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March 18, 2010

SPECIAL MASTER'S FINAL REPORT

The Honorable Larry Cretul
Speaker, The Florida House of Representatives
Suite 420, The Capitol
Tallahassee, Florida 32399-1300

Re: HB 195 - Representative Nehr
Relief of Pierreisna Archille/DCFS

THIS IS AN UNCONTESTED CLAIM FOR \$1,200,000 PREDICATED ON THE SETTLEMENT AGREEMENT ENTERED BETWEEN PIERREISNA ARCHILLE, BY AND THROUGH HER LIMITED GUARDIAN OF PROPERTY AT THE TIME, PATRICK WEBER, AND THE FLORIDA DEPARTMENT OF CHILDREN AND FAMILY SERVICES, BASED ON THE NEGLIGENCE OF THE DEPARTMENT, WHO FAILED TO CARE FOR AND PROTECT MS. ARCHILLE, A MODERATELY MENTALLY RETARDED FOSTER CHILD, FROM PHYSICAL AND SEXUAL ABUSE, RESULTING IN HER EVENTUAL IMPREGNATION AND THE BIRTH OF A CHILD. THE DEPARTMENT HAS ALREADY PAID \$100,000 PURSUANT TO SECTION 768.28, F.S.

FINDING OF FACT:

Procedural History: Patrick Weber, as the limited guardian of Pierreisna Archille at the time, filed suit in the Circuit Court of the Twentieth Judicial Circuit in and for Collier County, Florida against Bonifacio Velazquez, the Estate of Josephine Velazquez, and the State of Florida, Department of Children and Family Services (DCF) in 2002. The initial Amended Complaint alleged: 1) battery against Benny Velazquez for the sexual molestation, battery, and abuse of Ms. Archille from approximately June 1998, through June 24, 1999; 2) negligence against Josephine Velazquez for failing to protect Ms. Archille from Benny Velazquez when she knew or should have known that he was sexually abusing Pierreisna; 3) violation of the Bill of Rights of Persons with Developmental

Disabilities contained in section 393.13, Florida Statutes, by both Benny and Josephine Velazquez for violating Ms. Archille's right of dignity and humane care, her right to be free from sexual abuse, and her right to be free from harm and abuse; and 4) negligence against the department for failing to monitor and supervise the placement of Ms. Archille in the Velazquez home, and for failing to detect and prevent her sexual abuse.

In July, 2007, the claimant and the department entered into a Settlement Agreement, whereby the department agreed to pay the claimant \$1.3 million. Of this amount, \$100,000 has already been paid pursuant to the statutory cap on liability imposed by section 768.28, Florida Statutes. Claimant's attorney agreed to defer payment of attorney's fees and costs on the \$100,000 received by the claimant.

DCF fully supports passage of this claim bill, and notes, "[t]he department believes this is a reasonable settlement given that Pierreisna, a mentally-retarded foster child, was sexually abused by the foster father and now has the responsibility to raise a child that was a result of that abuse."

Findings: Pierreisna Archille, a 28 year-old woman possessing the cognitive ability of a 5 or 6 year old and an IQ below 40, was born on September 5, 1981, to Justine Archille in Spartanburg, South Carolina, the eldest of six brothers and sisters. Ms. Archille has a daughter, Takeisha, who was born to her on January 25, 2000, and is presently 8 years old and in the first grade. Pierreisna and Takeisha reside with Pierreisna's sister, Darlene Achille,¹ in Lee County, Florida. Darlene was awarded legal custody of Takeisha by the dependency court in Collier County, Florida, on December 29, 2004.

1997 Placement in the Velazquez Home; Alleged Molestation of S.A., a Toddler Residing at Velazquez Home

In 1993, and in response to claims of neglect by the children's biological mother and stepfather, Pierreisna and her siblings were all placed in foster care by DCF. Pierreisna resided in a foster home with two of her sisters, Darlene and Muriel, until 1997, when Darlene was removed from this placement and placed in the foster home of Josephine and Bonifacio "Benny" Velazquez.

A few months after Darlene moved in, on July 30, 1997, Pierreisna and Muriel were also transferred to the Velazquez home. Upon arriving at the Velazquez home, Darlene indicated that she was informed by other foster children at the home that Benny "liked to touch girls."

Also residing in the Velazquez home at this time was a toddler,

¹ Darlene has her last name listed on her birth certificate as "Achille", and Pierreisna has her last name listed on her birth certificate as "Archille".

S.A., who was later adopted by Mr. and Mrs. Velazquez. Darlene and her sister, Muriel, believing that they had seen Benny molesting S.A. on separate occasions, informed a friend's mother, who in turn alerted Child Protection investigators to the allegations. As a result, Darlene was sent for a Child Protection Team interview.

