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SPECIAL MASTER'S FINAL REPORT

The Honorable Tom Feeney
Speaker, The Florida House of Representatives
Suite 409, The Capitol
Tallahassee, Florida 32399-1100

Re: HB 57 - Representative Argenziano
Relief of Kimberly Godwin, by and through her guardian, Jimmy Godwin

THIS IS A CONTESTED, EXCESS JUDGMENT CLAIM FOR \$8,021,555.80 IN STATE GENERAL REVENUE, PREDICATED ON AN APRIL 2000, JURY VERDICT AND FINAL JUDGMENT AGAINST THE FLORIDA DEPARTMENT OF CHILDREN AND FAMILY SERVICES, BASED ON ITS PREDECESSOR AGENCY'S NEGLIGENCE IN FAILING TO CARE FOR AND PROTECT THE CLAIMANT, KIMBERLY GODWIN, A PROFOUNDLY DEVELOPMENTALLY DISABLED WOMAN, AS TO THE PHYSICAL AND SEXUAL ABUSE THAT SHE EXPERIENCED WHILE RESIDING IN THE SCHENCK GROUP HOME, A STATE LICENSED FACILITY.

THE DEPARTMENT HAS PREVIOUSLY PAID TO THE CLAIMANT THE SOVERIGN IMMUNITY AMOUNT OF \$400,000. THE JURY AWARDED \$8 MILLION TO THE CLAIMANT AND A COST JUDGMENT WAS SUBSEQUENTLY ENTERED IN THE AMOUNT OF \$21,555.80.

FINDING OF FACT:

Kimberly Godwin is a profoundly mentally retarded 29 year old with cerebral palsy who has an intelligence quotient (IQ) of below 20¹. She is functionally the equivalent of an 18 to 24 month old child, is non-verbal, sometimes incontinent and stands less than 4 feet tall. Ms. Godwin currently resides with her father and legal guardian, Jimmy Godwin, outside Telogia,

¹ Kimberly Godwin was also diagnosed with pulmonary stenosis, which is a hardening of the heart valve.

in Liberty County, Florida. Her mother, Darlene Godwin, died of cancer in September 1997.

In 1981, Kimberly, age 10, was placed in a Department of Health and Rehabilitative Services (HRS) contract group home for the developmentally disabled because of her many special needs. She was physically abused in that home and in August 1985 was placed in another contract home (Schenck Group Home) in St. Lucie County. The Schenck Group Home was licensed by HRS as a long-term residential care facility for physically and mentally disabled individuals.

During the period between 1987 and 1992, there were multiple incidents of abuse and neglect to Kimberly which were documented by her school in Ft. Pierce (Dale Cassens School for the Developmentally Disabled) and by her doctor. Specifically, she had multiple instances of bruises, blisters, burns, scratches or abrasions on her body; she appeared to be unkempt and "filthy" at times; and, she had infections. However, the record is not clear as to how many of these incidents were the result of "self-injurious behavior"² or the result of injury by others. During this time period, HRS officials had repeated difficulty with monitoring Kimberly's care and in contacting the Schenck Group Home.

On December 17, 1991, according to her doctor's report, Kimberly was diagnosed as pregnant after her school principal wrote HRS, urging that Kimberly undergo pregnancy testing after she had not had a menstrual cycle since August of that year. A subsequent criminal investigation revealed that Kimberly had been sexually battered and impregnated by LaVictor Schenck, the 15 year old son of the group home operator, Gladys Schenck. Mr. Schenck was subsequently charged with and confessed to one count of sexual battery against Kimberly and was ultimately sentenced to several years in a youthful offender program. Investigation also revealed that LaVictor Schenck was not supposed to be on the premises of the Schenck Group Home without HRS approval and that Gladys Schenck did not report to HRS that her son was staying at the home.

Jimmy and Darlene Godwin were not notified of their daughter's sexual battery and pregnancy until January 27, 1992, when they were informed of the incident by a Court-appointed guardian ad litem. During the period between the diagnosis of her pregnancy, December 17th, and January 27th, Kimberly received no medical treatment. Upon being informed of her daughter's pregnancy, Darlene Godwin successfully sought Circuit Court relief to be appointed as Kimberly's guardian. The Court also ordered Kimberly to undergo a "therapeutic" abortion as her health condition would not allow

² Such behavior could be due to frustration, self-stimulation, or as a means of engaging the attention of others.

her to carry the baby to term.

