

**In the United States Court of Federal Claims**

OFFICE OF SPECIAL MASTERS

No. 04-1370V

(Filed: February 9, 2012)

(Reissued for Publication: December 21, 2012)

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SHEN WANG, as parent and guardian \*  
ad litem for T.K., a minor, \*

Petitioner, \*

v. \*

SECRETARY OF HEALTH AND \*  
HUMAN SERVICES, \*

Respondent. \*

\*\*\*\*\*

*Thomas Gallagher, Somers Point, New Jersey, for petitioner.*  
*Linda Renzi, U.S. Department of Justice, Washington, D.C., for respondent.*

**RULING CONCERNING “LIFE CARE” DISPUTES**

**HASTINGS, *Special Master.***

This is an action seeking an award under the National Vaccine Injury Compensation (hereinafter “the Program”). Respondent has conceded that petitioner is entitled to an award on behalf of her daughter T.K. In this Ruling, I resolve certain disputes between the parties with respect to the *amount* of the award.

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<sup>2</sup>The applicable statutory provisions defining the Program are found at 42 U.S.C. § 300aa-10 *et seq.* (2000 ed.). Hereinafter, for ease of citation, all “§” references will be to 42 U.S.C. (2000 ed.).

# I

## INTRODUCTION

### ***A. Statutory background***

Under the Program, a petitioner's award consists of the sum of amounts available under four different categories, as provided in § 300aa-15(a). In this case, the parties, despite great efforts by their counsel, have been unable as yet to reach agreement concerning any of those categories--the categories of "past expenses," "future expenses," "lost earnings," and "pain and suffering." In this Ruling, I will deal with certain aspects of petitioner's claim in the second category, that of future unreimbursable expenses.

That category of compensable expenses under the Program consists of unreimbursable expenses that an injured vaccinee will likely incur in the *future--i.e.*, after the date of this court's judgment in the Program proceeding--resulting from the vaccine-related injury. § 300aa-15(a)(1)(A). Such expenses must fall within one of an enumerated set of subcategories--see § 300aa-15(a)(1)(A)(iii).

### ***B. Procedural history concerning the issues involved in this Ruling***

Subsequent to the concession by Respondent that Petitioner is entitled to an award on T.K.'s behalf, the parties and I turned our attention to resolving the difficult issue of the appropriate *amount* of the Program award for T.K.'s injury. As notified above, under the statute, this award will encompass four major elements: (1) past unreimbursed expenses incurred by T.K.'s family as a result of her injury; (2) future unreimbursed expenses likely to be incurred by T.K.'s family as a result of her injury; (3) "lost earnings" compensation because T.K. will not likely be able to work productively as an adult as a result of her injury; and (4) compensation for T.K.'s "pain and suffering."

This Ruling will encompass only the *second* of those elements, the amounts likely to be necessary for future care of T.K., an issue commonly described as the "life care" issue.

In order to resolve this life care issue, each party engaged a specialist "life care planner." Petitioner hired Ellen Econs, and Respondent hired Laura Fox. The planners each met T.K., reviewed her medical records, visited her home and school, and interviewed her treating physician and other professionals who have provided services to T.K. These two planners, along with counsel for both parties, worked in an attempt to settle the life care issue.

On September 24, 2009, a document was filed as Respondent's Ex. A, which constituted a "joint plan" authored jointly by both of the life care planners, Ms. Econs and Ms. Fox. In that joint plan, the two planners recommended resolutions of most, though not all, of the major items of future care likely to be needed by T.K.<sup>3</sup> The respective counsel then attempted to reach

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<sup>3</sup>At the same time, Respondent also filed Ex. B, a shorter list of life care items as to which Ms. Econs and Ms. Fox had *not* reached agreement.

agreement on the other items of life care and the other damages issues-- specifically, lost earnings, pain and suffering, and past unreimbursed expenses. However, despite mediation efforts,<sup>4</sup> the efforts to settle the entire case failed.

After the settlement efforts failed, Petitioner chose to file a new life care plan--Petitioner's Ex. 52, filed on August 19, 2010, authored by Ms. Econs. That new plan *considerably increased* the Petitioner's requests concerning many major life care items. After further settlement efforts again failed, Respondent filed a new life care plan on September 30, 2011--Ex. K, authored by Ms. Fox. A hearing was conducted to resolve the disputed life care items, on October 12 and 13, 2011, in the family's hometown, Seattle.<sup>5</sup> At that hearing, Petitioner presented the testimony of herself; her husband; Ms. Econs; T.K.'s treating neurologist, Dr. Brien Vlcek; and a neuropsychologist, Dr. Gayle Fay. Respondent presented the testimony of Ms. Fox and a neurologist, Dr. Perry Lubens.

Subsequent to the hearing, the parties again discussed settlement. During status conferences held on October 25 and November 21, 2011, Petitioner's counsel stated that Petitioner had not determined whether she wanted to file post-hearing briefs concerning the life care items in dispute. At the next conference, held on December 12, 2011, Petitioner's counsel stated that Petitioner did *not* wish to file post-hearing briefs, but instead requested that I decide the disputed life care items based upon the record as it stands. Accordingly, I resolve those disputed issues in this Ruling.

