

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 09-389V

Filed: November 19, 2012

*****		NOT TO BE PUBLISHED
JILL BARRETT, parent of	*	
KYLIE BARRETT, a minor	*	
	*	Special Master Zane
Petitioner,	*	
v.	*	
	*	Damages; Proffer on Award of
	*	Compensation; Measles-Mumps-Rubella
	*	("MMR") vaccine; Encephalitis
SECRETARY OF HEALTH	*	
AND HUMAN SERVICES,	*	
	*	
Respondent.	*	
	*	

Ronald Craig Homer, Conway, Homer & Chin-Caplan, P.C., Boston, MA, for Petitioner
Heather Lynn Pearlman, United States Dep't of Justice, Washington, DC, for Respondent

UNPUBLISHED DECISION AWARDING DAMAGES¹

On June 10, 2009, Jill Barrett ("Petitioner"), filed a petition seeking compensation under the National Childhood Vaccine Injury Act of 1986, as amended (the "Vaccine Act"), 42 U.S.C. §§ 300aa-10, *et seq.*, alleging that her daughter, Kylie, suffered from a neurological injury as a result of receiving a Measles-Mumps-Rubella ("MMR") vaccine on October 18, 2006. On November 19, 2009, Petitioner filed an Amended Petition alleging that Kylie suffered encephalitis and subsequent developmental delay as a result of receiving a MMR vaccine on October 18, 2006. On December 2, 2009, Respondent filed her Report in accordance with Vaccine Rule 4(c), recommending that compensation under the Act be awarded in this case.

¹ Because this decision contains a reasoned explanation for the Special Master's action in this case, the undersigned special master intends to post it on the website of the United States Court of Federal Claims, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 113 Stat. 2899, 2913 (Dec. 17, 2002). All decisions of the Special Master will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would clearly be an unwarranted invasion of privacy. When such a decision or designated substantive order is filed, a party has 14 days to identify and to move to delete such information before the documents' disclosure. If the Special Master, upon review, agrees that the identified material fits within the banned categories listed above, the Special Master shall delete such material from public access. 42 U.S.C. § 300aa-12 (d)(4); Vaccine Rule 18 (b).

On October 24, 2012, Respondent filed a Proffer on Award of Compensation (“Proffer”), to which Petitioner agrees. Based upon the record as a whole, the undersigned finds the Proffer reasonable and finds that Petitioner is entitled to an award as stated in the Proffer. Pursuant to the Proffer, attached as Appendix A and Tab A thereto, the undersigned awards Petitioner:

- A. A lump sum payment of \$479,039.00, representing the life care expenses expected to be incurred for Year One (\$14,439.00), lost future earnings (\$314,600.00), and actual and projected pain and suffering (\$150,000.00), in the form of a check payable to Jill Barrett as the guardian/conservator of Kylie Barrett;**
- B. A lump sum payment of \$2,561.00, representing compensation for payment for past unreimbursable expenses, in the form of a check payable to Jill Barrett;**
- C. A lump sum payment of \$30,476.00, representing compensation for satisfaction of a Commonwealth of Pennsylvania Medicaid lien, in the form of a check payable jointly to Jill Barrett as guardian/conservator of Kylie Barrett and the Commonwealth of Pennsylvania, Department of Public Welfare; and**
- D. An amount sufficient to purchase an annuity contract, as described in the Proffer, Section II. D., that will provide payments for life care items contained in the life care plan.**

The Court thanks the parties for their cooperative efforts in resolving this matter. In the absence of a motion for review filed pursuant to RCFC Appendix B, the Clerk of the Court is directed to enter judgment consistent with this decision.²

IT IS SO ORDERED.

/s/ Daria J. Zane
Daria J. Zane
Special Master

² Pursuant to Vaccine Rule 11(a), the parties can expedite entry of judgment by each party filing a notice renouncing the right to seek review by a United States Court of Federal Claims judge.

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

JILL BARRETT, parent of)	
KYLIE BARRETT, a minor,)	
)	
Petitioner,)	
)	No. 09-389V
v.)	Special Master Daria J. Zane
)	
SECRETARY OF HEALTH)	
AND HUMAN SERVICES,)	
)	
Respondent.)	