1997 Child Protection Team Interview with Darlene Achille

In the subsequent videotaped Child Protection investigation interview from September, 1997, Darlene told investigators that Benny would frequently blow kisses towards her and touch her inappropriately, and that she had begun refusing to let him in her door when he asked to come in. During this same interview, Darlene commented to Child Protection workers that Mr. Velazquez had even offered the child money, and requested that she not inform Josephine about his conduct.

As to her initial claims that Mr. Velazquez had molested a toddler in foster care at his residence, Darlene indicated to investigators that Benny would frequently take the toddler to a bedroom in the house, whereupon Darlene and several of the other children in the house, looking through an adjoining bedroom window, believed they witnessed Mr. Velazquez molesting the toddler with his digits. Despite the allegations, there was no physical damage noted in a subsequent medical examination of S.A. conducted by members of the Child Protection Team, and since the toddler was only 2 years old at the time of the alleged abuse, S.A. was not verbal enough to verify the abuse to investigators.

DCF investigators closed the case, and no new report was generated by the department to investigate Darlene's claim to investigators that Benny had groped her and offered to pay the child money. Subsequent to its investigation, DCF removed Darlene and Muriel from the Velazquez home, leaving Pierreisna as the only member of her family still residing in the home.

Allegations of Sexual Abuse Against Bonifacio Velazquez by Pierreisna Archille

It was at this time that Pierreisna, alone in the Velazquez home for the first time without her sisters, and who by this time was being referred to as "Christmas" by Mr. Velazquez, claims to have been the victim of roughly a year's worth of sexual molestation, battery, and abuse at the hands of Benny Velazquez, from June 1998, to June 24, 1999. When the alleged abuse began, Pierreisna was 16 years old.

In a deposition taken in January, 2007, Pierreisna claimed to have reported the abuse to Mrs. Velazquez, as well as to DCF caseworkers, however, nothing was done to address the allegations during this time. Ms. Archille explained that her room in the Velazquez home did not have a door knob, and that Benny would frequently push in the door to gain entry to her room.

Claiming to have been raped more than six times by Mr. Velazquez, Pierreisna indicated that Benny also frequently bit, choked and pushed her around, took inappropriate pictures of the child, and that he often attempted to look under the dresses of girls in his foster home. In fact, Pierreisna claimed that some of the abuse occurred in front of Mrs. Velazquez, who refused to respond or intervene, according to Pierreisna.

A subsequent deposition of one of the psychologists having evaluated Pierreisna characterized Velazquez's sexual abuse of Pierreisna as "sadistic and vicious". The psychiatrist noted that, in addition to sexually abusing the child, Mr. Velazquez frequently terrorized her.

Moreover, Pierreisna claimed to have observed Mr. Velazquez's molestation of S.A. and indicated that, on one occasion, she forcibly removed the toddler from Benny and refused to return S.A., despite Benny's objections.

Missing DCF Case Notes, 6/98 – 6/99

One of the caseworkers Pierreisna claimed to have contacted to report the abuse she was allegedly experiencing at the hands of Mr. Velazquez was Yves Benoit, a foster counselor employed by DCF. Mr. Benoit had been Pierreisna's foster counselor since 1993.

As a foster care counselor, Mr. Benoit was required by law to record his observations of Pierreisna in the Velazquez home in a set of chronological case notes.²

In preparation for trial, claimant's counsel filed a Request for Production dated February 13, 2003, in which the claimant requested the complete foster care file for Pierreisna Archille from DCF. The department responded to this request to produce records, but failed to produce additional foster care counselor progress notes or even evidence of contact between Mr. Benoit and Pierreisna between June, 1998 and June, 1999 (the period of time alleged in the Amended Complaint filed by the claimant during which Pierreisna was the victim of sexual abuse by Benny Velazquez). It was the department's contention that foster counselor visits to the Velazquez home were completed during this time period, and that chronological case notes were generated and maintained, but that such records were lost. The notes do not begin again until the latter half of June, 1999, near the time that Pierreisna was removed from the Velazquez home.

In a Recommended Order of the Magistrate of the Twentieth Judicial Circuit on the issue, the Magistrate noted that "(1) [t]he foster care progress notes from June, 1998 to June 14, 1999

² DCF Operating Procedure 174-42 Case Chronological Documentation; see also F.A.C. Rules 65C-15.030 and 65C-15.031 (1999), CF Operating Procedure 1751-41 Family Assessment, and CF Operating Pamphlet 15-7 Records Retention Schedules.

should have been made and retained by the defendant, DCF, should therefore exist, and therefore should have been produced by DCF. (2) DCF had a duty imposed by law to create and retain said notes, and has failed to produce said notes. (3) As a result, plaintiff has been hindered in its ability to establish a prima facie case.” The Magistrate then permitted a jury instruction indicating that, if members of the jury believed that such case notes would have been material in its fact-finding process, then such members were permitted to infer that such evidence would have been unfavorable to DCF.

