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. SECRETARY OF HEALTH AND HUMAN SERVICES, Respondent.	)	No. 08-463V Special Master Hastings

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 un-reimbursable 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 company[3] 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.

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[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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