## II

### RESOLUTION OF DISPUTED ISSUES

#### A. *General statement*

In resolving the life care disputes, I have begun with three primary items: Ex. 52, Ms. Econs' most recent life care plan; Ex. K, Ms. Fox' most recent plan; and Ex. M, filed by Respondent on October 7, 2011. In Ex. M, Respondent lists all of the items of life care on which the parties are *agreed* as of this time. Petitioner has *not* taken issue with that list. I have reviewed Ex. M, and those items appear appropriate to me. I will award funds for those items.

I have closely compared Ex. 52 and Ex. K. There are a number of separate items as to which the parties are in dispute. As to each of those items, I have reviewed the evidence, and I resolve the dispute below.

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<sup>4</sup>On September 15, 2009, the case was referred to another special master for mediation. Despite extensive efforts by all involved, however, the mediation did not resolve all issues, so on September 9, 2010, the parties reported, during a status conference, that they wished to litigate before me the unresolved damages issues.

<sup>5</sup>“Tr.” references in this ruling are to the transcript of that hearing.

Before proceeding to the individual items, however, I will state some general comments concerning both T.K.'s condition and the evidentiary hearing held on October 12-13, 2011.

First, due to her presumptively vaccine-related injury, T.K. now age 10, has a great many needs. Her cognitive ability is severely diminished from that of a typical child of her age. She has an uncontrolled seizure disorder, which causes her to suffer seizure clusters ten to twelve times per year. Controlling her behavior is also a difficult problem. All agree that she will likely suffer from lifelong seizures and limited cognitive ability, and will always depend on others for her care.

Next, during the evidentiary hearing, I was greatly moved by the testimony of T.K.'s parents, Shen Wang and Chen Ku. They obviously love their daughter immensely, and are thoroughly dedicated to T.K.'s welfare. Their testimony gave me valuable insight into the specific needs of T.K. I was very impressed by the testimony of T.K.'s treating neurologist, Dr. Brien Vlcek, as learned, candid, and backed by his long experience in treating T.K. I also was impressed by the knowledgeable testimony of the neurologist Dr. Perry Lubens.

As to the two life care planners, I found that Ms. Fox was generally more persuasive than Ms. Econs. She was better able to explain the rationale for her proposals than was Ms. Econs, concerning most items.

Further, I note that a number of the major "life care" disputes arose from the fact that Ms. Econs' 2010 plan, contained at Ex. 52, *substantially increased* her proposals in a number of areas from the joint plan which Ms. Econs co-authored in 2009, Ex. A. Ms. Econs acknowledged that she agreed to the joint plan, Ex. A, in 2009. (Tr. 37, 47-48.) She acknowledged that when she agreed to that plan in 2009, she believed that the joint plan was adequate for T.K.'s needs--*i.e.*, the joint plan did not "shortchange" T.K. (Tr. 38-39.) Ms. Econs seemed to acknowledge that T.K.'s condition did not significantly change between 2009 and 2010; it was Ms. Econs' *understanding* of T.K.'s condition, rather, that changed between the 2009 joint plan (Ex. A), and Ms. Econs' 2010 plan (Ex. 52). (Tr. 42.) But Ms. Econs did not adequately explain *why* her understanding of T.K.'s condition changed. She failed to persuasively explain why levels of care that Ms. Econs found adequate in 2009 were, one year later, no longer adequate.

As to each of the disputes resolved below, I have carefully studied all of the evidence presented by the parties concerning each issue. That evidence includes Ex. 52 and Ex. K; the testimony presented by both parties at the evidentiary hearing on October 12-13, 2011; and various other exhibits, to which the parties referred during the October hearing.<sup>6</sup> As to each disputed item, I will discuss the evidence and resolve the dispute in the following pages.

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<sup>6</sup>Among other items, I also considered Petitioner's Ex. 85, filed on January 4, 2012, and Respondent's response thereto filed on February 2, 2012.

I will address these items basically in the order listed in Ms. Econs' latest plan, Ex. 52, but with some exceptions for the sake of grouping similar items together. I also note that these amounts are the likely *full cost* of the services. At this time, I do *not* address the issue of "offsets"--that is, whether any part of these costs will likely be covered by health insurance and/or any other outside source. (That is because T.K.'s father recently lost his job, changing his health insurance situation, so that the parties were unable to address the issue of health insurance coverage during the October hearing.)