RESPONDENT’S PROFFER ON AWARD OF COMPENSATION

I. Items of Compensation

A. Life Care Items

The parties engaged life care planners Jacquelyn Morris, RN, BSN, CRRN, CNLCP and Maureen Clancy, RN, BSN, CLCP to provide an estimation of Kylie Barrett’s future vaccine-injury related needs. For the purposes of this proffer, the term “vaccine related” is as described in the Rule 4 report filed on December 2, 2009. All items for compensation identified in the far right-hand column of the life care plan, filed on October 23, 2012 as Respondent’s Exhibit B, are supported by the evidence, and are illustrated by the chart entitled Summary of Life Care Items, attached hereto as Tab A.¹ Respondent proffers that petitioner, as the

¹ The chart at Tab A illustrates the annual benefits provided by the 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.

guardian/conservator of Kylie Barrett's estate, should be awarded all items of compensation set forth in the life care plan and illustrated by the chart attached at Tab A. Petitioner agrees.

B. Lost Future Earnings

The parties agree that based upon the evidence in the record, Kylie Barrett will not be able to engage in full-time gainful employment. Therefore, respondent proffers that petitioner should be awarded partial future earnings as provided under the Vaccine Act, 42 U.S.C. § 300aa-15(a)(3)(B). Respondent proffers that the appropriate award for Kylie Barrett's lost future earnings is \$314,600.00. Petitioner agrees.

C. Pain and Suffering

Respondent proffers that petitioner should be awarded \$150,000.00 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). Petitioner agrees.

D. Past Unreimbursable Expenses

Evidence supplied by petitioner documents her expenditure of past unreimbursable expenses related to Kylie Barrett's vaccine-related injury. Respondent proffers that petitioner should be awarded past unreimbursable expenses in the amount of \$2,561.00. Petitioner agrees.

E. Medicaid Lien

Respondent proffers that petitioner should be awarded funds to satisfy the Commonwealth of Pennsylvania Medicaid lien in the amount of \$30,476.00, which represents full satisfaction of any right of subrogation, assignment, claim, lien or cause of action the Commonwealth of Pennsylvania may have against any individual as a result of any Medicaid payments the Commonwealth of Pennsylvania has made to or on behalf of Kylie Barrett 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 26, 2006, under Title XIX of the Social Security Act.

F. Attorneys' Fees and Costs

This proffer does not address final attorneys' fees and costs. Petitioner is entitled to reasonable attorneys' fees and costs, to be determined at a later date upon petitioner filing substantiating documentation.

II. Form of the Award

The parties recommend that the compensation provided to petitioner on behalf of Kylie Barrett 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 **\$479,039.00**, representing compensation for lost future earnings (\$314,600.00), pain and suffering (\$150,000.00), and life care expenses for Year One (\$14,439.00) in the form of a check payable to petitioner as the guardian/conservator of Kylie Barrett. No payments shall be made until petitioner provides respondent with documentation establishing that she has been appointed as the guardian/conservator of Kylie Barrett's estate.

B. A lump sum payment of **\$2,561.00**, representing compensation for payment for past unreimbursable expenses, payable to Jill Barrett, petitioner.

C. A lump sum payment of **\$30,476.00**, representing compensation for satisfaction of the Commonwealth of Pennsylvania Medicaid lien, payable jointly to petitioner as

guardian/conservator of Kylie Barrett and

Commonwealth of Pennsylvania
Pennsylvania Department of Public Welfare
Bureau of Program Integrity
Division of Third Party Liability, Recovery Section
P.O. Box 8486
Harrisburg, PA 17105-8486
Attn: Desiree D. Havasi

Petitioner agrees to endorse this payment to the Commonwealth.

D. An amount sufficient to purchase an annuity contract,² subject to the conditions described below, that will provide payments for the life care items contained in the life care plan, as illustrated by the chart at 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 petitioner as

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 Petitioner authorizes 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

guardian/conservator of the estate of Kylie Barrett, for the benefit of Kylie Barrett, only so long as Kylie Barrett is alive at the time a particular payment is due. At the Secretary's sole discretion, the periodic payments may be provided to petitioner 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 petitioner and do not require that the payment be made in one annual installment.

1. Growth Rates

Respondent proffers that a four percent (4%) growth rate should be applied to all non-medical life care items, and a six percent (6%) growth rate should be applied to all medical life care items, in accordance with the Schedule at Tab A. 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 six percent (6%) compounded annually from the date of judgment for medical items.

2. Life-contingent annuity

Petitioner will continue to receive the annuity payments from the Life Insurance Company only so long as Kylie Barrett 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 Kylie Barrett's death.

