

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 08-463V

(Filed: May 19, 2011)

(Not to be published¹)

S.M., by and through RACHEL *
and JOEL MOYER, as Parents and Natural *
Guardians, *

Petitioners, *

v. *

SECRETARY OF HEALTH AND *
HUMAN SERVICES, *

Respondent. *

DECISION

HASTINGS, Special Master.

This is an action seeking an award under the National Vaccine Injury Compensation Program² on account of an illness of S.M.. On September 16, 2008, respondent filed a report conceding that petitioners are entitled to compensation in this case.

¹This document will not be sent to electronic publishers as a formally "published" opinion. However, because this document contains a reasoned explanation for my action in this case, I intend to post this document on the United States Court of Federal Claims' website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). Therefore, each party has 14 days within which to request redaction "of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, this entire document will be available to the public. Id. See also 42 U.S.C. § 300aa-12(d)(4)(B).

²The applicable statutory provisions defining the Program are found at 42 U.S.C. § 300aa-10 et seq. (2006 ed.). Hereinafter, for ease of citation, all "\$" references will be to 42 U.S.C. (2006 ed.).

After discussions between the parties, on May 12, 2011, respondent filed “Respondent’s Proffer on Award of Compensation.” Petitioners’ counsel, Anne Toale, during a status conference held on May 13, 2011, indicated that petitioners accept that Proffer as a reasonable measure of the amount of the award in this case.

I have reviewed respondent’s Proffer and the attached Appendix A, and find that they define appropriate compensation in this case pursuant to 42 U.S.C. § 300aa-15(b). I conclude that compensation should be awarded based on those documents. (I have attached the Proffer and Appendix A to this Decision.) I order that respondent make lump sum payments and purchase an annuity contract as described below.

1. Lump Sums

- A lump sum payment of \$356,679.58, representing trust seed funds consisting of the present year cost of compensation for residential care expenses in Compensation Years 2027 and 2028 (\$223,022.30) and life care expenses in the first year after judgment (\$133,657.28), in the form of a check payable to Regions Bank, as Trustee of the Reversionary Trust established for the benefit of S.M., as set forth in Appendix A: Items for Compensation for S.M..
- A lump sum payment of \$817,625.21, representing compensation for lost future earnings (\$622,261.55) and pain and suffering (\$195,363.66), in the form of a check payable to the court-appointed guardian(s)/conservator(s) of the estate of S.M. for the benefit of S.M.. No payments shall be made until petitioners provide respondent with documentation establishing the appointment of a guardian(s)/conservator(s) of S.M..
- A lump sum payment of \$2,935.07, representing compensation for past unreimbursable expenses, payable to Rachel and Joel Moyer.
- A lump sum payment of \$17,098.57, representing compensation for reimbursement of the State of Ohio Medicaid lien, in the form of a check payable jointly to petitioners and to the

Ohio Department of Job and Family Services
The Ohio Tort Recovery Unit
350 Worthington Road, Suite G
Westerville, OH 43082
Attn: Ms. Christine Ewans

Petitioners have agreed to endorse this check to the Ohio Department of Job and Family Services.

2. Annuity

I consider it in S.M.'s best interest that compensation for life care items awarded beyond Year One post-judgment be paid chiefly in the form of an annuity, which annuity shall be purchased as soon as practicable after entry of judgment. Accordingly, pursuant to 42 U.S.C. § 300aa-15(f)(4), I order respondent to purchase, and take ownership of, an annuity, pursuant to which the insurance company³ will agree to make periodic payments to Regions Bank, as Trustee of the Reversionary Trust for the benefit of S.M., for the rest of S.M.'s life, commencing on the first anniversary of the date of judgment. The amount of the annuity payments in each year will be calculated based on the summary of "Items of Compensation for S.M." attached hereto as Appendix A.

The insurance company (or companies) must meet the following criteria:

- 1) have a minimum of \$250,000,000 of capital and surplus, exclusive of any mandatory security valuation reserve; and
- 2) have one of the following ratings from two of the following rating organizations:
 - a) A.M. Best Company: A++, A+, A+g, A+p, A+r, or A+s;
 - b) Moody's Investor Service Claims Paying Rating: Aa3, Aa2, Aa1, or Aaa;
 - c) Standard and Poor's Corporation Insurer Claims-Paying Ability Rating: AA-, AA, AA+, or AAA;
 - d) Fitch Credit Rating Company, Insurance Company Claims Paying Ability Rating: AA-, AA, AA+, or AAA.

Under the statute governing the Program, as well as the "Vaccine Rules" adopted by this court, the special master must now enter a decision endorsing that Proffer, and the clerk must enter judgment, in order to authorize payment of the award. See § 300aa-12(d)(3)(A) and (e)(3); § 300aa-13(a); Vaccine Rules 10(a), 11(a).⁴ I have reviewed the file, and, based on that review, I conclude that respondent's Proffer appears to be appropriate. Accordingly, my decision is that a Program award shall be made to petitioners in the amounts set forth above, with checks made payable to the

³To satisfy the conditions set forth herein, in respondent's discretion, respondent may purchase one or more annuity contracts from one or more life insurance companies.

⁴The "Vaccine Rules of the United States Court of Federal Claims" are found in Appendix B of the Rules of the United States Court of Federal Claims.

individuals and entities set forth above. In the absence of a timely-filed motion for review of this Decision, the clerk shall enter judgment in accordance herewith.

/s/ George L. Hastings, Jr.