## ***B. Resolution of Individual Issues***

### ***1. Neuropsychological assessments.***

Ms. Econs recommends that the Program provide funds for comprehensive neuropsychological assessments of T.K. over the next 10 years, to be performed by Dr. Fay. (Ex. 52, p. 3, last item; Ex. 54, p. 4, first item.) Ms. Econs recommends \$5,000 each for four *annual* assessments during the first four years after the judgment in this case is filed, then \$5,000 every two years for additional assessments through the year 2022. (*Id.*) Ms. Fox disagrees. (Ex. K, p. 4 of 19, second through fourth items; Tr. 481-83.) Ms. Fox recommends that T.K. receive three neuropsychological assessments--one in early adolescence, and again at ages 17 and 20. (*Id.*)

As to the appropriate *number* of assessments, I found Respondent's evidence to be more persuasive, chiefly because of the testimony of Dr. Vlcek, T.K.'s own treating neurologist. Dr. Vlcek, during a 2009 deposition, recommended three assessments in the same general time frame proposed by Ms. Fox. (Ex. C, p. 14.) He then repeated a similar opinion during his hearing testimony. (Tr. 127-28.) Ms. Econs never explained why she recommended the much greater frequency in her Ex. 52. Even Dr. Fay, who would apparently do the assessments under Ms. Econs' plan, did *not* explain, in her own hearing testimony, why the more frequent assessments might be needed.

Thus, based primarily on Dr. Vlcek's testimony, I will award funds for three comprehensive neuropsychological assessments of T.K., at ages 12, 16, and 20.

As to the appropriate *amount* for each assessment (prior to any offset), the amount proposed by Ms. Econs, of \$5,000 per assessment, stands essentially uncontradicted. I award \$5,000 for each assessment.

### ***2. Therapy.***

Ms. Econs has recommended funding for four types of therapies: "communications services" (also known as speech therapy) (Ex. 52, p. 4, second and third items); cognitive therapy (Ex. 52, p. 4, fourth item); occupational therapy (Ex. 52, p. 10, sixth and seventh items), and physical therapy (Ex. 52, p. 10, eighth and ninth items). These recommendations would result in a total amount of 656 hours per year of therapy in these four areas in the first three years after judgment, then 556 hours per year through 2022. Ms. Fox, in response, suggests an *overall yearly allowance* for therapy for T.K. for these years, for all of those types of therapy combined

(and also including behavioral therapy); the hours would be utilized each year as dictated by T.K.'s current needs. (Ex. K, p. 5 of 11 and second-last page; Tr. 454-64.) While Ms. Fox' written plan is somewhat confusing in this regard, she clarified at the hearing that she would provide funds for 300 hours per year (200 days times 1.5 hours per day), for the first three years. (Tr. 463-464.)

I am persuaded that Ms. Fox' general approach, to provide funds for an *overall* amount of therapy hours per year, is a sound one. But to decide the appropriate *number* of hours is not an easy task.

In this regard, Ms. Fox argued that the total amount of private therapy services proposed by Ms. Econs would be more than T.K. could productively utilize, especially on top of the therapy that T.K. gets from the school system. (*E.g.*, Tr. 460-62.) In addition, Dr. Lubens testified that for most children like T.K., an hour to an hour and one-half per day would be all that the child could handle. (Tr. 434-36.)

On the other hand, Dr. Fay testified that some clients could handle 14 hours per week of therapy (Tr. 207), and Dr. Vlcek testified that T.K. might be able to handle 13 or 14 hours per week (Tr. 49, 135-140).

In this regard, T.K.'s mother herself provided some helpful testimony. She explained that in recent weeks T.K. has successfully utilized 2.7 hours per week of speech therapy (Tr. 191-92) (four sessions of 40 minutes each), three hours per week of occupational therapy (Tr. 192-94), and two hours per week of physical therapy (Tr. 195), which totals to 7.7 hours per week,<sup>7</sup> in addition to T.K.'s time at school during those weeks. This testimony indicates that T.K. can successfully utilize perhaps eight hours per week during school weeks, but it also seemed from that description that it would be difficult to pack even more therapy into a school week.

The evidence also indicated that about ten times per year T.K. experiences seizure clusters, and each time that happens she would have about two days in which she would be unable to utilize therapy. (*E.g.*, Tr. 116, 120, 147, 149, 413.)

Based on all the evidence on this topic, I conclude that T.K. can benefit from eight hours per week of therapy for 36 school weeks (180 school days = 36 school weeks). That leaves 16 non-school weeks, when she probably will be able to benefit from 10 hours per week of therapy. From that 16 weeks, I will subtract one week for the camp experience contained in the life care plan, and I will also subtract three weeks for holidays and family vacation. (16 weeks minus four weeks = 12 weeks.) That calculates to 36 school weeks times eight hours per week = 288 hours per year, plus 12 non-school weeks at 10 hours per week = 120 hours. From that total, I will next account for 20 days when T.K. will be unlikely to benefit from therapy because of seizure clusters and/or recovery therefrom. I will subtract 25 hours of therapy for this purpose.

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<sup>7</sup>This is in addition to "aqua therapy," which has been agreed between the parties, and behavioral therapy (including "ABA" therapy--see (Tr. 148)), which I address separately at pp. 7-8 below.