In early February 1992, Darlene Godwin placed her daughter in the hospital because of Kimberly's poor health due to her neglect at the Schenck Group Home. Doctors diagnosed Kimberly with pneumonia, dehydration, and malnutrition. She was treated with blood transfusions, intravenous fluids and medications, and was released from the hospital to her mother's care 10 days later.

At this point in time, Darlene and Jimmy Godwin decided to permanently remove Kimberly from HRS custody and to care for her in their own home. In deposition and at trial, the Godwin's testified that they could no longer entrust the Department of Children and Family Services (hereinafter referred to as "DCF," and successor agency to HRS) to provide a safe environment for their daughter given the multiple traumas Kimberly had endured at the Schenck Group Home. From 1992 until the present time, Kimberly has resided with her parents (Darlene died in 1997) and she currently lives with her father in a trailer in Telogia, Florida.

When Kimberly began living with her parents she exhibited "self-abusive" behavior which consisted of biting, banging, slapping, and hitting herself with both hands. In August 1992, a HRS-funded behavioral therapist, Stelios Chimonides, began working with Kimberly, her family, and care givers to reduce Kimberly's self-injurious behaviors. Over a period of months, the instances of self-abuse were greatly reduced. However, in February 1993, the instances of self-abuse increased after Kimberly attended the sentencing hearing for her sexual batterer, LaVictor Schenck. When Kimberly saw Mr. Schenck in the courtroom, she began "moaning like an animal." Since that time, Mr. Chimonides has continued to work with Kimberly, her family, and care givers, and her self-injurious behavior has significantly decreased in frequency, duration, and magnitude.

Kimberly currently receives certain "at-home" care services provided by the Developmental Disabilities Program within DCF which are funded from three sources: Medicaid, the Medicaid Home and Community-Based Waiver Services Program, and DCF's general revenue fund. These services include: a personal caregiver who comes to her home an average of 12 to 14 hours a day, 6 days a week, to care for Kimberly while her father works (Kimberly has had several care givers over the course of her living at home); a behavioral therapist, Stelios Chimonides, who has treated developmentally disabled persons like Kimberly for many years; and, a Development Services support coordinator, Nancy Smith, who coordinates a support program for Kimberly and acts as a liaison with DCF. Kimberly also receives medical and dental services as needed and yearly supplies of diapers.

Since Kimberly began living at home in 1992, she has not received sufficient services from DCF due to two primary

reasons: the budgetary limitations placed on DCF for developmental services, and, over the past couple years, the miscommunication between Nancy Smith, Kimberly's support care coordinator, and representatives of DCF. However, these two problems were addressed at the Special Master hearing and appear to be remedied. According to the representations made by DCF officials, the Department will provide the needed services to Kimberly because it received significant increases in funding for its developmentally disabled programs in July 1999. Specifically, the Department will place Kimberly in an Adult Day Training Program, provide transportation to that program, provide additional respite care, and other non-residential services which are services both Ms. Smith and Mr. Godwin have requested.

At trial, the claimant presented a Life Care Habilitation Plan based on the actuarial estimate that Kimberly will live another 50 years (until age 79). The DCF did not present any Life Care Plan at trial, but did offer a plan at the Special Master hearing. Such plans provide for a variety of services and goods and are based on Kimberly receiving such services at home as opposed to a group home setting. These services include, but are not limited to, Kimberly's medical care, education and training needs, primary support care needs, transportation, personal items, prescriptions, leisure activities, therapy, and ancillary services. The model presented by Kimberly's representatives had a present value of \$7.7 million, while the present value of the Department's model plan was estimated to range from \$2.8 to \$3.3 million. The differences between the two plans were attributed to the number of services provided, their value, and the various inflation, discount, and other factors assumed over a 50-year period.

Kimberly's father, Jimmy, testified at the Special Master hearing that his daughter has made significant strides in her activities of daily living, such as socialization and toileting. She appears to be "happy," enjoying riding in a car or being in his boat. He emphasized that he would like to keep his daughter at home and never again place her in a DCF group facility. Mr. Godwin is 53 and earns approximately \$28,000 annually as a heavy equipment operator. Kimberly currently receives monthly income from social security and supplemental security income (SSI) in the amount of \$534 each month. Should her father predecease her, Kimberly would be sent to live with her first cousin, Sharon Lalla, in West Palm Beach.

