



STORAGE NAME: h6523.CJC

DATE: 3/6/2017

March 6, 2017

SPECIAL MASTER'S FINAL REPORT

The Honorable Richard Corcoran
Speaker, The Florida House of Representatives
Suite 420, The Capitol
Tallahassee, Florida 32399-1300

Re: HB 6523 - Representative Diaz
Relief/"Survivor" & Estate of "Victim"/DCF

THIS IS AN EQUITABLE CLAIM BASED ON A SETTLEMENT AGREEMENT, WHEREIN THE DEPARTMENT OF CHILDREN AND FAMILIES HAS AGREED TO PAY \$5,000,000 TO SURVIVOR AND THE ESTATE OF VICTIM FOR DAMAGES THEY RECEIVED AS A RESULT OF ALLEGED NEGLIGENT ACTIONS OF THE DEPARTMENT THAT FAILED TO PROTECT THEM FROM THE ABUSIVE BEHAVIOR OF THEIR ADOPTIVE PARENTS. DCF, THROUGH THE CHIEF FINANCIAL OFFICER, HAS PAID \$1,250,000 PURSUANT TO THE SETTLEMENT LEAVING, \$3,750,000 TO BE PAID PURSUANT TO THIS CLAIM BILL.

FINDING OF FACT:

On February 14, 2011, eleven year-old Victim was found dead in a truck parked off on I-95 in Palm Beach County. Victim's twin, Survivor, was found inside the truck, suffering from chemical burns. Mr. Barahona, the children's adoptive father, claims Survivor received those burns when the truck they were in bounced off the highway, spilling caustic chemicals over both of them, but it appears that something far more insidious occurred.

The events that precede this span seven years and lucidly portray the Barahona's ongoing abuse of Survivor and Victim

both during and after the twins were in the care of the Department of Children and Families (DCF). In August 2003, the court terminated the parental rights of the twins' mother. In March of 2004, DCF removed Survivor and Victim from their biological father's custody when he was charged with sexual battery on a minor that he was not related to. DCF placed the twins in the foster home of Jorge and Carmen Barahona.

Just four days after Survivor and Victim were placed in the Barahona home, a paternal aunt and uncle in Texas reached out to DCF and asked for custody of the twins. A month later the Court ordered the home study be conducted. In May of 2004, two months after the relatives made their existence and desire to take custody of the children known, the Guardian ad Litem noted that a home study that needed to be done before the relatives could take custody would take up to three months. However, Texas did not return the home study until over a year later. By that time it was determined that removing the children from the Barahona's home would not be in their best interests.

In the five years the Barahonas first became foster parents until the twins were adopted, several questionable incidents were recorded. Near the end of 2004, a nurse for Victim's endocrinologist said she felt the twins were not in a good placement situation because the parents sent Victim to her doctor's appointment in DCF provided transportation but did not accompany her.

In January 2005, less than a year after Victim came into the Barahona home, Victim reported being sexually abused by one of her fathers. It was initially believed that she was alleging that Mr. Barahona was the abuser, but her psychologist determined that, because of inconsistencies in her story, she was talking about her biological father. The DCF investigation was closed after face to face meetings with the family members alleviated any lingering concerns. The biological father was ultimately charged with sexual abuse of both of the twins and ordered to undergo treatment.

In February 2006, a call came into the child abuse hotline mentioning Victim had a large bruise on her neck and was missing many days of school. DCF investigated the event by interviewing Survivor and Victim at school and by interviewing Mr. Barahona and school officials. Victim had two different stories about how she got the bruise, but Survivor said that no one hit Victim and that he did not know how she got the bruise. DCF found no abuse but stated that the child was very hyper and should be tested for hyperactivity.

In March 2007, DCF received another hotline call. School administrators stated that Victim was unclean, smelled, hoarded food at school, fell asleep in class often, and was, at times, scared to go home at the end of the day. She also was

observed one morning with applesauce in her hair, but when she came back the next day with the same applesauce in her hair, it was a cause for concern for school officials. There were also worries that Mrs. Barahona was punishing Victim by hitting her on the bottom of her feet, a method of corporal punishment often used by abusers that does not leave bruises or marks. The case was investigated by staff, but the information was never sufficiently communicated with all those involved in caring for the twins. Also, staff did not conduct an interview with Victim outside the presence of her alleged abuser. The Guardian ad Litem stated in his notes regarding the incident that "the principal said that something just does not seem right with the foster parents situation; I'm starting to agree." The case was closed with staff noting no indication of neglect.

In October of 2007 a citizen review panel was established to provide opinion on Survivor and Victim's case thus far, and said that DCF was in substantial compliance. The review panel noted some missing documentation regarding medical care, but the prevalent suggestion was that permanence (adoption) be achieved as soon as possible.

In 2008, the biological father's appeals of his termination of parental rights were exhausted. Dr. Archer declared that Survivor and Victim were already a part of the Barahona family, and their adoption would merely formalize what was already true in fact. The possibility of placement with the relatives in Texas was all but permanently foreclosed when Dr. Archer said that removing the children from their current home would inflict irreparable mental and developmental harm while also encouraging their adoption by the Barahonas.