The resulting calculation is 288 hours plus 120 hours minus 25 hours = 383 hours per year, for the first three years after judgment.<sup>8</sup>

The evidence indicates that T.K.'s therapy needs will reduce somewhat as she gets older. For example, Ms. Econs' plan contemplated reduced funding after three years for both speech therapy and physical therapy, then virtually a complete cessation of funding for therapy after 2022 (except for a small amount of occupational therapy for two additional years). (Ex. 52, pp. 4, 10.) Ms. Fox' plan also contemplated significantly reduced therapies after three years. (Ex. K, second-last page.) Dr. Lubens testified that the need for therapies would gradually reduce over the years (Tr. 438-438), as did Ms. Fox (Tr. 496).

Therefore after the first three years, I will reduce the overall number of hours. I note that in Ms. Econs' plan, after three years she reduced the number of speech therapy hours by 25%, and the physical therapy hours by 50%. (E.g., 52, pp. 4, 10.) Ms. Fox apparently reduced the total number of hours after three years by about 40%. (Ex. K, second last page.) After three years, I will reduce the number of hours by 33%, from 383 to 256 hours per year. I will allow 256 hours for the following eight years.

I will also allow 24 hours of occupational therapy for the 12<sup>th</sup> and 13<sup>th</sup> years, as proposed by Ms. Econs. (Ex. 52, p. 10.)

Finally, I need to determine an *hourly rate* for therapy. In her plan, Ms. Fox proposed an hourly rate of \$125 for all therapies. (Ex. K, second-last page.) In her plan, Ms. Econs also proposed \$125 per hour for both occupational and physical therapy (Ex. 52, p. 10), while proposing \$150 per hour for cognitive and speech therapy (Ex. 52, p. 4). At the hearing, Ms. Fox explained how she determined her \$125 rate (Tr. 505), while Ms. Econs did not explain why she proposed a higher rate for speech and cognitive therapy. I found Ms. Fox' explanation to be reasonable, and I will utilize her proposed rate of \$125 per hour.

### **3. Behavioral treatment.**

Ms. Econs recommends \$1,755 for an initial evaluation by Dr. Craig Jensen, then \$6,480 per year for six years, for four hours per month of behavioral treatment. (Ex. 52, p. 6, first item.) Ms. Fox responds that the initial evaluation by Dr. Jensen has already been done, and then proposes to include behavioral treatment in her *overall* therapy proposal. (Ex. K, p. 7 of 19, last item; p. 8 of 19, first item.)

Petitioner did not dispute that an initial evaluation by Dr. Jensen has been done, so I will not award funds for an initial evaluation. However, the testimony of T.K.'s parents and Dr. Vlcek

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<sup>8</sup>It is noteworthy that the joint plan that Ms. Econs supported in 2009, Ex. A, would have supplied 108 hours of speech therapy per year, plus 50 hours of occupational therapy, with no allocation for physical or cognitive therapy. The total yearly amount in the plan for therapy in these four categories, thus, was 158 hours. Accordingly, my allocation here of 383 hours per year is more than *twice* the amount to which the Petitioner's own life care planner agreed in 2009.

established that T.K.'s behavior is a *major* problem, and that treatment in this area could help. (E.g., Tr. 160.) Because of the high importance of this item, I will treat it separately and make the annual award as requested by Ms. Econs.<sup>9</sup>

#### 4. *Psychotherapy/Counseling.*

In her plan, Ms. Econs proposed funding for "psychotherapy," to be provided by Dr. Fay, for 15 years. (Ex. 52, p. 5, first two items.) Ms. Fox proposed no funding for this purpose. (Ex. K, p. 5 of 19.)

At the evidentiary hearing, Ms. Econs clarified that by "psychotherapy," she really meant "counseling" services, to help T.K. emotionally adjust to her disability, because T.K. recognizes that she is different from other children. (Tr. 12, 62-63.) Ms. Fox disagreed, stating that because of T.K.'s severe cognitive disability, she would not likely benefit from this service. (Tr. 463.)

Dr. Fay also addressed this issue briefly in her testimony, but was quite vague, apparently indicating that the purpose of counseling was to help T.K. manage stress and manage her behavior. (Tr. 211-12.)

Dr. Vlcek's testified, both in a deposition and at the hearing, that because of her reduced cognitive ability, T.K. does not understand her disability. (Ex. C, p. 18, line 12; Tr. 160.) He suggested that T.K. might benefit from counseling (Tr. 159), but then seemed to indicate that in this regard he was thinking of "behavioral help, \* \* \* behavioral management, behavior modification help." (Tr. 159, line 17; Tr. 160, lines 22-23.) I note that I have provided ample funds elsewhere in this Ruling for behavioral treatment.

Finally, Dr. Lubens testified that T.K. would not likely benefit from the stress-management techniques described by Dr. Fay in this regard. (Tr. 432-33.)

After consideration of all the evidence in this regard, I conclude that the evidence fails to demonstrate that it is likely that T.K. will benefit from this proposed counseling, in light of her cognitive deficit. I will not award funds for this item.

#### 5. *QEEG.*

Ms. Econs proposes funding for a medical intervention intended to control seizures, known as QEEG. (Ex. 52, p. 5). Ms. Fox opposes. (Ex. K, p. 6 of 19.)