George L. Hastings, Jr.
Special Master

Moyer v. HHS, Case No. 08-463V

Tab A

Appendix A: Items of Compensation for S, M,

| ITEMS OF COMPENSATION | G.R. | Lump Sum | Compensation Year 1 | Compensation Year 2 | Compensation Year 3 | Compensation Year 4 | Compensation Year 5 | Compensation Year 6 | Compensation Year 7 | Compensation Year 8 | Compensation Year 9 |
|-------------------------|------|----------|---------------------|---------------------|---------------------|---------------------|---------------------|---------------------|---------------------|---------------------|---------------------|
| Swallow Study | 5% | * | 2011 | | | | | | | | |
| VCIUG | 5% | * | | | | | | | | | |
| Renal Ultrasound | 5% | * | | | | | | | | | |
| Urine Cultures | 5% | * | | | | | | | | | |
| Sleep Study | 5% | * | | | | | | | | | |
| Chest X-ray | 5% | * | | | | | | | | | |
| Abdominal X-ray | 5% | * | | | | | | | | | |
| Medicare Part D | 5% | * | | | | | | | | | |
| Keppra | 5% | * | 600.00 | 600.00 | 600.00 | 600.00 | 600.00 | 600.00 | 600.00 | 600.00 | 600.00 |
| Carnitor | 5% | * | 600.00 | 600.00 | 600.00 | 600.00 | 600.00 | 600.00 | 600.00 | 600.00 | 600.00 |
| Lactulose | 5% | * | 96.18 | 96.18 | 96.18 | 96.18 | 96.18 | 96.18 | 96.18 | 96.18 | 96.18 |
| Prevacid | 5% | * | 600.00 | 600.00 | 600.00 | 600.00 | 600.00 | 600.00 | 600.00 | 600.00 | 600.00 |
| Proventil | 5% | * | 525.96 | 525.96 | 525.96 | 525.96 | 525.96 | 525.96 | 525.96 | 525.96 | 525.96 |
| Albuterol | 5% | * | 100.00 | 100.00 | 100.00 | 100.00 | 100.00 | 100.00 | 100.00 | 100.00 | 100.00 |
| Diastat | 5% | * | 35.00 | 35.00 | 35.00 | 35.00 | 35.00 | 35.00 | 35.00 | 35.00 | 35.00 |
| Baclofen | 5% | * | | | | | | | | | |
| Oral Antibiotics | 5% | * | 8.00 | 8.00 | 8.00 | 8.00 | 8.00 | 8.00 | 8.00 | 8.00 | 8.00 |
| Miralax | 4% | * | 218.12 | 218.12 | 218.12 | 218.12 | 218.12 | 218.12 | 218.12 | 218.12 | 218.12 |
| PT Eval | 4% | * | | | | | | | | | |
| WC Adjustment | 4% | * | | | | | | | | | |
| OT Eval | 4% | * | | | | | | | | | |
| ST Eval | 4% | * | | | | | | | | | |
| ST | 4% | * | | | | | | | | | |
| CPAP | 4% | * | | | | | | | | | |
| Tubing and Mask | 4% | * | | | | | | | | | |
| Control II Disinfective | 4% | * | | | | | | | | | |
| AFOs | 4% | * | | | | | | | | 32.00 | 32.00 |
| Hand Splints | 4% | * | | | | | | | | | |
| Bracing Spine | 4% | * | | | | | | | | | |
| Walker/ Stander | 4% | * | | | | | | | | | |
| Hoyer Lift | 4% | * | | | | | | | | | |
| Slings | 4% | * | | | | | | | 97.84 | | |

Appendix A: Items of Compensation for S. M.

| ITEMS OF COMPENSATION | G.R. | Lump Sum Compensation Year 1 | Compensation Year 2 | Compensation Year 3 | Compensation Year 4 | Compensation Year 5 | Compensation Year 6 | Compensation Year 7 | Compensation Year 8 | Compensation Year 9 |
|------------------------------|------|------------------------------|---------------------|---------------------|---------------------|---------------------|---------------------|---------------------|---------------------|---------------------|
| Yankauer Suction & Cath | 4% | 2011 | | | | | | | | |
| Nebulizer | 4% | * | | | | | | | | |
| Nebulizer Filters | 4% | * | | | | | | | | |
| Percussor | 4% | * | | | | | | | | |
| Skilled Nursing | 4% | 2,903.42 | 2,903.42 | 2,903.42 | 2,903.42 | 2,903.42 | 2,903.42 | 2,903.42 | 2,903.42 | 2,903.42 |
| Attendant Care | 4% | 14,400.00 | 14,400.00 | 14,400.00 | 14,400.00 | 14,400.00 | 14,400.00 | 14,400.00 | 14,400.00 | 14,400.00 |
| Attendant Care | 4% | 23,040.00 | 23,040.00 | 23,040.00 | 23,040.00 | 23,040.00 | 23,040.00 | 23,040.00 | 23,040.00 | 23,040.00 |
| Case Mngr | 4% | 2,000.00 | 2,000.00 | 2,000.00 | 2,000.00 | 1,400.00 | 1,400.00 | 1,400.00 | 1,400.00 | 1,400.00 |
| Residential Camp | 4% | 735.00 | 735.00 | 735.00 | 735.00 | 735.00 | 735.00 | 735.00 | 735.00 | 735.00 |
| Trust Seed/ Residential Care | 4% | 223,022.30 | | | | | | | | |
| Home Mod: Ramp/Bath Add | 4% | 50,865.02 | | | | | | | | |
| Van | 4% | 11,415.00 | | | | | | | | |
| Van Mods | 4% | 15,718.50 | | | | | | | | |
| Lost Future Earnings | | 622,261.55 | | | | | | | | |
| Pain and Suffering | | 195,363.66 | | | | | | | | |
| Past Unreimbursable Expenses | | 2,935.07 | | | | | | | | |
| Medicaid Lien | | 17,098.57 | | | | | | | | |
| Annual Totals | | 1,194,338.43 | 53,264.28 | 53,286.27 | 53,531.78 | 52,864.27 | 52,764.28 | 53,151.61 | 51,585.08 | 51,607.07 |