3. Guardianship Issues

No payments shall be made until petitioner provides respondent with documentation establishing that she has been appointed as the guardian/conservator of Kylie Barrett's estate. If

petitioner is not authorized by a court of competent jurisdiction to serve as guardian/conservator of the estate of Kylie Barrett, any such payment shall be made to the party or parties appointed by a court of competent jurisdiction to serve as guardian/conservator of the estate of Kylie Barrett upon submission of written documentation of such appointment to the Secretary.

III. Summary of Recommended Payments Following Judgment

A.	Lump sum paid to petitioner as guardian/conservator of Kylie Barrett's estate:	\$479,039.00
B.	Lump sum paid to petitioner:	\$ 2,561.00
C.	Reimbursement for Medicaid lien:	\$ 30,476.00
D.	Reasonable final attorneys' fees and costs:	TBD
E.	An amount sufficient to purchase the annuity contract described above in section II. D.	

Respectfully submitted,

STUART F. DELERY
Acting Assistant Attorney General

RUPA BHATTACHARYYA
Director
Torts Branch, Civil Division

VINCENT J. MATANOSKI
Acting Deputy Director
Torts Branch, Civil Division

LYNN E. RICCIARDELLA
Trial Attorney
Torts Branch, Civil Division

s/ Heather L. Pearlman
HEATHER L. PEARLMAN
Trial Attorney
Torts Branch, Civil Division
U.S. Department of Justice
P.O. Box 146
Benjamin Franklin Station
Washington, D.C. 20044-0146
Tel: (202) 353-2699