The evidence concerning this issue is relatively one-sided. Dr. Fay, who is a neuropsychologist but not a medical doctor, did voice support for the possible utility of the procedure. (Tr. 239-41.) But Respondent's neurologist, Dr. Lubens, effectively rebutted Dr. Fay's testimony, explaining that the medical studies concerning this treatment have *not* supported its efficacy. (Tr. 436-37.) Further, Petitioner's own neurologist, Dr. Vlcek, declined to vouch

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<sup>9</sup>This is in *addition* to the agreed-upon item for social skills/behavioral services at Ex. M, p. 3.

for the proposal, acknowledging that he knows of no evidence supporting the effectiveness of QEEG, and that he does not use the procedure in his treatment of his patients. (Tr. 157-59.)

Based on the evidence cited above, I decline to award any funds for this item.

#### **6. *Physiatrist/Developmental Pediatrician.***

Ms. Econs proposes funding for the services of a “physiatrist” and a developmental pediatrician. (Ex. 52, p. 5, last two items.) Ms. Fox, on the other hand, would provide funds for two physiatrist visits per year, but no funds for a developmental pediatrician, opining that the services are duplicative of each other. (Ex. K, p. 7 of 19; Tr. 471.)

The evidence does not support the full request made by Ms. Econs. Ms. Econs made only the briefest mention of these items in her hearing testimony, supplying no substantial explanation of the need therefore. (Tr. 12-13.) Ms. Fox’ argument that the two categories are duplicative draws support from the joint plan to which both planners agreed in 2009, which provided funding for a physiatrist only for the first five years, then for a developmental pediatrician only for the following six years. (Ex. A, p. 4.)

I will follow the recommendation of the 2009 joint plan, providing funds for four visits per year to either a physiatrist or developmental pediatrician, at \$165 per visit, for the first five years, then funds for two visits per year for the following six years.

#### **7. *Case Management.***

Both planners agree that funds should be provided for a case manager to help coordinate T.K.’s many different services. But they disagree as to the appropriate amount. Ms. Econs recommends funds for 120 hours per year for 13 years (Ex. 52, p. 6, second item), while Ms. Fox recommends 20 hours for the first year, then 12 hours per year for ten more years. (Ex. K, p. 8 of 19, second item.)

The testimony of Petitioner’s witnesses concerning this issue was not very enlightening. Both Ms. Econs and Dr. Fay supported Ms. Econs’ proposal, but neither provided a coherent explanation as to why 120 hours per year would be necessary. (Tr. 13-14, 250-52.) Ms. Econs could not explain why in 2009 she had agreed to a figure of 12 hours per year, then changed to a figure of 120 hours per year. (Tr. 60-62; Ex. A, p. 6.) Ms. Fox, on the other hand, gave at least a bit more of an explanation, noting that she herself performs case management, and that based on that experience, her recommendation was an adequate number of hours. (Tr. 467-69, 501-02.) Ms. Fox added that her plan also provided funding for ten hours per year of services by an “educational advocate,” to help the family deal with the school system. (Tr. 470.) That means that the case manager can spend his/her time on matters *other* than dealing with school issues.

It is also noteworthy that the 2009 joint plan, Ex. A, provided for 15 case management hours in the first year, then 12 per year thereafter, a slightly lesser amount than Ms. Fox now

advocates. And I note that Ms. Fox' recommendation is similar to case management recommendations that I have seen in other Vaccine Act cases for persons similar to T.K.

Considering all the evidence, I find Ms. Fox' recommendation to be appropriate, and I therefore award case management in the amount that she proposes for 11 years. I will also extend the allocation for a twelfth year, so that a case manager who knows T.K. well can assist the family during the first year of her placement in an adult residential facility.

### 8. *Home Care.*

Because of her deficits, T.K. obviously needs far more care than would an ordinary child. Both parties propose extensive funding to hire personnel to help care for T.K. But they disagree as to the amounts and costs thereof.

The parties agree that for some of the assistance hours, the services of an licensed practical nurse ("LPN") are needed, because T.K.'s parents will not be around, and the caregiver therefore may need to administer anti-seizure medication to T.K. At other times, when one or both parents will be in the house, but a caregiver is still needed to provide constant supervision of T.K., the services of a "home health aide" ("aide") will be sufficient.

Ms. Econs proposed that for each year for the next 11 years, the Program provide funds for 2,616 hours of LPN care at \$60 per hour, plus 480 hours of aide care at \$26.50 per hour, for a total yearly cost of \$169,680. (Ex. 52, pp. 6-7; Tr. 16-23.) Ms. Fox, on the other hand, proposes 1,464 hours of LPN care per year at \$50 per hour, plus 684 hours per year at \$25 per hour for aide care, plus \$1,400 for aide care during an annual four-day camp experience for T.K., for a total yearly cost of \$91,700. (Ex. K, third-last page; Tr. 473-80.)