LITIGATION HISTORY:

In July 1995, Jimmy and Darlene Godwin, both individually and as Kimberly Godwin's parents, filed a Complaint against the Florida Department of Health and Rehabilitative Services (HRS), the Schenck Group Home, and Gladys Schenck, alleging negligence and various violations of the rights of the developmentally disabled under the "Bill of Rights of Persons Who are Developmentally Disabled," established under s. 393.13, F.S., which negligence and violations were alleged to be direct and

proximate causes of injuries to Ms. Godwin. In 1997, Kimberly's mother died of cancer, and her father Jimmy was adjudged her legal guardian. By joint stipulation in 1999, Mr. Godwin's individual claim was dismissed. The lawsuit then progressed as a claim made on Ms. Godwin's behalf by her father as her legal guardian.

In June 1999, prior to the trial, the Department and the Schenck Group Home filed an "Admission of Liability" in answering the Godwin's Complaint by admitting that both the Department and the Schenck Group Home owed a duty of care to Ms. Godwin and that such duty had been breached. Thus, the trial was held on the issues of proximate cause and damages.

In March, 2000, the trial was held in the Circuit Court of the 19th Judicial Circuit in St. Lucie County. The final judgment was based on the \$8 million jury verdict rendered in favor of the claimant. Of that amount, the jury apportioned \$5 million in economic damages caused by the September 1991 sexual battery and impregnation and \$3 million in past non-economic damages (pain and suffering) for 4 separate occurrences. Even though DCF admitted to 14 individual instances of abuse and neglect to Kimberly, the jury made no compensatory damages award as to 10 of those counts.

Motions by DCF for a New Trial, and for Remittitur were denied. The DCF appealed neither these post-judgment orders nor the final judgment. There is no litigation currently pending.

Pursuant to the Sovereign Immunity provisions under s. 768.28, F.S., DCF paid \$400,000 to Kimberly Godwin based on \$100,000 for each of 4 separate occurrences of abuse and neglect found by the jury as part of the pain and suffering award. These monies are currently being held in a trust account by her attorney to pay off certain debts or liens, e.g., a Medicaid lien as to Kimberly's hospitalization; and fees due an attorney who worked on Kimberly's behalf concerning her abortion.

CLAIMANT'S ARGUMENTS:

- There is a well-supported jury verdict that was not appealed.
- The jury had substantial and competent evidence on the issue of proximate cause, based on the trial testimony of Stelios Chimonides, a behavioral psychologist, who diagnosed self-injurious behavior that he attributed to the chronic trauma that Kimberly experienced while living at the Schenck Group Home. There was also testimony that Kimberly's self-abusive behavior increased as a result of attending the sentencing hearing of her sexual batterer, LaVictor Schenck.
- The jury was presented with a Life Care Plan prepared by Lawrence Forman, who was accepted by the court as an expert in the field of rehabilitation and life care planning. Kimberly's behavioral psychologist and her support coordinator also had input into the plan. Two residential

models were presented; Model 1 contemplated "home based" services and was assigned a present value of \$7.7 million. Model 2 contemplated "group home" services and was assigned a present value of \$4.6 million. The jury's verdict of \$5 million indicates there was a serious reduction in the Model 1 life care plan, and reveals that the jury determined item by item, what was needed and reasonable.

- No evidence was presented at trial to rebut the claimant's Life Care Plan and economic damages testimony.
- The Life Care Plan presented by the Department at the Special Master hearing, was valued by the claimant's economist to be \$3.5 million, depending on the inflation factors and other assumptions utilized.
- All of Kimberly's economic damages are directly related to the history of chronic abuse and neglect by the Department.
- Kimberly has received inadequate care since her removal from the Department's custody, thus the need to separately fund the individualized life care plan.
- Regarding the non-economic (pain and suffering) damages, the jury verdict compensated Kimberly for only four of fourteen incidents, and awarded half of what the claimant's attorney asked for at trial.

RESPONDENT'S ARGUMENTS:

- Kimberly's future economic damages were not proximately caused by the negligent acts of the Department and/or the Schenck Group Home. Rather, her needs are a result of her pre-existing developmental disability.
- Alternatively, the necessary services outlined in the Life Care Plan are being and will continue to be provided to her as a client of the Developmental Disabilities Program through a combination of Medicaid, the Medicaid Home and Community Based Waiver Services Program, and the Department's general revenue fund. Therefore, there should be no economic damages awarded.
- Payment of \$8 million will adversely impact the Department of Children and Family Services and put at risk the programs relating to the developmentally disabled currently provided by the Department.
- However, in the alternative, if the Legislature finds it necessary to supplement services currently provided by the Department, the services and goods provided in the Department's Life Care Plan (ranging from \$2.8 to \$3.3 million) are more than sufficient to meet Kimberly's needs. Further, the award should be placed in a Special Needs

Trust with the remaining proceeds reverting back to the state upon Kimberly's death.

