, 2007

Page 18

million awarded by the jury. Thus, if the Senate decides to pay the claim at \$8.5 million, the bill should still be amended to direct payment of at least the Medicaid liens and any other “outstanding medical liens” (and, perhaps, the other costs as well) from the parents’ share of the claim and to reduce the lobbyist’s fee to no more than \$200,000.

RECOMMENDATIONS:

For the reasons set forth above, I recommend that Senate Bill 52 (2007) be reported FAVORABLY, as amended.

Respectfully submitted,

T. Kent Wetherell, II  
Senate Special Master

cc: Senator Nan Rich  
Representative Perry Thurston  
Faye Blanton, Secretary of the Senate  
House Committee on Constitution and Civil Law  
Counsel of Record