Note: Compensation Year 1 consists of the 12 month period following the date of judgment.
 Compensation Year 2 consists of the 12 month period commencing on the first anniversary of the date of judgment.
 As soon as practicable after entry of judgment, respondent shall make the following payment to Regions Bank, as trustee for the benefit of S. M., for Trust seed funds (\$223,022.30) and Yr 1 life care expenses (\$133,657.28): \$356,679.58.
 As soon as practicable after entry of judgment, respondent shall make the following payment to the guardian(s)/conservator(s) of the estate of S. M., for lost future earnings (\$622,261.55) and pain and suffering (\$195,363.66): \$817,625.21.
 As soon as practicable after entry of judgment, respondent shall make the following payment to petitioners, Rachel and Joel Moyer for past unreimbursable expenses: \$2,935.07.
 As soon as practicable after entry of judgment, respondent shall make the following payment jointly to petitioners and the State of Ohio, for reimbursement of the state's Medicaid lien: \$17,098.57.
 Annual amounts payable through an annuity for future Compensation Years follow the anniversary of the date of judgment.
 Annual amounts shall increase at the rates indicated in column "G.R." above, compounded annually from the date of judgment.
 Items denoted with an asterisk (*) covered by health insurance and/or Medicare.

Appendix A: Items of Compensation for S, M.

| ITEMS OF COMPENSATION | G.R. | * | Compensation Year 10 | Compensation Year 11 | Compensation Year 12 | Compensation Year 13 | Compensation Year 14 | Compensation Year 15 | Compensation Year 16 | Compensation Year 17 | Compensation Year 18 |
|-------------------------------|------|---|----------------------|----------------------|----------------------|----------------------|----------------------|----------------------|----------------------|----------------------|----------------------|
| ITEMS OF COMPENSATION | G.R. | * | 2020 | 2021 | 2022 | 2023 | 2024 | 2025 | 2026 | 2027 | 2028 |
| Ins. MOP including Deductible | 5% | | 3,000.00 | 3,000.00 | 3,000.00 | 3,000.00 | 3,000.00 | 3,000.00 | 3,000.00 | | |
| Medicare Part A Deductible | 5% | | | | | | | | | | |
| Medicare Part B | 5% | | | | | | | | | | |
| Medigap F | 5% | | | | | | | | | | |
| Medigap F Deductible | 5% | | | | | | | | | | |
| PCP Eval | 5% | * | | | | | | | | | |
| PCP | 5% | * | | | | | | | | | |
| Ophthal-mology | 5% | * | | | | | | | | | |
| Gastro-enterology | 5% | * | | | | | | | | 432.00 | 432.00 |
| Changing G Tube | 5% | * | | | | | | | | 940.50 | 940.50 |
| Nephrology | 5% | * | | | | | | | | | |
| Neurology | 5% | * | | | | | | | | 238.00 | 238.00 |
| Pulmon-ology | 5% | * | | | | | | | | 725.20 | 725.20 |
| O2 Saturation Levels | 5% | * | | | | | | | | 38.08 | 38.08 |
| Pulmonary: Home Instruction | 5% | * | | | | | | | | | |
| Orthopaedist | 5% | * | | | | | | | | 79.00 | 79.00 |
| Developmental Pediatrician | 5% | * | | | | | | | | | |
| CP Clinic at Dayton Childrens | 5% | * | | | | | | | | | |
| CP Clinic - Coordinator Fee | 5% | * | | | | | | | | | |
| ER and Urgent Care | 5% | * | | | | | | | | 809.47 | |
| Hospitalization | 5% | * | | | | | | | | | |
| Dental Care & Sedation | 5% | * | | | | | | | | 5,420.83 | 5,420.83 |
| Spasticity Mngt | 5% | * | | | | | | | | 4,328.50 | |
| Botox | 5% | * | | | | | | | | | |
| MD Visit for Botox | 5% | * | | | | | | | | | |
| Scoliosis Surgery | 5% | * | | | | | | | | | |
| Hip Surgery | 5% | * | | | | | | | | | |
| Knee Surgery | 5% | * | | | | | | | | | |
| PT after Surgery | 5% | * | | | | | | | | | |
| Orthopaedic X-rays | 5% | * | | | | | | | | | |
| EKG | 5% | * | | | | | | | | 1,863.00 | |
| Blood Work | 5% | * | | | | | | | | 306.00 | 306.00 |

Appendix A: Items of Compensation for S.M.