In May 2009, the adoption of Survivor and Victim was finalized.

A year later, in June 2010, the DCF hotline received another call from school officials alleging many of the same symptoms of neglect from the March 2007 call. Victim was hungry, unfocused, jittery, exhibited hair loss, and had missed many days of school due to heavy bleeding. Mrs. Barahona attributed most of Victim's symptoms to her medical condition, which includes hormone imbalances, but the report from DCF admits that the investigator does not know the last time Victim visited her endocrinologist. A simple check with Victim's doctor would have turned up the fact that her medical condition would not cause any of the problems Mrs. Barahona attributed to it. It is also noted that Victim's adoption was held up because she often came to school dirty while in Mrs. Barahona's care. DCF also admitted that the call was misclassified and that CPI's were required by policy to interview neighbors but did not. The referral was closed with no services recommended. The Barahonas removed the twins from school and began homeschooling them shortly after, realizing that most of the complaints about the twins' condition was coming from school

officials.

Two days before Victim's death, DCF received two calls on back to back days. The first call came from a doctor treating one of the Barahona's grandchildren. The grandchild stayed with them in the afternoons and said that Victim and Survivor were constantly tied up and put in the bath tub. When she went in the bathroom to use the bathroom, Mrs. Barahona went in and watched to make sure that she didn't talk to or even acknowledge Victim and Survivor. This call should have warranted an immediate response and a referral to law enforcement. Instead it was given a 24-hour response time. DCF investigators attempted to locate the children at school but they were not there. Even though the children were missing, DCF investigators never called the police.

The next day, Mr. Barahona's brother made a disturbing call to the hotline. He had seen Mr. Barahona and Survivor that day, but Victim wasn't with them. He asked where Victim was, and Mr. Barahona gave evasive, non-responsive answers. Even though DCF had this information, it was not aware that Victim had been missing since the day before and did not call law enforcement. This is illustrative of DCF's failure to communicate pertinent information with all others in the organization. If this information had been properly communicated, DCF would have certainly realized the gravity of the situation and called law enforcement.

Two days later, on February 14, 2011, Victim was found dead, wrapped in a plastic bag in the back of the truck where Mr. Barahona and Survivor were found. Due to Mr. Barahona's actions involving the caustic chemicals, Survivor suffered burns to 10% of his body.

Survivor has since revealed more specifics about the abuse that he and Victim were subjected to in the Barahona house. The children were made to eat feces, while at other times the Barahonas smeared it on their faces. At one point Mr. Barahona put it into Survivor's ears with a q-tip. They also had hot sauce put in their ears. Victim was subjected to electrical shocks. Both children had marks on their ankles and wrists from constantly being tied up in the bathtub. Survivor reported being suffocated with a plastic bag while lying on his bed. All of these things illustrate systematic efforts of the Barahonas to emotionally and physically torture the twins.

Dr. Newberger, a pediatrician who has met and examined Survivor on numerous occasions, stated that he suffers from ongoing, chronic post-traumatic stress disorder as a result of the physical and mental abuse he suffered at the hands of the Barahonas. Like many with PTSD, Survivor struggles to turn off his body's fight or flight response, which prevents higher order brain functioning. He has trouble going to therapy to discuss

what has happened to him and is constantly overwhelmed with his abuse. The chemical burns to his lower back and genitals will be long lasting, if not permanent, and are a haunting reminder of the trauma he suffered.

LITIGATION HISTORY:

The plaintiffs brought two cases against DCF and their agents. Survivor v. Our Kids of Miami-Dade/Monroe, Inc., Case No. 1:11-cv-24611 PAS (the "Federal Case"), and Survivor v. Fla. Dep't of Children & Families, Case No. 13-2715-ca-25 (the "State Case").

The Federal Case included DCF, Our Kids, Center for Family and Child Enrichment, and individual employees of those name entities. The plaintiffs settled Our Kids and CFCE for an amount that remains confidential.

The State Case named only one defendant, DCF.

On March 6, 2013, DCF entered into a settlement with the plaintiffs in the Federal Case for \$1,250,000. As a part of the settlement, DCF agreed to settle the state negligence claims and not oppose this \$3,750,000 claim bill and submit a letter supporting the claimants. On June 18, 2013 the State Case was settled under the same terms.

CONCLUSION OF LAW:

I concur with the claimants' assertion that DCF had a duty to act reasonably in protecting Survivor and Victim, that they breached that duty, and that those negligent acts were the legal cause of Victim's death and the permanent physical and emotional damage suffered by Survivor.

Florida's limited waiver of sovereign immunity requires that the state's actions be operational as opposed to decisional in order to be subject to the waiver.¹ In other words, the state has waived sovereign immunity for actions that carry out policy rather than create it. Florida courts have decided that failure to remove a foster child from an abusive home is operational, not decisional.² The Florida Supreme Court has also said that the state owes a duty where it is providing general services for the health and welfare of its citizens.³ Therefore, DCF had a duty to act reasonably in detecting, preventing, and remedying child abuse.