Removal from Velazquez Home; Pregnancy; Incarceration of Mr. Velazquez

On June 14, 1999, Josephine Velazquez died, and Pierreisna was removed from the home on June 24, 1999, at which time she was discovered to be four months pregnant. Although initially denying having sexual relations with Pierreisna, Mr. Velazquez ultimately admitted to having sex with the child. Subsequent DNA testing confirmed that Benny Velazquez was her father. In a deposition taken on June 23, 2006, Velazquez indicates that he and Yves Benoit had several conversations regarding the sexual molestation allegations against him, but that Mr. Benoit did not believe that the allegations were true.

Moreover, in July, 1999, S.A., now a more-verbal 4 year old, was re-examined by the Medical Director of the Collier County Child Protection Team, and was determined to have experienced genital trauma in the interval since her initial 1997 medical examination.

Bonifacio Velazquez pled guilty to the sexual battery of Pierreisna Archille, and also pled guilty to the charge of lewd and lascivious assault upon S.A. He was adjudicated guilty on both charges, and sentenced to Florida state prison. Mr. Velazquez was released from prison in 2008.

Custody Dispute; Pierreisna's Current Functional Abilities

Following the birth of her daughter, Takeisha, Pierreisna was residing in the home of Erica Lynne, with Takeisha having been placed in the long-term custody of Ms. Lynne by Court Order on February 1, 2002. By all accounts, this living arrangement worked out for a while; however, Pierreisna became frustrated and left because she felt that Ms. Lynne was usurping her role as Takeisha's mother.

Pierreisna subsequently moved in with her sister, Darlene. By this time, Darlene was employed and was attending Edison College.³ In a separate Court Order dated December 29, 2004, the circuit court directed all parties involved to comply with a Settlement Agreement dated October 28, 2004, which designated Darlene as the long-term care custodian of

³ Darlene has since received her A.A. from Edison College, and is presently a full-time student at Florida Gulf Coast University. She has an internship, and holds two jobs – one at Sweet Bay supermarket, and another at K-Mart.

Takeisha and permitted Erica Lynne to have custody of the child on weekends, vacations, and shared holidays. At the Special Masters Hearing in December, 2007, the parties indicated that this remained the current custody arrangement for Takeisha.

Kathryn Kuehnle, a licensed psychologist having evaluated Pierreisna, has noted that Pierreisna, by virtue of her cognitive deficiencies and learning limitations, will need a lot of guidance and a great deal of assistance in taking care of her child. Further, Dr. Kuehnle indicated that "Pierreisna is also vulnerable to involvement and abuse of exploitative male relationships because of her sexual and physical abuse in foster care. She's never had a healthy male father figure ... she's had either no father figure or she's had this very sadistic abusive man [in her life]."

Factual Conclusion

A preponderance of the evidence shows that the department removed Pierreisna Archille from her natural parents and placed her into its custody. Ultimately, Pierreisna was placed in a family foster home operated by Josephine and Bonifacio Velazquez. As a result of complaints against Mr. Velazquez dating back to 1993, and specifically as a result of its Child Protection Team investigation into the alleged molestation of S.A., a toddler at the Velazquez home, and revelations during this investigation indicating that Pierreisna's sister, Darlene, might also have been the victim of molestation by Mr. Velazquez, the department knew or should have known that Pierreisna was at risk of herself being molested. Instead, the department chose not to conduct a follow-up investigation into the claims that Darlene Achille had been inappropriately touched or propositioned by Mr. Velazquez, electing to remove both Darlene and her sister, Muriel, from the Velazquez home, leaving only Pierreisna. Between the period June, 1998 and June, 1999, the department failed to perform its required monthly foster care counselor visits or maintain chronological case notes that may have indicated Pierreisna was in danger of, or was in fact the victim of, sexual abuse by Benny Velazquez. Mr. Velazquez impregnated Pierreisna during this period, and Pierreisna gave birth to a daughter, Takeisha, who is now 9 years old. Subsequently, Mr. Velazquez pled guilty to the sexual battery of Pierreisna Archille, and also pled guilty to the charge of lewd and lascivious assault upon S.A. He was adjudicated guilty on both charges, and sentenced to Florida state prison.

Standards for Findings of Fact

Findings of fact must be supported by a preponderance of evidence. The Special Master may collect, consider, and include in the record, any reasonably believable information that the Special Master finds to be relevant or persuasive in the matter under inquiry. The claimant has the burden of proof on each required element.