| ITEMS OF COMPENSATION | G.R. | Compensation Year 10 | Compensation Year 11 | Compensation Year 12 | Compensation Year 13 | Compensation Year 14 | Compensation Year 15 | Compensation Year 16 | Compensation Year 17 | Compensation Year 18 |
|--------------------------|------|----------------------|----------------------|----------------------|----------------------|----------------------|----------------------|----------------------|----------------------|----------------------|
| Shower WC | 4% | 2020 | | | | | | | | |
| Manual Zippie WC | 4% | * | | | | | | | | |
| Seating System | 4% | * | | | | | | | | |
| Adult WC | 4% | * | | | | | | | | |
| WC Maint | 4% | * | 300.00 | 300.00 | 300.00 | 300.00 | 300.00 | 300.00 | 300.00 | 300.00 |
| Bath Chair | 4% | | | | | | | | | |
| Portable Ramp | 4% | | | | | | | | | |
| Car Seat | 4% | | | | | | | | | |
| Corner Chair | 4% | * | | | | | | | | |
| Therapy Ball | 4% | | 21.99 | | 21.99 | | 21.99 | | | |
| Therapy Mat | 4% | | 174.00 | | 174.00 | | | 174.00 | | |
| Therapy Table | 4% | | | 564.99 | | | | | | |
| Bolsters | 4% | | 93.50 | | 93.50 | | | 93.50 | | |
| Wedges | 4% | * | | | | | | | | |
| Hospital Bed | 4% | * | | | | | | | | |
| Bed Rails | 4% | | | | | | | | | |
| Bedside Table | 4% | | | | | | | | | |
| Feeding Kit | 4% | * | | | | | | | 366.36 | 366.36 |
| Mic-Key Button | 4% | * | | | | | | | 453.00 | 453.00 |
| Extension Set | 4% | * | | | | | | | 83.76 | 83.76 |
| 60cc Syringes | 4% | * | | | | | | | 92.56 | 92.56 |
| 10cc Syringes | 4% | * | | | | | | | 45.76 | 45.76 |
| Pediasure | 4% | | | | | | | | | |
| Ensure | 4% | | 949.00 | 949.00 | 949.00 | 949.00 | 949.00 | 949.00 | 949.00 | 949.00 |
| Pedalyte | 4% | | | | | | | | | |
| Diapers | 4% | | 1,244.65 | 1,244.65 | 1,244.65 | 1,244.65 | 1,244.65 | 1,244.65 | 1,244.65 | 1,244.65 |
| Wipes | 4% | | 481.80 | 481.80 | 481.80 | 481.80 | 481.80 | 481.80 | 481.80 | 481.80 |
| Gloves | 4% | | 132.00 | 132.00 | 132.00 | 132.00 | 132.00 | 132.00 | 132.00 | 132.00 |
| Blue Pads | 4% | | 83.95 | 83.95 | 83.95 | 83.95 | 83.95 | 83.95 | 83.95 | 83.95 |
| Portable Suction Machine | 4% | * | | | | | | | | |
| Bulb Syringe | 4% | * | | | | | | | 47.76 | 47.76 |
| Suction Canisters & Cath | 4% | * | | | | | | | 79.44 | 79.44 |

Appendix A: Items of Compensation for S, M.

| ITEMS OF COMPENSATION | G.R. | Compensation Year 10 | Compensation Year 11 | Compensation Year 12 | Compensation Year 13 | Compensation Year 14 | Compensation Year 15 | Compensation Year 16 | Compensation Year 17 | Compensation Year 18 |
|------------------------------|------|----------------------|----------------------|----------------------|----------------------|----------------------|----------------------|----------------------|----------------------|----------------------|
| Yankauer Suction & Cath | 4% | * | | | | | | | 41.28 | 41.28 |
| Nebulizer | 4% | * | | | | | | | 272.00 | |
| Nebulizer Filters | 4% | * | | | | | | | 12.00 | 12.00 |
| Percussor | 4% | * | | | | | | | 550.00 | |
| Skilled Nursing | 4% | 2,903.42 | 2,903.42 | 2,903.42 | 2,903.42 | 2,903.42 | 2,903.42 | 2,903.42 | | |
| Attendant Care | 4% | 14,400.00 | 14,400.00 | 14,400.00 | 14,400.00 | 14,400.00 | 14,400.00 | 14,400.00 | | |
| Attendant Care | 4% | 23,040.00 | 23,040.00 | 23,040.00 | 23,040.00 | 23,040.00 | 23,040.00 | 23,040.00 | | |
| Case Mngtr | 4% | 1,400.00 | 1,400.00 | 1,400.00 | 1,400.00 | 1,400.00 | 1,400.00 | 1,400.00 | 500.00 | 500.00 |
| Residential Camp | 4% | 735.00 | 735.00 | 735.00 | 735.00 | 735.00 | 735.00 | 735.00 | | |
| Trust Seed/ Residential Care | 4% | | | | | | | | | |
| Home Mod. Ramp/Bath Add | 4% | | | | | | | | | |
| Van | 4% | | 19,788.00 | | | | | | | |
| Van Mods | 4% | | 15,718.50 | | | | | | | |
| Lost Future Earnings | | | | | | | | | | |
| Pain and Suffering | | | | | | | | | | |
| Past Unreimbursable Expenses | | | | | | | | | | |
| Medicaid Lien | | | | | | | | | | |
| Annual Totals | | 51,852.58 | 87,678.56 | 51,585.08 | 51,874.57 | 51,585.08 | 51,607.07 | 51,852.58 | 35,659.19 | 22,723.22 |

Note: Compensation Year 1 consists of the 12 month period following the date of judgment. Compensation Year 2 consists of the 12 month period commencing on the first anniversary of the date of judgment. As soon as practicable after entry of judgment, respondent shall make the following payment to Regions Bank, as trustee for the benefit of S, M, for Trust seed funds (\$223,022.30) and Yr 1 life care expenses (\$133,657.28): \$356,679.58. As soon as practicable after entry of judgment, respondent shall make the following payment to the guardian(s)/conservator(s) of the estate of S, M, for lost future earnings (\$622,261.55) and pain and suffering (\$195,363.66): \$817,625.21. As soon as practicable after entry of judgment, respondent shall make the following payment to petitioners, Rachel and Joel Moyer for past unreimbursable expenses: \$2,935.07. As soon as practicable after entry of judgment, respondent shall make the following payment jointly to petitioners and the State of Ohio, for reimbursement of the state's Medicaid lien: \$17,098.57. Annual amounts payable through an annuity for future Compensation Years follow the anniversary of the date of judgment. Annual amounts shall increase at the rates indicated in column "G.R." above, compounded annually from the date of judgment. Items denoted with an asterisk (*) covered by health insurance and/or Medicare.