DATED: October 24, 2012

Pet. Kylie Barrett
D.O.B. 07/18/2005

DATE: 10/19/12
TIME: 02:51 PM

SUMMARY OF LIFE CARE ITEMS - AGREED LIFE CARE PLAN dated October 12, 2012

ITEM OF CARE	Insurance	Medical Care	Ancillary Services	Medications	Supplies	Transportation	Home Mods	Home Services	TOTALS of Items with a 6.0% Growth Rate	TOTALS of Items with a 4.0% Growth Rate	TOTALS OF 4.0% & 6.0% ITEMS & APPLYING THE GROWTH RATE	
GROWTH RATE	6.0%	6.0%	4.0%	4.0%	4.0%	4.0%	4.0%	4.0%				
AGE	YEAR											
7	2012	2,000.00	75.00	7,924.00	144.00	184.42	768.46	1,700.00	0.00	2,075	10,721	12,796
8	2013	2,000.00	95.00	4,098.00	144.00	58.27	756.91	0.00	0.00	2,095	5,057	7,480
9	2014	2,000.00	75.00	4,318.00	144.00	58.27	505.18	0.00	0.00	2,075	5,025	7,767
10	2015	2,000.00	75.00	4,168.00	144.00	58.27	505.18	0.00	0.00	2,075	4,875	7,956
11	2016	2,000.00	75.00	4,168.00	144.00	58.27	505.18	0.00	0.00	2,075	4,875	8,323
12	2017	2,000.00	75.00	4,408.00	144.00	58.27	505.18	0.00	0.00	2,075	5,115	9,001
13	2018	2,000.00	75.00	4,168.00	144.00	58.27	505.18	0.00	0.00	2,075	4,875	9,112
14	2019	2,000.00	75.00	4,168.00	144.00	58.27	505.18	0.00	0.00	2,075	4,875	9,536
15	2020	2,000.00	95.00	4,408.00	144.00	58.27	505.18	0.00	0.00	2,095	5,115	10,340
16	2021	2,000.00	75.00	4,168.00	144.00	58.27	945.76	0.00	0.00	2,075	5,316	11,072
17	2022	2,000.00	75.00	4,408.00	144.00	58.27	593.29	0.00	0.00	2,075	5,204	11,419
18	2023	2,000.00	75.00	4,168.00	144.00	125.47	593.29	0.00	0.00	2,075	5,031	11,684
19	2024	2,000.00	35.00	4,168.00	144.00	53.48	591.29	0.00	0.00	2,035	4,957	12,031
20	2025	2,000.00	35.00	4,168.00	144.00	53.48	586.49	0.00	0.00	2,035	4,952	12,586
21	2026	2,000.00	55.00	4,168.00	144.00	53.48	586.49	0.00	0.00	2,055	4,952	13,221
22	2027	2,000.00	35.00	956.15	144.00	53.48	110.60	0.00	0.00	2,035	1,264	7,154
23	2028	2,000.00	35.00	716.15	144.00	53.48	107.73	0.00	0.00	2,035	1,021	7,083
24	2029	2,000.00	35.00	716.15	144.00	53.48	107.73	0.00	0.00	2,035	1,021	7,469
25	2030	2,000.00	55.00	716.15	144.00	53.48	107.73	0.00	5,397.60	2,055	6,419	18,869
26	2031	10,668.00	35.00	716.15	120.00	53.48	103.95	0.00	5,397.60	10,703	6,391	45,848
27	2032	10,668.00	35.00	716.15	120.00	53.48	103.95	0.00	5,397.60	10,703	6,391	48,330
28	2033	10,668.00	35.00	716.15	120.00	53.48	103.95	0.00	5,397.60	10,703	6,391	50,950
29	2034	10,668.00	35.00	716.15	120.00	53.48	103.95	0.00	5,397.60	10,703	6,391	53,715
30	2035	10,668.00	35.00	2,216.15	120.00	53.48	103.95	0.00	5,397.60	10,703	7,891	60,332
31	2036	10,668.00	35.00	716.15	120.00	53.48	103.95	0.00	5,397.60	10,703	6,391	59,718
32	2037	10,668.00	35.00	716.15	120.00	53.48	15.83	0.00	5,397.60	10,703	6,303	62,739
33	2038	10,668.00	35.00	716.15	120.00	53.48	15.83	0.00	5,397.60	10,703	6,303	66,167
34	2039	10,668.00	35.00	716.15	120.00	53.48	15.83	0.00	5,397.60	10,703	6,303	69,788
35	2040	10,668.00	35.00	716.15	120.00	53.48	15.83	0.00	5,397.60	10,703	6,303	73,611
36	2041	10,668.00	35.00	716.15	120.00	53.48	15.83	0.00	5,397.60	10,703	6,303	77,650
37	2042	10,668.00	35.00	716.15	120.00	53.48	15.83	0.00	5,397.60	10,703	6,303	81,916
38	2043	10,668.00	35.00	716.15	120.00	53.48	15.83	0.00	5,397.60	10,703	6,303	86,422
39	2044	10,668.00	35.00	716.15	120.00	53.48	15.83	0.00	5,397.60	10,703	6,303	91,182
40	2045	10,668.00	35.00	716.15	120.00	53.48	15.83	0.00	5,397.60	10,703	6,303	96,211
41	2046	10,668.00	35.00	716.15	120.00	53.48	15.83	0.00	5,397.60	10,703	6,303	101,524
42	2047	10,668.00	35.00	716.15	120.00	53.48	15.83	0.00	5,397.60	10,703	6,303	107,137
43	2048	10,668.00	35.00	716.15	120.00	53.48	15.83	0.00	5,397.60	10,703	6,303	113,067
44	2049	10,668.00	35.00	716.15	120.00	53.48	15.83	0.00	5,397.60	10,703	6,303	119,334
45	2050	10,668.00	35.00	716.15	120.00	53.48	15.83	0.00	5,397.60	10,703	6,303	125,956
46	2051	10,668.00	35.00	716.15	120.00	53.48	15.83	0.00	7,196.80	10,703	8,102	141,260