The two plans, however, are not as far a part as the totals above might indicate. After studying them carefully, I conclude that both plans are reasonable ones. The differences here are difficult "judgment calls," as to which reasonable minds can differ. In the areas where the plans differ, I find that Ms. Econs' plan seems more reasonable in some aspects, while Ms. Fox' plan seems superior in other aspects.

Accordingly, in the following paragraphs I will set forth my conclusions, concerning funds that I will award for home care. These conclusions apply to each of the *first 11 years* from the date of judgment in this case.

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<sup>10</sup>See, e.g., *Stotts v. HHS*, 1990 WL 293856, at \*6 (Cl. Ct. Spec. Mstr. Oct. 11, 1990), and the cases cited therein at footnotes 36 and 37.

<sup>11</sup>Ms. Fox noted that her plan assumes that T.K.'s mother will return to work outside the home. (Tr. 501.) In my resolution, I also assume that T.K.'s mother will return to work, on a full-time basis.

### **A. School days.**

For the 180 school days each year, Ms. Econs assumes that T.K. will attend school 129 days and be absent 51 days. Ms. Fox assumes 155 days of attendance, and 25 days of absence. I conclude that the best estimate falls between those estimates. I conclude that it is likely each year that T.K. will miss about 16 days for seizure clusters (eight clusters times two days each), plus about 14 days for other reasons, or about 30 days total.

For those school days of actual attendance, Ms. Econs would provide six hours of LPN care, while Ms. Fox would provide four LPN hours. I will award funds for *four* hours per day of LPN care (for the afternoon) for those 150 school attendance days, plus two hours of aide care (for the mornings). In this regard, Ms. Econs testified that her plan would provide some LPN hours for the *mornings* of these school days, when T.K.'s parents would be at home. (Tr. 78.) This does not make sense to me, since a non-LPN aide could watch T.K. while the parents got ready for work, and the parents would be available to take over if T.K. had a seizure.

For the 30 school days when T.K. will be *absent* from school, Ms. Econs would provide 12 hours of LPN care, while Ms. Fox would provide 10. I conclude that 10 hours would be sufficient, to provide time for T.K.'s parents to go to work and return.

### **B. Non-school days**

There are 185 non-school days in a year. I will award home care for those days as follows.

First, I deal with the 104 *weekend* days. For six of those weekend days, I will award funds for "full respite" for T.K.'s parents--*i.e.*, 24 hours of LPN care. As proposed by Ms. Econs, I will also award an additional 12 weekend days of "half-time" respite--*i.e.*, 12 hours of LPN care.

That leaves 86 additional weekend days. For those 86 days I will award four hours per day of aide care, as proposed by Ms. Fox.

For the eight major holidays, I will follow Ms. Fox' proposal, and award funds for four hours of aide care. My rationale is that T.K.'s parents will likely want to be with T.K. on such holidays, but the aide care will allow them some relief from the burden of constant supervision of T.K.

Next are 13 non-school, non-holiday days during the school year (Christmas break, spring break, the day after Thanksgiving, etc.). For such days, Ms. Econs proposes 10 hours of LPN care, while Ms. Fox proposes 6 hours of LPN care and 4 hours of aide care. I will follow Ms. Fox' proposal.

Finally, I will deal with 60 non-weekend, non-holiday days during the *summer*. For six of those 60 days, as proposed by Ms. Econs, I will award funds for “full respite” for T.K.’s parents--again, 24 hours of LPN care.

For the other 54 days, Ms. Econs recommends 10 LPN hours, while Ms. Fox recommends 6 LPN hours and 4 aide hours. After consideration, for 36 of those 54 days I will award six LPN hours plus four aide hours, as Ms. Fox proposes. For the other 18 days, I choose to give T.K.’s parents a little additional relief, granting the 10 LPN hours per day proposed by Ms. Econs.

### *C. Hourly rates*

The two parties are also in dispute about the appropriate *hourly rates* for both LPN care and aide care. As to the hourly rate for LPN care, I note that in 2009, the two planners found a local agency that they both agreed could adequately supply LPN care, at a rate of \$38 per hour. (Ex. A, p. 7.) Now, Ms. Econs proposes an hourly rate of \$60, while Ms. Fox proposes \$50. (Ex. 52, pp. 6-7; Ex. K, third-last page.)

Concerning this issue, Ms. Fox’ presentation was more specific and more convincing. She explained that to obtain an hourly rate she contacted a particular agency, an agency that T.K.’s family had requested, and obtained a quote of \$50 per hour. (Tr. 476.) She confirmed that rate as of August 16, 2011. (*Id.*) Ms. Fox also contacted another agency and got a rate of \$45 (Tr. 477), but chose to propose the \$50 rate.

Ms. Econs also seemed to indicate that she obtained her \$60 rate from an agency, but provided no further detail, and did not explain why LPN care would cost more than 50% more in 2010 than it did in 2009. (Tr. 16-17, 47-52.)

Accordingly, I will utilize the hourly rate proposed by Ms. Fox.