Appendix A: Items of Compensation for S, M.

| ITEMS OF COMPENSATION | G.R. | Compensation Year 19 | Compensation Year 20 | Compensation Year 21 | Compensation Year 22 | Compensation Year 23 | Compensation Year 24 | Compensation Year 25 | Compensation Year 26 | Compensation Year 27 |
|------------------------------|------|----------------------|----------------------|----------------------|----------------------|----------------------|----------------------|----------------------|----------------------|----------------------|
| Yankauer Suction & Cath | 4% | 41.28 | 41.28 | 41.28 | 41.28 | 41.28 | 41.28 | 41.28 | 41.28 | 41.28 |
| Nebulizer | 4% | 272.00 | | 272.00 | | 272.00 | | 272.00 | | 272.00 |
| Nebulizer Filters | 4% | 12.00 | 12.00 | 12.00 | 12.00 | 12.00 | 12.00 | 12.00 | 12.00 | 12.00 |
| Percussor | 4% | * | | | 550.00 | | | | | 550.00 |
| Skilled Nursing | 4% | | | | | | | | | |
| Attendant Care | 4% | | | | | | | | | |
| Attendant Care | 4% | | | | | | | | | |
| Case Mngt | 4% | 500.00 | 500.00 | 500.00 | 500.00 | 500.00 | 500.00 | 500.00 | 500.00 | 500.00 |
| Residential Camp | 4% | | | | | | | | | |
| Trust Seed/ Residential Care | 4% | 111,511.15 | 111,511.15 | 111,511.15 | 111,511.15 | 111,511.15 | 111,511.15 | 111,511.15 | 111,511.15 | 111,511.15 |
| Home Mod. Ramp/Bath Add | 4% | | | | | | | | | |
| Van | 4% | | | | | | | | | |
| Van Mods | 4% | | | | | | | | | |
| Lost Future Earnings | | | | | | | | | | |
| Pain and Suffering | | | | | | | | | | |
| Past Unreimbursable Expenses | | | | | | | | | | |
| Medicaid Lien | | | | | | | | | | |
| Annual Totals | | 138,245.87 | 136,894.84 | 144,859.08 | 134,367.37 | 141,644.34 | 137,175.37 | 138,245.87 | 142,496.84 | 138,967.87 |

Note: Compensation Year 1 consists of the 12 month period following the date of judgment.
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 As soon as practicable after entry of judgment, respondent shall make the following payment to Regions Bank, as trustee for the benefit of S, M, for Trust seed funds (\$223,022.30) and Yr 1 life care expenses (\$133,657.28): \$356,679.58.
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 As soon as practicable after entry of judgment, respondent shall make the following payment to petitioners, Rachel and Joel Moyer for past unreimbursable expenses: \$2,935.07.
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 Annual amounts payable through an annuity for future Compensation Years follow the anniversary of the date of judgment.
 Annual amounts shall increase at the rates indicated in column "G.R." above, compounded annually from the date of judgment.
 Items denoted with an asterisk (*) covered by health insurance and/or Medicare.

Appendix A: Items of Compensation for S, M,

| ITEMS OF COMPENSATION | G.R. | Compensation Year 28 | Compensation Year 29 | Compensation Year 30 | Compensation Year 31 | Compensation Year 32 | Compensation Years 33-59 | Compensation Years 60-Life |
|-------------------------------|------|----------------------|----------------------|----------------------|----------------------|----------------------|--------------------------|----------------------------|
| Ins. MOP including Deductible | 5% | | | | | | 1,132.00 | |
| Medicare Part A Deductible | 5% | | | | | | 1,546.80 | 1,384.80 |
| Medicare Part B | 5% | | | | | | 2,208.00 | 1,593.36 |
| Medigap F | 5% | | | | | | 2,000.00 | |
| Medigap F Deductible | 5% | | | | | | | |
| PCP Eval | 5% | * | | | | | | |
| PCP | 5% | * | | | | | | |
| Ophthalmology | 5% | * | | | | | | |
| Gastro-enterology | 5% | * | 432.00 | 432.00 | 432.00 | 432.00 | 432.00 | 432.00 |
| Changing G Tube | 5% | * | 940.50 | 940.50 | 940.50 | 940.50 | 940.50 | |
| Nephrology | 5% | * | | | | | | |
| Neurology | 5% | * | 238.00 | 238.00 | 238.00 | 238.00 | 238.00 | |
| Pulmon-ology | 5% | * | 725.20 | 725.20 | 725.20 | 725.20 | 725.20 | |
| O2 Saturation Levels | 5% | * | 38.08 | 38.08 | 38.08 | 38.08 | 38.08 | |
| Pulmonary: Home Instruction | 5% | * | | | | | | |
| Orthopaedist | 5% | * | 79.00 | 79.00 | 79.00 | 79.00 | 79.00 | |
| Developmental Pediatrician | 5% | * | | | | | | |
| CP Clinic at Dayton Childrens | 5% | * | | | | | | |
| CP Clinic - Coordinator Fee | 5% | * | | | | | | |
| ER and Urgent Care | 5% | * | | 809.47 | | | 809.47 | |
| Hospitalization | 5% | * | 5,420.83 | 5,420.83 | 5,420.83 | 5,420.83 | 5,420.83 | |
| Dental Care & Sedation | 5% | * | | 4,328.50 | | | 4,328.50 | |
| Spasticity Mngt | 5% | * | | | | | | |
| Botox | 5% | * | | | | | | |
| MD Visit for Botox | 5% | * | | | | | | |
| Scoliosis Surgery | 5% | * | | | | | | |
| Hip Surgery | 5% | * | | | | | | |
| Knee Surgery | 5% | * | | | | | | |
| PT after Surgery | 5% | * | | | | | | |
| Orthopaedic X-rays | 5% | * | | | 401.35 | | | |
| EEG | 5% | * | | | | | | |
| Blood Work | 5% | * | 306.00 | 306.00 | 306.00 | 306.00 | 306.00 | |

