THE FLORIDA SENATE

SPECIAL MASTER ON CLAIM BILLS

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DATE	COMM	ACTION
2/10/11	SM	Fav/1 amendment

February 10, 2011

The Honorable Mike Haridopolos
President, The Florida Senate
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: **SB 326 (2011)** – Senator Jim Norman
HB 179 (2011) - Representative Kathleen C. Passidomo
Relief of Stephen and Meredith Kirby

SPECIAL MASTER'S FINAL REPORT

THIS IS AN UNCONTESTED CLAIM FOR $1.8 MILLION FROM UNAPPROPRIATED FUNDS OF THE UNIVERSITY OF SOUTH FLORIDA (USF), BASED ON A SETTLEMENT AGREEMENT BETWEEN USF AND THE PARENTS OF HARPER KIRBY, TO COMPENSATE THEM FOR HER WRONGFUL BIRTH WITH CYSTIC FIBROSIS.

FINDINGS OF FACT:

On October 18, 2006, Stephen and Meredith Kirby sought genetic counseling from Dr. Michael Parsons, a professor of obstetrics and gynecology at the USF College of Medicine. The Kirbys wanted a consultation because their first daughter, Railey, had been found to be a carrier of a cystic fibrosis gene, although she was not affected by the disease. When it was discovered that Railey was a carrier of the cystic fibrosis gene, the Kirbys were tested and it was found that Stephen carried one particular type of mutation of the cystic fibrosis gene and Meredith carried a different type of mutation.

Dr. Parsons advised the Kirbys that, because they carried different mutations of the cystic fibrosis gene, there was no possibility that their children would have the cystic fibrosis disease, but, like their first daughter, Railey, all their children

would likely be carriers of one of the cystic fibrosis gene types. Dr. Parson's advice was incorrect. In fact, there was a 25 percent chance that a child born to the Kirbys would actually have the disease.

Based on the advice of Dr. Parsons, the Kirbys had a second daughter, Harper, born in August 2007. A routine newborn screening test revealed that Harper had cystic fibrosis. When Dr. Parsons was told that Harper Kirby had been born with cystic fibrosis, he checked his consultation notes and realized immediately that "I made an error." Dr. Parsons could not explain how he made the mistake. He knew at the time of the consultation that there was a 1 in 4 chance that a child born to parents carrying these different genes for cystic fibrosis would have a child that had the disease.

Cystic fibrosis is a genetic disease with debilitating effects which worsen over time, requiring continuous medical treatment and ultimately causing a premature death. The average life span of a person with cystic fibrosis is 37 years. Recent developments in the treatment of the disease are increasing life expectancy, but there is still no cure.

There are four general categories of problems that cystic fibrosis can cause in a patient. First, and generally the reason for premature death, are the infections and inflammations of the lungs that cause their slow but inevitable deterioration. There are particular kinds of bacteria in the lung that are associated with cystic fibrosis and all patients ultimately become chronically infected and require lifelong antibiotic dosing. A second category of problems are gastrointestinal, due primarily to a pancreatic enzyme imbalance that reduces a patient's ability to absorb nutrients from food. These problems require regular monitoring of the patient's diet and the use of dietary supplements. Many older patients must be fed overnight through a tube in order to obtain sufficient nutrients. The disease also interferes with normal glucose control and increases the risk of diabetes. Third, cystic fibrosis patients have sweat chloride abnormalities and usually require sodium supplements. These abnormalities are especially problematic in warm climates. Finally, there are fertility problems, almost always seen in males, but females with the disease are sometimes infertile, too. Patients who can have

children are at risk to pass the disease on to their children.

The treatment of cystic fibrosis consists of medicines or therapies that counter the patients' problems with nutrition and sweat abnormalities and slow down the damage to the lungs. Cystic fibrosis involves a lifetime of constant monitoring by doctors and parents, and by patients when they are old enough, and the constant application of medicines and therapies. By the time they are teens, most patients must devote several hours each day to various self-administered treatments.

Harper Kirby is now three years old. She must wear a pneumatic vest twice a day for 20 minutes that administers periodic air bursts to vibrate her chest and break up mucous in her lungs. A family history of asthma complicates her situation. She uses a nebulizer for as much as three hours each day to administer inhaled antibiotics and other medications. Harper takes a regimen of pills with every meal. She is currently taking six kinds of medication.

Harper's projected future medical expenses were estimated to cost almost $2 million. In addition to the costs of Harper's medical care, her parents suffer the mental anguish of watching their daughter's discomfort and pain and knowing that, even with the best of care, the disease is going to make her sicker and sicker until it ends her life.

LITIGATION HISTORY:

A lawsuit was filed in December 2008 in the circuit court for Hillsborough County, but was settled before trial in July 2010. Under the settlement agreement, USF agreed to pay the Kirbys the $200,000 sovereign immunity limit and not to oppose a claim bill for an additional $1.8 million.

CONCLUSIONS OF LAW:

The claim bill hearing was a *de novo* proceeding for the purpose of determining, based on the evidence presented to the Special Master, whether USF is liable for the wrongful birth of Harper Kirby and, if so, whether the amount of the claim is reasonable.

USF admitted that Dr. Parsons' erroneous advice to the Kirbys failed to meet the standard of medical care. Dr. Parsons was acting in the course and scope of his employment with USF. Therefore, USF is also liable.

The amount of the claim is reasonable under the circumstances.

ATTORNEYS FEES: In compliance with section 768.28 (8), Florida Statutes, the Kirbys' attorneys will limit their fees to 25 percent of any amount awarded by the Legislature.

SPECIAL ISSUES: USF reports that it currently has sufficient unappropriated funds to pay this claim if it is approved by the Legislature.

The Kirbys have indicated their intention to use most of the amount they receive from this claim bill to fund a special needs trust for Harper. However, that intention is not reflected in the claim bill. Senate Bill 326 should be amended to require this action.

RECOMMENDATIONS: For the reasons set forth above, I recommend that Senate Bill 326 (2011) be reported FAVORABLY, as amended.

Respectfully submitted,

Bram D. E. Canter
Senate Special Master

cc: Senator Jim Norman
Representative Kathleen C. Passidomo
R. Philip Twogood, Secretary of the Senate
Counsel of Record

Attachment

580202

LEGISLATIVE ACTION

Senate . House

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The Special Master on Claim Bills recommended the following:

Senate Amendment

Delete lines 55 - 62

and insert:

Section 2. The University of South Florida is authorized and directed to appropriate from funds of the university not otherwise appropriated and to draw a warrant in the amount of $1.8 million, payable to Stephen and Meredith Kirby, $826,740 of which shall be deposited in or used to fund a special needs trust for the benefit of Harper Kirby, as compensation for the mental anguish and the extraordinary expenses associated with Harper's birth with cystic fibrosis.