CONCLUSION OF LAW:

DUTY: Whether or not there is a jury verdict or a Settlement Agreement, as there is here, every claim bill must be based on facts sufficient to meet the preponderance of evidence standard. From the review of the evidence, I find that the DCF had a duty to protect and care for Pierreisna Archille while she was under the care of her foster parents, Josephine and Bonifacio Velazquez, while a foster child at the Velazquez foster home.

Specifically, DCF had a duty to place Ms. Archille in a safe, caring, and well-operated foster home; to regularly inspect and monitor the foster home, and to ensure the proper care and absence of abuse or neglect; to document all efforts of monitoring Pierreisna, her foster parents, and their care of Pierreisna; and to generally exercise reasonable care under the circumstances.

DCF and Pierreisna's state-licensed foster parents 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 of the Developmentally Disabled, under section 393.13, Florida Statutes. Such Bill of Rights guarantees that developmentally disabled individuals 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, Pierreisna's state-licensed foster parents had a duty not to abuse or neglect Pierreisna. Further, they had a duty to exercise reasonable care to protect foster children in their care from abuse and neglect; to exercise reasonable care to discover abuse or neglect of Pierreisna; to exercise reasonable care to ensure that Pierreisna received prompt and appropriate medical care and treatment; to provide Pierreisna with a reasonably safe foster home; and to generally exercise reasonable care under the circumstances.

BREACH: A preponderance of the evidence establishes that DCF and Josephine Velazquez breached their duty to properly care for and protect Pierreisna Archille. Further, DCF and Josephine Velazquez breached their duty to Pierreisna with respect to compliance with the rights and privileges afforded the developmentally disabled pursuant to the Bill of Rights of the Developmentally Disabled.

PROXIMATE CAUSE: The negligence of the department and Josephine Velazquez was the legal proximate cause of the damages suffered by Pierreisna Archille. Further, the sexual, physical, and emotional abuse experienced by Ms. Archille constituted a violation of her rights as guaranteed under the Bill of Rights for the Developmentally Disabled.

DAMAGES: Damages in the amount of \$1,300,000 are reasonable under these circumstances, and fully supported by the weight of the evidence. As noted above, the department has indicated that it believes this amount represents a reasonable settlement.

A life care continuum was formulated by Larry Forman of Comprehensive Rehabilitation Consultants, Inc., to determine the funds necessary to provide for the counseling and supports needed by Pierreisna as a direct consequence of the sexual abuse she experienced, as well as to support Pierreisna's care for her daughter, Takeisha, considering her profound disability. Dr. Fred Raffa, an economist, reduced said costs to the present value of the life care needs of Ms. Archille, which was calculated to be \$4,067,431. This amount does not factor in the substantial non-economic damages suffered by Ms. Archille.

In reaching a determination regarding the adequacy of the damages sought through filing of this claim bill, the availability of governmental benefits has been taken into account. Pierreisna receives \$474 per month from SSI, and Takeisha receives \$476 per month from SSI. As part of the Settlement Agreement, the department has agreed not to reduce the benefits and services received by Pierreisna and her daughter as of the date of the settlement.

DRAFTING COMMENTS : The bill appropriates the awarded funds from the General Revenue Fund. However, DCF has stated that it can pay the claim from funds set aside in the DCF Federal Grants Trust Fund. Therefore, the bill should be amended to award the claim from the DCF Federal Grants Trust Fund in order to avoid any impact on the General Revenue Fund.

ATTORNEY'S/
LOBBYING FEES:

Claimant's attorneys have acknowledged in writing that nothing in excess of 25 percent of the gross recovery will be withheld or paid as attorneys' fees. The attorney for the claimant has acknowledged that attorneys' fees are inclusive of a lobbyist fee of 5% of the gross amount recovered.

Claimant's attorney deferred collecting attorneys' fees and costs on the initial \$100,000 paid to the claimant pursuant to the statutory cap on liability imposed by section 768.28, Florida Statutes. A verified statement of costs incurred in the prosecution of the action has also been filed by claimant's attorney in the amount of \$47,978.10.

PRIOR LEGISLATIVE
HISTORY:

HB 915 (2008) was filed by Rep. Nehr, and died on second reading calendar. The Senate companion, SB 48 (2008), by Sen. Aronberg, was never heard in any Senate Committee.

HB 223 (2009) was filed by Rep. Nehr and died in Human Services Appropriations Committee. SB 12 (2009) by Sen. Haridopolos was never heard in any Senate Committee.

RECOMMENDATIONS:

Accordingly, I recommend that House Bill 195 be reported FAVORABLY, with the amendment suggested to pay the claim from the DCF Federal Grants Trust Fund.

Respectfully submitted,

TOM THOMAS
Special Master
Florida House of Representatives

cc: Representative Nehr, House Sponsor
Senator Storms, Senate Sponsor
Judge Bram D. E. Canter, Senate Special Master