Appendix A: Items of Compensation for S, M,

| ITEMS OF COMPENSATION | G.R. | Compensation Year 28 | Compensation Year 29 | Compensation Year 30 | Compensation Year 31 | Compensation Year 32 | Compensation Years 33-59 | Compensation Years 60-Life |
|-------------------------|------|----------------------|----------------------|----------------------|----------------------|----------------------|--------------------------|----------------------------|
| Swallow Study | 5% | 2038 | | | | | | |
| VCOG | 5% | | | | | | | |
| Renal Ultrasound | 5% | | | 440.00 | | | | |
| Urine Cultures | 5% | 95.00 | 95.00 | 95.00 | 95.00 | 95.00 | | |
| Sleep Study | 5% | | | | | | | |
| Chest X-ray | 5% | 211.21 | 211.21 | 211.21 | 211.21 | 211.21 | | |
| Abdominal X-ray | 5% | | | | 169.86 | | | |
| Medicare Part D | 5% | | | | | | 6,174.00 | 6,174.00 |
| Keppra | 5% | 1,310.64 | 1,310.64 | 1,310.64 | 1,310.64 | 1,310.64 | | |
| Carnitor | 5% | 715.89 | 715.89 | 715.89 | 715.89 | 715.89 | | |
| Laculose | 5% | 96.18 | 96.18 | 96.18 | 96.18 | 96.18 | | |
| Prevacid | 5% | 2,036.09 | 2,036.09 | 2,036.09 | 2,036.09 | 2,036.09 | | |
| Preventil | 5% | 525.96 | 525.96 | 525.96 | 525.96 | 525.96 | | |
| Albuterol | 5% | 1,459.78 | 1,459.78 | 1,459.78 | 1,459.78 | 1,459.78 | | |
| Diastat | 5% | 351.92 | 351.92 | 351.92 | 351.92 | 351.92 | | |
| Baclofen | 5% | 746.25 | 746.25 | 746.25 | 746.25 | 746.25 | | |
| Oral Antibiotics | 5% | 154.86 | 154.86 | 154.86 | 154.86 | 154.86 | 8.00 | 8.00 |
| Miralax | 4% | 218.12 | 218.12 | 218.12 | 218.12 | 218.12 | | 218.12 |
| PT Eval | 4% | 600.00 | 600.00 | 600.00 | 600.00 | 600.00 | | |
| W/C Adjustment | 4% | | | | | 172.00 | | |
| OT Eval | 4% | | | | | | | |
| ST Eval | 4% | 504.00 | 504.00 | 504.00 | 504.00 | 504.00 | | |
| ST | 4% | | | | | | | |
| CPAP | 4% | 589.00 | | | | | | |
| Tubing and Mask | 4% | 121.14 | 121.14 | 121.14 | 121.14 | 121.14 | | |
| Control II Disinfective | 4% | 32.00 | 32.00 | 32.00 | 32.00 | 32.00 | 32.00 | 32.00 |
| AFOs | 4% | | 2,000.00 | | | 2,000.00 | | |
| Hand Splints | 4% | 560.00 | 560.00 | 560.00 | 560.00 | 560.00 | | |
| Bracing Spine | 4% | | | | | | | |
| Walker/ Stander | 4% | | | | 3,530.00 | | | |
| Hoyer Lift | 4% | | | | | | | |
| Slings | 4% | | | | | | | |

Appendix A: Items of Compensation for S, M,

| ITEMS OF COMPENSATION | G.R. | Compensation Year 28 | Compensation Year 29 | Compensation Year 30 | Compensation Year 31 | Compensation Year 32 | Compensation Years 33-59 | Compensation Years 60-Life |
|--------------------------|------|----------------------|----------------------|----------------------|----------------------|----------------------|--------------------------|----------------------------|
| Shower WC | 4% | * | 2038 | | | | | |
| Manual Zipple WC | 4% | * | | | | | | |
| Seating System | 4% | * | | | | | | |
| Adult WC | 4% | * | | | 5,500.00 | | | |
| W/C Maint | 4% | * | 300.00 | 300.00 | 300.00 | 300.00 | | |
| Bath Chair | 4% | | | | | | | |
| Portable Ramp | 4% | | | | | | | |
| Car Seat | 4% | | | | | | | |
| Corner Chair | 4% | * | | | | | | |
| Therapy Ball | 4% | | | | | | | |
| Therapy Mat | 4% | | | | | | | |
| Therapy Table | 4% | | | | | | | |
| Bolsters | 4% | | | | | | | |
| Wedges | 4% | * | | | | | | |
| Hospital Bed | 4% | * | | | | | | |
| Bed Rails | 4% | | | | | | | |
| Bedside Table | 4% | | | | | | | |
| Feeding Kit | 4% | * | 366.36 | 366.36 | 366.36 | 366.36 | | |
| Mic-Key Button | 4% | * | 453.00 | 453.00 | 453.00 | 453.00 | | |
| Extension Set | 4% | * | 83.76 | 83.76 | 83.76 | 83.76 | | |
| 60cc Syringes | 4% | * | 92.56 | 92.56 | 92.56 | 92.56 | | |
| 10cc Syringes | 4% | * | 45.76 | 45.76 | 45.76 | 45.76 | | |
| Pediasure | 4% | | | | | | | |
| Ensure | 4% | | 949.00 | 949.00 | 949.00 | 949.00 | 949.00 | 949.00 |
| Pedialyte | 4% | | | | | | | |
| Diapers | 4% | | 1,244.65 | 1,244.65 | 1,244.65 | 1,244.65 | 1,244.65 | 1,244.65 |
| Wipes | 4% | | | | | | | |
| Gloves | 4% | | | | | | | |
| Blue Pads | 4% | | | | | | | |
| Portable Suction Machine | 4% | * | | | 542.00 | | | |
| Bulb Syringe | 4% | * | 47.76 | 47.76 | 47.76 | 47.76 | | |
| Suction Canisters & Cath | 4% | * | 79.44 | 79.44 | 79.44 | 79.44 | | |