As to aide care, Ms. Econs proposes a rate of \$26.50 per hour (Ex. 52, p. 7), while Ms. Fox proposes \$25 per hour. (Ex. K, third-last page.) Neither planner explained her proposed rate at the hearing. I will use a rate of \$26 per hour.

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<sup>12</sup>I computed my figure of 60 days as follows. I consider the “school year” to consist of 40 weeks, or 280 days. (180 school days, 7 holidays and 13 non-school, non-holiday weekdays, and 80 weekend days.) The summer is the remaining 85 days, including 24 weekend days, and 61 weekdays, including one holiday (July 4). 61 weekdays minus one holiday = 60 days.

<sup>13</sup>If T.K.’s parents choose to send her to a camp, these funds would cover the cost of an aide to accompany T.K. to camp, according to Ms. Fox’ figures. (Ex. K, third-last page.)

<sup>14</sup>Finally, I note that my overall resolution of this “home care” issue will provide *substantially more* funds for home care of T.K., over the next 11 years, than would the joint plan to which Ms. Econs agreed in 2009. (Ex. A, pp. 6-7.)

## **9. Residential Care Issues**

T.K. will be unable to care for herself as an adult. Accordingly, the parties agree that the program should provide the funds necessary to place T.K. in a residential facility at age 21. The parties have agreed on a facility that will provide a very high level of care, costing \$122,925 per year. (Ex. M, p. 4, item 6; Ex. 52, p. 8, first item.) There are four contested issues, however, concerning *additional* amounts requested by Petitioner in association with that residential care.

### **A. Room and board**

The facility in question apparently charges an additional amount to residents beyond the above-mentioned yearly charge of \$122,925 for supervision and care of the resident, to which the parties have agreed. The separate charge is for room and board. Ms. Econs in her plan requested \$20,160 for room and board. (Ex. 52, p. 8, last item.) In her plan, however, Ms. Fox stated that the average cost for room and board at the facility is \$5,400 per year. (Ex. K, p. 11 of 19.)

At the hearing, Ms. Econs mentioned her proposed cost for room and board, and indicated that she had obtained her figure by talking to the facility, but did not explain why her cost figure was different than that of Ms. Fox. (Tr. 25, 89-90.) Ms. Fox similarly indicated that she had obtained her figure by talking to someone at the facility, but her testimony, like that of Ms. Econs, was not very helpful to me in deciding this question. (Tr. 491-92.)

The record, thus, leaves me little information on which to choose between the proposals of the two planners. Ms. Fox' proposal seems more likely to be correct, simply based on my own general knowledge of living costs. I will utilize Ms. Fox' figure.

### **B. LPN care**

Petitioner also proposes that I award additional funds--\$647,085 per year--to hire LPNs to attend T.K. 24 hours per day, 365 days per year, while she is at the residential facility. (Ex. 52, p. 8, second item.) The rationale is that the LPN would be available to administer anti-seizure medication if T.K. undergoes seizure activity.

The evidence, however, does not support an additional allotment for this expense. Ms. Fox explained that the residential facility to which the parties have agreed is a "Level 5" facility, which has two LPNs at the facility at all times, always available within five to ten minutes to administer anti-seizure medication if necessary. (Tr. 488-91.) Ms. Econs acknowledged the same fact about the facility. (Tr. 55-57.) Petitioner's own medical expert, Dr. Vlcek, indicated that the above-described Level 5 LPN staffing would be suitable for T.K., and stated that he had never recommended round-the-clock personal LPN staffing for T.K. (Tr. 164.) Respondent's medical expert also confirmed that T.K. would not need a personal LPN within the Level 5 facility. (Tr. 439.)

Based on the evidence described above, I must deny this request of Petitioner.

### *C. Day program*

The parties also disagree concerning funding for a daytime activity program for T.K. when she is in the residential facility. Ms. Econs recommends \$45,000 per year for the activity program itself (Ex. 52, p. 9, first item), while Ms. Fox recommends \$13,200 (Ex. K, p. 11 of 19).

This is a difficult issue. During the evidentiary hearing, each planner gave a substantial and plausible description of her proposed program. (Tr. 25-27, 492-94.) Both proposed programs seems reasonable to me. Ms. Econs explained that she consulted several providers of such day programs, and chose one provider which provides individualized programs, and obtained her cost figure from that provider. (Ex. 52, p. 9; Tr. 25-27.) Ms. Fox also explained that she called a few providers, and obtained a cost figure from one. (Tr. 493-94.)