Pet. Kylie Barrett
D.O.B. 07/18/2005

DATE: 10/19/12
TIME: 02:51 PM

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ITEM OF CARE	Insurance	Medical Care	Ancillary Services	Medications	Supplies	Transportation	Home Mods	Home Services	TOTALS of Items with a 6.0% Growth Rate	TOTALS of Items with a 4.0% Growth Rate	TOTALS OF 4.0% & 6.0% ITEMS & APPLYING THE GROWTH RATE	
GROWTH RATE	6.0%	6.0%	4.0%	4.0%	4.0%	4.0%	4.0%	4.0%				
AGE	YEAR											
47	2052	10,668.00	35.00	716.15	120.00	53.48	15.83	0.00	7,196.80	10,703	8,102	148,987
48	2053	10,668.00	35.00	716.15	120.00	53.48	15.83	0.00	7,196.80	10,703	8,102	157,148
49	2054	10,668.00	35.00	716.15	120.00	53.48	15.83	0.00	7,196.80	10,703	8,102	165,768
50	2055	10,668.00	35.00	716.15	120.00	53.48	15.83	0.00	7,196.80	10,703	8,102	174,873
51	2056	10,668.00	35.00	716.15	120.00	53.48	15.83	0.00	7,196.80	10,703	8,102	184,490
52	2057	10,668.00	35.00	716.15	120.00	53.48	15.83	0.00	7,196.80	10,703	8,102	194,649
53	2058	10,668.00	35.00	716.15	120.00	53.48	15.83	0.00	7,196.80	10,703	8,102	205,382
54	2059	10,668.00	35.00	716.15	120.00	53.48	15.83	0.00	7,196.80	10,703	8,102	216,720
55	2060	10,668.00	35.00	716.15	120.00	53.48	15.83	0.00	7,196.80	10,703	8,102	228,700
56	2061	10,668.00	35.00	716.15	120.00	53.48	15.83	0.00	8,996.00	10,703	9,901	253,652
57	2062	10,668.00	35.00	716.15	120.00	53.48	15.83	0.00	8,996.00	10,703	9,901	267,517
58	2063	10,668.00	35.00	716.15	120.00	53.48	15.83	0.00	8,996.00	10,703	9,901	282,161
59	2064	10,668.00	35.00	716.15	120.00	53.48	15.83	0.00	8,996.00	10,703	9,901	297,627
60	2065	10,668.00	35.00	716.15	120.00	322.45	15.83	0.00	8,996.00	10,703	10,170	316,113
61	2066	10,668.00	35.00	716.15	120.00	90.02	14.60	0.00	8,996.00	10,703	9,937	331,511
62	2067	10,668.00	35.00	716.15	120.00	90.02	14.60	0.00	8,996.00	10,703	9,937	349,749
63	2068	10,668.00	35.00	716.15	120.00	90.02	14.60	0.00	8,996.00	10,703	9,937	369,016
64	2069	10,668.00	35.00	716.15	120.00	90.02	14.60	0.00	8,996.00	10,703	9,937	389,370
65	2070	2,523.36	0.00	192.00	0.00	90.02	14.60	0.00	23,871.00	2,523	24,168	309,137
66	2071	2,523.36	0.00	192.00	0.00	90.02	14.60	0.00	23,871.00	2,523	24,168	322,984
67	2072	2,523.36	0.00	192.00	0.00	90.02	14.60	0.00	23,871.00	2,523	24,168	337,474
68	2073	2,523.36	0.00	192.00	0.00	90.02	14.60	0.00	23,871.00	2,523	24,168	352,638
69	2074	2,523.36	0.00	192.00	0.00	90.02	14.60	0.00	23,871.00	2,523	24,168	368,508
70	2075	2,523.36	0.00	192.00	0.00	90.02	14.60	0.00	23,871.00	2,523	24,168	385,119
71	2076	2,523.36	0.00	252.00	0.00	90.02	14.60	0.00	23,871.00	2,523	24,228	403,245
72	2077	2,523.36	0.00	252.00	0.00	90.02	14.60	0.00	23,871.00	2,523	24,228	421,477
73	2078	2,523.36	0.00	252.00	0.00	90.02	14.60	0.00	39,785.00	2,523	40,142	652,390
74	2079	2,523.36	0.00	252.00	0.00	90.02	14.60	0.00	39,785.00	2,523	40,142	680,847
75	2080	2,523.36	0.00	252.00	0.00	90.02	14.60	0.00	39,785.00	2,523	40,142	710,584
76	2081	2,523.36	0.00	252.00	0.00	90.02	14.60	0.00	39,785.00	2,523	40,142	741,661
77	2082	2,523.36	0.00	252.00	0.00	90.02	14.60	0.00	39,785.00	2,523	40,142	774,140
78	2083	2,523.36	0.00	252.00	0.00	90.02	14.60	0.00	39,785.00	2,523	40,142	808,087
79	2084	2,523.36	0.00	252.00	0.00	90.02	14.60	0.00	39,785.00	2,523	40,142	843,571
80	2085	2,523.36	0.00	252.00	0.00	90.02	14.60	0.00	39,785.00	2,523	40,142	880,663
		494,426	2,590	103,282	7,416	5,208	10,767	1,700	775,530	497,016	903,903	15,453,711
		35.29%	0.18%	7.37%	0.53%	0.37%	0.77%	0.12%	55.36%			100.00%