Appendix A: Items of Compensation for S, M, .

| ITEMS OF COMPENSATION | G.R. | Compensation Year 28 | Compensation Year 29 | Compensation Year 30 | Compensation Year 31 | Compensation Year 32 | Compensation Years 33-59 | Compensation Years 60-Life |
|------------------------------|------|----------------------|----------------------|----------------------|----------------------|----------------------|--------------------------|----------------------------|
| Yankauer Suction & Cath | 4% | 41.28 | 41.28 | 41.28 | 41.28 | 41.28 | | |
| Nebulizer | 4% | * | 272.00 | | 272.00 | | | |
| Nebulizer Filters | 4% | 12.00 | 12.00 | 12.00 | 12.00 | 12.00 | | |
| Percussor | 4% | * | | | | 550.00 | | |
| Skilled Nursing | 4% | | | | | | | |
| Attendant Care | 4% | | | | | | | |
| Attendant Care | 4% | | | | | | | |
| Case Mngr | 4% | 500.00 | 500.00 | 500.00 | 500.00 | 500.00 | 500.00 | 500.00 |
| Residential Camp | 4% | | | | | | | |
| Trust Seed/ Residential Care | 4% | 111,511.15 | 111,511.15 | 111,511.15 | 111,511.15 | 111,511.15 | 111,511.15 | 111,511.15 |
| Home Mod: Ramp/Bath Add | 4% | | | | | | | |
| Van | 4% | | | | | | | |
| Van Mods | 4% | | | | | | | |
| Lost Future Earnings | | | | | | | | |
| Pain and Suffering | | | | | | | | |
| Past Unreimbursable Expenses | | | | | | | | |
| Medicaid Lien | | | | | | | | |
| Annual Totals | | 134,234.37 | 141,055.34 | 134,085.37 | 148,389.08 | 137,176.84 | 127,523.72 | 123,615.08 |

Note: Compensation Year 1 consists of the 12 month period following the date of judgment.
 Compensation Year 2 consists of the 12 month period commencing on the first anniversary of the date of judgment.
 As soon as practicable after entry of judgment, respondent shall make the following payment to Regions Bank, as trustee for the benefit of S, M, for Trust seed funds (\$223,022.30) and Yr 1 life care expenses (\$133,657.28): \$356,679.58.
 As soon as practicable after entry of judgment, respondent shall make the following payment to the guardian(s)/conservator(s) of the estate of S, M, for lost future earnings (\$622,261.55) and pain and suffering (\$195,363.66): \$817,625.21.
 As soon as practicable after entry of judgment, respondent shall make the following payment to petitioners, Rachel and Joel Moyer for past unreimbursable expenses: \$2,935.07.
 As soon as practicable after entry of judgment, respondent shall make the following payment jointly to petitioners and the State of Ohio, for reimbursement of the state's Medicaid lien: \$17,098.57.
 Annual amounts payable through an annuity for future Compensation Years follow the anniversary of the date of judgment.
 Annual amounts shall increase at the rates indicated in column "G.R." above, compounded annually from the date of judgment.
 Items denoted with an asterisk (*) covered by health insurance and/or Medicare.

IN THE UNITED STATES COURT OF FEDERAL CLAIMS
OFFICE OF SPECIAL MASTERS

| | | |
|-----------------------------------|---|-------------------------|
| S.M. |) | |
| by and through |) | |
| RACHEL and JOEL MOYER, as parents |) | |
| and natural guardians, |) | |
| |) | |
| Petitioners, |) | |
| |) | |
| v. |) | No. 08-463V |
| |) | Special Master Hastings |
| SECRETARY OF |) | |
| HEALTH AND HUMAN SERVICES, |) | |
| |) | |
| Respondent. |) | |

RESPONDENT'S PROFFER ON AWARD OF COMPENSATION

I. Items of Compensation

A. Life Care Items

The parties reached engaged their own life care planners. The respondent retained Laura Fox, MSN, RN, CLCP, and petitioner retained Liz Holakiewicz, BSN, RN, CNCLP. The life care planners worked together and provided a joint plan which provides an estimation of S.M.'s future vaccine-injury related needs. For the purposes of this proffer, the term "vaccine related" is as described in respondent's Rule 4 report filed on September 16, 2008. All items of compensation identified in the Items of Compensation for S.M. chart, attached at Tab A, are supported by the evidence and the recommendations of both life care planners.¹ Respondent

¹ The chart at Tab A illustrates the annual benefits recommended by the joint life care plan. The annual benefit years run from the date of judgment up to the first anniversary of the date of judgment, and every year thereafter up to the anniversary of the date of judgment.

proffers that S.M. should be awarded all items of compensation set forth in Tab A.

Petitioners agree.

B. Lost Future Earnings

The parties agree that based upon the evidence of record, S.M. will never be gainfully employed. Therefore, respondent proffers that S.M. should be awarded full lost future earnings as provided under the Vaccine Act, 42 U.S.C. § 300aa-15(a)(3)(B). Respondent proffers that the appropriate award for S.M. lost future earnings is \$622,261.55. Petitioners agree.

C. Pain and Suffering

Respondent proffers that S.M. should be awarded \$195,363.66 in actual and projected pain and suffering. This amount reflects that the award for projected pain and suffering has been reduced to net present value. See 42 U.S.C. § 300aa-15(a)(4). Petitioners agree.

D. Past Unreimbursable Expenses

Evidence supplied by petitioners documents their expenditure of past unreimbursable expenses related to S.M.'s vaccine-related injury. Respondent proffers that petitioners should be awarded past unreimbursable expenses in the amount of \$2,935.07. Petitioners agree.