In these circumstances, I find no strong reason to prefer one proposal over the other. Based on my memory of prior Program cases, in which the parties *stipulated* to an amount for a day program and I wrote no opinion, Ms. Econs' figure strikes me as somewhat high, while Ms. Fox' figure seems a bit low. In most Program cases, the parties reach agreement on issues such as this, so there are few published opinions. But the few published opinions which I have found, which list figures for such day programs, have given varying figures, as follows: *Doe 21 v. HHS*, 2012 WL 219343, at \*3 (Fed.Cl.Spec.Mstr. Jan. 4, 2012)(\$5,283); *Lawson v. HHS*, 2011 WL 310939, at\*7-8 (Fed.Cl.Spec.Mstr. Jan. 12, 2011)(\$22,950); *Suel v. HHS*, 1997 WL 617034, at \*18 (Fed.Cl.Spec.Mstr., Sept. 22, 1997)(\$13,000); *Keller v. HHS*, 1993 WL 34924, at \*8 (Fed.Cl.Spec.Mstr. Jan. 28, 1993)(\$5,750); *Shields v. HHS*, 1994 WL 59273, at \*2 (Fed.C.Spec.Mstr. Feb. 9, 1994)(\$10,400); *Mackler v. HHS*, 1991 WL 211868, at \*3 (Cl.Ct.Spec.Mstr. Oct. 3, 1991)(\$12,000); *Correa v. HHS*, 1991 WL 211885, at \*5, \*8 (Cl.Ct.Spec.Mstr. Sept. 30, 1991)(\$18,900).

I also note that one potential problem with Ms. Fox' figure is that it seems to have been specific to a *particular* program, at a hospital. (Tr. 493-94.) That program might in fact be good for T.K., but I find it reasonable to provide funds sufficient that T.K. can have an ample *range* of programs to choose from, in order to find one that ultimately fits her.

Accordingly, based on all of the evidence, I find it appropriate to utilize a figure in between those proposed by the two planners. I have taken into account that Seattle is likely a fairly high-cost city, and that most of the figures in the cases cited above are from 20 years ago or so. Considering all those factors, I elect to award \$25,000 per year for this item.

Further, because of T.K.'s seizure disorder, she will need to have someone with her at the day program who can administer anti-seizure medication if necessary, as Ms. Econs proposed (Ex. 52, p. 9; Tr. 27.) I therefore find it appropriate to provide additional funds for an LPN attendant to

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<sup>15</sup>I also note that Ms. Econs did not recommend such round-the-clock LPN care in the joint plan filed in 2009, Ex. A.

accompany her to the day program. I thus will provide 15 hours of LPN care (12 hours for the program, three for transportation) at \$50 per hour for that purpose.

This allocation will last from the year 2022 through age 64.

#### ***D. Recreation***

Concerning this item, Ms. Econs proposed \$1,020 for the year 2022, and \$480 annually thereafter. (Ex. 52, p. 9; Tr. 27.) Ms. Fox proposed no funds. (Ex. K, p. 11 of 19.) As to this relatively minor item, I find Ms. Econs' proposal to be reasonable, I will grant the amounts requested.

#### ***10. Indoor Play Area***

Ms. Econs recommended \$625 in the first year to fund a special indoor play area for T.K. (Ex. 52, p. 11; Tr. 29, 95) while Ms. Fox disagreed (Ex. 52, p. 16 of 19; Tr. 498). I will allow the request, because I am persuaded that T.K. does have somewhat different play needs than those of a typical child.

#### ***11. Trampoline***

In her plan, Ms. Econs recommended \$210 in the first year for a trampoline (Ex. 52, p. 11), while Ms. Fox did not address this issue in either her responsive plan or her hearing testimony. I will allow this item.

#### ***12. Adult tricycle***

The planners disagreed about this item. (Ex. 52, p. 12, first item; Ex. K, p. 16 of 19; Tr. 29-30, 497-98.) I found Ms. Econs' testimony on this issue to be persuasive, so I will award \$2,100 in 2022 for this item, then \$210 per year for 20 years thereafter for replacement. (Thus, this provides funds for 30 years of use, which seems sufficient to me.)

#### ***13. Helmet***

Ms. Econs also seemed to indicate at the hearing that there was a dispute about a helmet recommendation, but then seemed to back off of this proposal, so I will not award any funds for a helmet beyond that provided in Ex. M. (Tr. 30-31.)

#### ***14. Computer***

Ms. Econs recommended funds for a computer for T.K. (Ex. 52, p. 12; Tr. 29, 97), while Ms. Fox disagreed (Ex. K, p. 18 of 19; Tr. 496-97). While Ms. Fox is correct that many children in our country have a computer, certainly not all do. I will award funds for this item, \$1,499 in the first year and then \$300 per year for replacement for the next ten years.

### ***15. Medication***

The planners indicated that they had reached agreement on medication costs, as reflected in Ex. M. (Tr. 27.) However, there was some indication at the hearing that the amount of the Diastat medication included in the agreed plan may need to be increased. (Tr. 27-28, 495.) The planners should consult each other and resolve that issue as soon as possible.

### **III**

#### **FURTHER PROCEEDINGS**

In light of the awards that I have made in this ruling, opposing counsel and planners should promptly attempt to agree upon (1) inflation rates for the items and (2) medical insurance offsets. A status conference will be scheduled for a date as soon as possible, at which time we will discuss potential ways to speed resolution of the rest of the “damages” issues.

/s/ George L. Hastings, Jr.

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George L. Hastings, Jr.  
Special Master