- Ms. Godwin is not entitled to non-economic damages (pain and suffering), as she now appears to be doing well residing with her father.

CONCLUSION OF LAW:

DUTY: Whether or not there is a jury verdict, as there is here, every claim bill must be based on facts sufficient to meet the preponderance of the evidence standard. From my review of the evidence, I find that the Department of Children and Family Services (DCF), based on the actions of its predecessor agency, the Department of Health and Rehabilitative Services (HRS), and the Schenck Group Home, had a duty to protect and care for Kimberly Godwin while she was under the care of the Schenck Group Home.

Specifically, DCF (HRS) had a duty to Kimberly Godwin to place her in a safe, caring, and well-operated facility for the physically and mentally disabled; to regularly inspect and monitor the facility and the treatment that Kimberly was receiving to ensure proper care and absence of abuse and neglect; to conduct proper screening of all individuals employed by or living in the group home; to document all efforts of monitoring and inspecting the group home and the care and treatment of Kimberly; to make reasonable efforts to contact Kimberly's parents to timely communicate incidents of abuse, neglect, and medical condition; and to exercise reasonable care under all the circumstances.

The DCF (HRS) and the Schenck Group Home had a duty to recognize, comply with, and take reasonable steps to ensure compliance with the rights and privileges of the developmentally disabled as set forth under the Bill of Rights for the Developmentally Disabled (s. 393.13, F.S.), in that such persons have the right to dignified and humane care including the right to be free from sexual abuse in a residential facility; the right to be free from harm; and the right to receive prompt and appropriate medical care and treatment.

Further, the Schenck Group home had a duty to exercise reasonable care in the selection, training, retention, and supervision of its employees and caretakers; to provide reasonable security to residents from abuse; to exercise reasonable care to protect residents from neglect; to exercise reasonable care to discover abuse or neglect of Kimberly; to exercise reasonable care to ensure that

Kimberly received prompt and appropriate medical care and treatment; to provide Kimberly with a reasonably safe residential facility; and to exercise reasonable care under the circumstances.

BREACH OF DUTY: A preponderance of the evidence establishes that DCF (HRS) and the Schenck Group Home breached their duty to properly care for and protect Kimberly Godwin. Further, DCF (HRS) and the Schenck Group Home breached their duty to Ms. Godwin with respect to compliance with the rights and privileges afforded the developmentally disabled pursuant to the Bill of Rights for the Developmentally Disabled

PROXIMATE CAUSE: The evidence points to the conclusion that the negligence of DCF (HRS) and the Schenck Group Home was the legal (proximate) cause of the abuse and the sexual battery to Kimberly Godwin. Specifically, I find that as a direct and proximate result of the aforesaid negligence of the Department and the Schenck Group Home, Kimberly Godwin was caused bodily injury, sickness, pain and suffering, and the need for medical care, including an abortion. Likewise, Kimberly has been deprived of habilitative services she was entitled to under the Bill of Rights for the Developmentally Disabled.

DAMAGES: I find that the portion of the jury's verdict that awarded a total of \$3,000,000 to Kimberly Godwin for past pain and suffering (non-economic damages) was supported by the evidence and is as follows:

• Pneumonia, anemia and dehydration (1992)	\$1,000,000
• Pregnancy unrecognized For 20 weeks (1991-92)	\$ 500,000
• Sexual battery and resulting Impregnation (1991)	\$1,000,000
• Burns on upper thigh (1989)	\$ 500,000
TOTAL PAIN/SUFFERING.....	\$3,000,000

As to economic damages, the jury awarded \$5,000,000 for damages caused by the September 1991 sexual battery and impregnation and related "expense of hospitalization, medical and nursing care and treatment". However, in evaluating the evidence in its entirety and balancing the equities of this matter, I recommend that the economic damages in this case be reduced to zero damages for the following reasons:

1. The Department of Children and Family Services can provide, at no cost to either Kimberly Godwin or her

guardian, Jimmy Godwin, the vast majority of the goods and services provided in Kimberly's Life Care Plan to meet her anticipated future needs for the rest of her life. No matter where Kimberly lives in this state, she is entitled, by virtue of her pre-existing developmental disability, to receive most of the goods and services listed in either the claimant's or Department's proposed Life Care Plans through Medicaid, the Medicaid Home and Community-Based Waiver Services Program, or DCF's general revenue appropriation. Providing for an additional \$5 million to fund Kimberly's Life Care Plan will duplicate most of the services and goods DCF can already furnish.