E. Medicaid Lien

Respondent proffers that S.M. should be awarded funds to satisfy the State of Ohio Medicaid lien in the amount of \$17,098.57, which represents full satisfaction of any right of subrogation, assignment, claim, lien, or cause of action the State of Ohio may have against any individual as a result of any Medicaid payments the State of Ohio has made to or on behalf of S.M. from the date of her eligibility for benefits through the date of judgment in this case

as a result of her vaccine-related injury suffered on or about October 10, 2005, under Title XIX of the Social Security Act. Petitioners agree.

II. Form of the Award

The parties recommend that the compensation provided to S.M. should be made through a combination of lump sum payments and future annuity payments as described below, and request that the special master's decision and the Court's judgment award the following:

A. A lump sum payment of \$356,679.58, representing trust seed funds consisting of the present year cost of compensation for residential care expenses in Compensation Years 2027 and 2028 (\$223,022.30) and life care expenses in the first year after judgment (\$133,657.28), in the form of a check payable to Regions Bank, as Trustee of the Reversionary Trust established for the benefit of S.M. as set forth in Appendix A: Items of Compensation for S.M.

B. A lump sum payment of \$817,625.21, representing compensation for lost future earnings (\$622,261.55) and pain and suffering (\$195,363.66), in the form of a check payable to the court-appointed guardian(s)/conservator(s) of the estate of S.M. for the benefit of S.M.. No payments shall be made until petitioners provide respondent with documentation establishing the appointment of a guardian(s)/conservator(s) of S.M.'s estate;

C. A lump sum payment of \$2,935.07, representing compensation for past unreimbursable expenses, payable to Rachel and Joel Moyer, petitioners;

D. A lump sum payment of \$17,098.57, representing compensation for the reimbursement of the State of Ohio Medicaid lien, payable jointly to petitioners, and

Ohio Department of Job and Family Services
The Ohio Tort Recovery Unit
350 Worthington Road, Suite G
Westerville, OH 43082
Attn: Ms. Christine Ewans

Petitioners agree to endorse this payment to the Ohio Department of Job and Family Services;
and

E. An amount sufficient to purchase an annuity contract,² subject to the conditions described below, that will provide payments for the care items described in the compensation chart in Tab A attached hereto, paid to the life insurance company³ from which the annuity will be purchased.⁴ Compensation for Year Two (beginning on the first anniversary of the date of judgment) and all subsequent years shall be provided through respondent's purchase of an annuity, which annuity shall make payments directly to Regions Bank, as trustee of the reversionary trust for the benefit of S.M., only so long as S.M.

² In respondent's discretion, respondent may purchase one or more annuity contracts from one or more life insurance companies.

³ The Life Insurance Company must have a minimum of \$250,000,000 capital and surplus, exclusive of any mandatory security valuation reserve. The Life Insurance Company must have one of the following ratings from two of the following rating organizations:

- a. A.M. Best Company: A++, A+, A+g, A+p, A+r, or A+s;
- b. Moody's Investor Service Claims Paying Rating: Aa3, Aa2, Aa1, or Aaa;
- c. Standard and Poor's Corporation Insurer Claims-Paying Ability Rating: AA-, AA, AA+, or AAA;
- d. Fitch Credit Rating Company, Insurance Company Claims Paying Ability Rating: AA-, AA, AA+, or AAA.

⁴ Petitioners authorize the disclosure of certain documents filed by the petitioner in this case consistent with the Privacy Act and the routine uses described in the National Vaccine Injury Compensation Program System of Records, No. 09-15-0056.

is alive at the time a particular payment is due. At the Secretary's sole discretion, the periodic payments may be provided to the trustee in monthly, quarterly, annual or other installments. The "annual amounts" set forth in the chart at Tab A describe only the total yearly sum to be paid to the trustee and do not require that the payment be made in one annual installment.

1. Growth Rate

Respondent proffers that a four percent (4%) growth rate should be applied to all non-medical life care items, and a five percent (5%) growth rate should be applied to all medical life care items. Thus, the benefits illustrated in the chart at Tab A that are to be paid through annuity payments should grow as follows: four percent (4%) compounded annually from the date of judgment for non-medical items, and five percent (5%) compounded annually from the date of judgment for medical items. Petitioners agree.

2. Life-contingent annuity

The trustee will continue to receive the annuity payments from the Life Insurance Company only so long as S.M. is alive at the time that a particular payment is due. Written notice shall be provided to the Secretary of Health and Human Services and the Life Insurance Company within twenty (20) days of S.M.'s death.

3. Guardianship

No payments under paragraph III.A & III.B of this proffer shall be made until petitioners provide respondent with documentation establishing the appointment of a guardian(s)/conservator(s) of S.M.'s estate. If petitioners are not authorized by a court of competent jurisdiction to serve as guardian(s)/conservator(s) of the estate of S.M., any

such payment shall be made to the party or parties appointed by a court of competent jurisdiction to serve as guardian(s)/conservator(s) of the estate of S.M. upon submission of written documentation of such appointment to the Secretary.

III. Summary of Recommended Payments Following Judgment

| | | |
|----|---|---------------|
| A. | Lump Sum ⁵ paid to trustee: | \$ 356,679.58 |
| B. | Lump Sum paid to guardian(s)/conservator(s) of S.M.'s estate: | \$ 817,625.21 |
| C. | Lump sum paid to petitioners: | \$ 2,935.07 |
| D. | Reimbursement for Medicaid lien: | \$ 17,098.57 |
| E. | An amount sufficient to purchase the annuity contract described above in section II. E. | |

⁵ The lump sum paid to trustee is comprised of the present year cost of residential care expenses in compensation years 2027 and 2028, and life care expenses expected to be incurred in the first year after judgment.

Respectfully submitted,

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Dated: May 12, 2011