DCF had evidence of several instances of abuse that were each ruled as not being abusive in nature because the Department failed to properly share and gather evidence together in order to more clearly establish the pattern of abuse the twins suffered while being fostered by the Barahonas. On many occasions, DCF employees failed to properly follow DCF

¹ *Commercial Carrier Corp. v. Indian River Cty*, 371 So. 2d 1010 (Fla. 1979).

² *Department of Health & Rehabilitative Svcs. v. Yamuni*, 529 So. 2d 258 (Fla. 1988).

³ *Trianon Park Condominium Ass'n, Inc. v. City of Hialeah*, 468 So. 2d 912, 921 (Fla. 1985).

policies and generally acted in a manner that fell far below the reasonable duty of care. In sum, the cumulative effect of the evidence shows that DCF should have known the twins were being abused and failed to prevent the situation from continuing. DCF employees performed their tasks in a mere perfunctory fashion, filling out forms and bubbling in boxes without adequate critical thinking and analysis of the data they were collecting. The Department and its employees had a duty and breached that duty.

It should be noted that though almost all of the injuries suffered by the twins were at the hands of the Barahonas, DCF's failure to detect, prevent, and remedy the abuse was a legal cause of the twins' injuries.

In sum, before the adoption, DCF had an ongoing duty to protect the children from threats that it knew of or should have discovered by exercising reasonable care. After the adoption, DCF had a duty to act reasonably in discovering and stopping abuse when it received calls alleging abuse and agreed to investigate those allegations. DCF was negligent on multiple instances relating to the care of Survivor and Victim therefore breaching those duties.

The injuries the twins suffered have been outlined above. The permanent emotional and physical damages that Survivor has to carry with him are significant, and the years of suffering Victim endured that ultimately led to her death defies calculation. The prolonged nature and severity of the injuries justifies a large settlement.

COLLATERAL SOURCES &
OTHER ISSUES:

There is still the issue of collateral sources. The claimants argue that collateral sources should not factor into the Legislature's decision because DCF settled with the claimants for \$5,000,000 knowing the amount Our Kids and CFCE had settled for. Therefore, the collateral sources have already been factored in. This argument neglects to understand that the Legislature is not bound by the settlement amount DCF has agreed to and has the prerogative to assess the collateral sources to determine the total amount it thinks should be fair compensation. For that reason, I feel that the amount of the settlement with CFCE and Our Kids is relevant in determining the amount of the settlement with the state. The state waived sovereign immunity and made itself amenable to tort suits up to a \$300,000 threshold for multiple claimants.⁴ Any amount over that threshold is an equitable remedy, not a legal right that is subject to the independent approval of the Legislature.⁵ Thus, the Legislature has the unfettered ability to grant any award over the threshold on whatever basis it determines to

⁴ s. 768.28(5).

⁵ *Id.*

be best. Here, that determination should include the calculation of collateral sources. The fact that the amount is confidential, thus effectively unavailable for calculating the total compensation, is somewhat problematic. My recommendation is that the \$5,000,000 (\$3,750,000 of which is to be paid by this claim bill) settlement amount is appropriate compensation.

Since Victim has died intestate, her share of this claim bill will pass through intestacy by the Florida rules of intestate succession. Those intestate heirs have been determined.⁶ Her three siblings, Survivor, her blood brother, and GK and JB, her two adoptive siblings, will split her share.⁷

ATTORNEY'S/
LOBBYING FEES:

Claimant's attorney has an agreement with Claimant to take a fee of 25% of Claimant's total recovery. Claimant's attorney has hired a lobbyist and has agreed to pay 5% of any amount of the claim bill in lobbying fees; such payment is included in the attorney's 25% fee. Outstanding costs total \$76,312.81.

The attorney's fees collected from the settlement with Our Kids and CFCE are unavailable.

LEGISLATIVE HISTORY:

This is the fourth legislative session this claim has been filed. In the 2016 legislative session, the claim was filed as Senate Bill 48 by Senator Flores and House Bill 3529 by Representative Diaz, J. The Senate bill was heard in two committees but died in the Appropriations Committee. The House bill was not heard in a committee and died in the Civil Justice Subcommittee.

In 2015, the claim was filed as Senate Bill 74 by Senator Flores and House Bill 3539 by Representative Avila. Neither bill was heard in a committee.

In 2014, the claim was filed as Senate Bill 44 by Senator Flores. It was not heard in a committee and a House bill was not filed.

RECOMMENDATIONS:

I respectfully recommend House Bill 6523 be reported **FAVORABLY**.

⁶ On October 7, 2015, Circuit Judge Bernard Shapiro approved an Order Determining Heirs, which provided that for \$200, Jorge and Carmen Barahona waived any claims they had as heirs to Victim's estate.

⁷ Both G.K. and J.B. brought lawsuits against DCF. In 2016, G.K.'s claim was settled for \$100,000 while J.B.'s claim is still pending and in the discovery phase.

Respectfully submitted,

PARKER AZIZ

House Special Master

cc: Representative Diaz, J., House Sponsor
Senator Flores, Senate Sponsor
Tom Cibula, Senate Special Master