2. The importance of keeping Kimberly at home with her father, as opposed to her residing in a DCF group home, cannot be overemphasized. The \$3 million I recommend she receive for her past pain and suffering can be placed in a structured account or annuity, the principal of which will increase over time, and can be used to "purchase" additional services for Kimberly which DCF cannot provide. Also, in the event future funding for DCF services is reduced, then those services could be supplemented from this amount.
3. The future economic damages being claimed, e.g., the Life Care Plan, are necessitated by Kimberly's developmental disabilities which pre-existed her abuse and neglect by DCF.
4. The "teach-em a lesson" effect of this claim bill on a state agency will be minimal because the Legislature is now dealing with the successor department regarding activities that occurred some 8 to 11 years ago.

TOTAL RECOMMENDED

DAMAGE AMOUNT: \$3,000,000

PROTECTION OF
THE AWARD:

The Legislature generally favors structured payments, guaranteed-term annuities, or special needs trusts in large claims and in claims on behalf of those who have suffered serious or permanent injuries that are likely to require substantial or long-term medical care. Thus, I recommend that after the payment of attorneys' fees and costs, medical bills and other immediate needs, that the remaining proceeds be used to purchase an appropriate structured financial plan, the proceeds of which shall be placed in a Special Needs Trust created exclusively for the use and benefit of Kimberly Godwin.

Special Needs Trusts are established to meet the "special needs" of an individual. The special needs are defined in the trust document and specifically exclude covered services under the Medicaid program. That is the proceeds (principal and earnings of the trust) may not be used to pay for medical care. These trusts are used as a vehicle to retain Medicaid eligibility when the recipient would otherwise have access to extensive assets. The

theory is that if the assets are not available to pay for medical care, the individual can be determined to have no resources available to pay for such care.

Any lien against the source funding the trust must be satisfied prior to the approval of the trust. Because the Medicaid lien will continue to accrue after the trust is established, the trust must provide that the agency is the beneficiary of the proceeds of the trust when it is dissolved (generally at death) up to the amount paid by Medicaid for medical care.

Thus, the Medicaid program will take a priority position upon Kimberly Godwin's passing and will be entitled to reimbursement for any and all monies paid for Kimberly's benefit for the remainder of her lifetime. I further recommend that any funds remaining in the trust after the payment of a Medicaid lien, should revert back to the General Revenue fund of the State of Florida

As a further protection, I recommend that any withdrawal from the Special Needs Trust be made pursuant to Court order upon a written finding of necessity and appropriateness.

ATTORNEYS FEES:

Section 768.28(8), F.S., limits claimant's attorneys' fees to 25% of claimant's total recovery by way of any judgment or settlement obtained pursuant to section 768.28, F.S. Claimant's attorneys have acknowledged this limitation and verified in writing that nothing in excess of 25% of the gross recovery will be withheld or paid as attorneys' fees.

There is a cost judgment of \$21,555.80, which should be paid from the proceeds of the award.

INTEREST:

The final judgment entered in this case provides that the amount of the recovery shall bear interest at the rate of 10% per year. However, since the award could not be paid without further act of the Legislature, as required by s. 768.28, F.S., the Department should not have to pay interest on a judgment that they could not satisfy but for the passage of a claims bill.

RECOMMENDATIONS:

ACCORDINGLY, I recommend House Bill 57 be reported FAVORABLY, with the following AMENDMENTS:

1. Pay Kimberly Godwin's guardianship account the sum of **\$2,600,000**, which represents the amount of the jury verdict for Kimberly Godwin's pain and suffering, less the \$400,000 already paid to Ms. Godwin by the Department of Children and Family Services.
2. Provide that an appropriate structured financial plan be purchased with the proceeds to be deposited in a Special Needs Trust created for the exclusive use and benefit of Kimberly Godwin.
3. Provide that it is the intent of the Legislature that no amount over \$1,000 per month be withdrawn from the

Special Needs Trust without prior Court order upon a written finding of necessity and appropriateness. Jimmy Godwin, as parent and legal guardian of Kimberly Godwin, is directed to petition the Court of Liberty County, Florida to amend the guardianship order to reflect this legislative intent and to forward a copy of this act to the Clerk of said County for inclusion in Kimberly Godwin's guardianship file.

4. Provide that it is the Legislature's intent that upon Kimberly Godwin's death, any funds remaining in the Special Needs Trust, after payment of outstanding Medicaid funds, shall revert to the State of Florida

Respectfully submitted,

Stephanie Birtman
House Special Master

cc: Rep. Argenziano, House Sponsor
Sen. Campbell, Senate Sponsor
Kathie Emrich, Senate special master
House Claims Committee