

# In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 08-0750V

Filed: November 22, 2011

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ENJOLI GRAVES, legal	*	UNPUBLISHED
representative of her minor child,	*	
EMMA OLIVIA GRAVES,	*	Damages Decision Based on Proffer
	*	
Petitioner,	*	
	*	
v.	*	
	*	
SECRETARY OF HEALTH	*	
AND HUMAN SERVICES,	*	
	*	
Respondent	*	

\*\*\*\*\*

Richard Alan Rozanski, Alexandria, LA, for petitioner.

Chrysovalantis Panagiotis Kefalas, Washington, DC, for respondent.

## **DECISION AWARDING DAMAGES<sup>1</sup>**

On October 22, 2008, petitioner, Enjoli Graves, filed a petition seeking compensation under the National Vaccine Injury Compensation Program (“the Vaccine

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<sup>1</sup> Because this decision contains a reasoned explanation for the undersigned’s action in this case, the undersigned intends to post this decision 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). As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction “of any information furnished by that party: (1) that is a trade secret or commercial or financial in substance and is privileged or confidential; or (2) that includes medical files or similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy.” Vaccine Rule 18(b). Otherwise, “the entire” decision will be available to the public. Id.

Program”).<sup>2</sup> In the petition, petitioner alleged that Emma Oliva Graves, her minor child, suffered a permanent and severe neurologic injury as a direct result of her receipt on November 3, 2005 of pertussis antigen-containing vaccine.

Respondent has conceded that petitioner is entitled to compensation because she has proven that Emma suffered an encephalopathy as defined by the Vaccine Injury Table, 42 C. F. R. § 100.3(b)(2).

On November 21, 2011, respondent filed a Proffer on Award of Compensation (Proffer). Based on the record as a whole, the undersigned finds that petitioners are entitled to an award as stated in the Proffer. Pursuant to the terms stated in the attached Proffer, the court awards petitioners:

1. A lump sum payment of \$933,102.43, representing compensation for life care expenses expected to be incurred during the first year after judgment (\$39,968.10), lost future earnings (\$664,733.27) and pain and suffering (\$228,401.06), in the form of a check payable to petitioner, as the court appointed guardian(s)/tutrix of Emma Graves, for the benefit of Emma Graves. No payments shall be made until petitioner provides respondent with documentation establishing that she has been appointed as the guardian/tutrix of Emma Grave’s estate;
2. A lump sum payment of \$768.40, representing compensation for past unreimbursable expenses, payable to Enjoli Graves, petitioner;
3. A lump sum payment of \$4,854.64, representing compensation for satisfaction of the State of Louisiana Medicaid lien, payable jointly to petitioner and

Louisiana Department of Health and Hospitals  
Bureau of Health Services Financing  
543 Spanish Town Road  
Baton Rouge, LA 70802  
Attn: Ms. Velma Gray

Petitioner agreed to endorse this payment to the State.

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<sup>2</sup> National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755 (the “Act”). Hereinafter, for ease of citation, all “§” references to the Vaccine Act will be to the pertinent subparagraph of 42 U.S.C. § 300aa (2006).

4. An amount sufficient to purchase an annuity contract, subject to the conditions described in paragraph II. D. of the attached Proffer, paid to the life insurance company from which the annuity will be purchased.<sup>3</sup>

In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court is directed to enter judgment herewith.<sup>4</sup>

**IT IS SO ORDERED.**

s/Patricia E. Campbell-Smith  
Patricia E. Campbell-Smith  
Chief Special Master

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<sup>3</sup> At respondent's discretion, respondent may purchase one or more annuity contracts from one or more life insurance companies.

<sup>4</sup> Pursuant to Vaccine Rule 11(a), entry of judgment is expedited by the parties' joint filing of notice renouncing the right to seek review.



compensation set forth in the joint 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 of record, Emma Graves will never be gainfully employed. Therefore, respondent proffers that petitioner 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 Emma Graves's lost future earnings is \$664,733.27. Petitioner agrees.

C. Pain and Suffering

Respondent proffers that petitioner should be awarded \$228,401.06 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 Emma Graves's vaccine-related injury. Respondent proffers that petitioner should be awarded past unreimbursable expenses in the amount of \$768.40. Petitioner agrees.

E. Medicaid Lien

Respondent proffers that petitioner should be awarded funds to satisfy the State of Louisiana lien in the amount of \$4,854.64, which represents full satisfaction of any right of subrogation, assignment, claim, lien, or cause of action the State of Louisiana may have against any individual as a result of any Medicaid payments the State of Louisiana has made to or on

behalf of Emma Graves 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 November 3, 2005, under Title XIX of the Social Security Act.

**II. Form of the Award**

The parties recommend that the compensation provided to petitioner 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 \$933,102.43, representing compensation for lost future earnings (\$664,733.27), pain and suffering (\$228,401.06), and life care expenses for Year One (\$39,968.10), in the form of a check payable to petitioner as guardian/tutrix of Emma Graves, for the benefit of Emma Graves. No payments shall be made until petitioner provides respondent with documentation establishing that she has been appointed as the guardian/tutrix of Emma Graves's estate;

B. A lump sum payment of \$768.40, representing compensation for past unreimbursable expenses, payable to Enjoli Graves, petitioner;

C. A lump sum payment of \$4,854.64, representing compensation for satisfaction of the State of Louisiana Medicaid lien, payable jointly to petitioner and

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543 Spanish Town Road  
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Attn: Ms. Velma Gray

Petitioner agrees to endorse this payment to the State.

D. An amount sufficient to purchase an annuity contract,<sup>2</sup> 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 company<sup>3</sup> from which the annuity will be purchased.<sup>4</sup> 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 guardian/tutrix of the estate of Emma Graves, for the benefit of Emma Graves, only so long as Emma Graves 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.

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<sup>2</sup> At respondent's discretion, respondent may purchase one or more annuity contracts from one or more life insurance companies.

<sup>3</sup> 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.

<sup>4</sup> 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 Injury Compensation Program System of Records, No. 09-15-0056.

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. Petitioner agrees.

2. Life-contingent annuity

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

3. Guardianship/Tutorship

No payments shall be made until petitioner provides respondent with documentation establishing that she has been appointed as the guardian/tutrix of Emma Graves's estate. If petitioner is not authorized by a court of competent jurisdiction to serve as guardian/tutrix of the estate of Emma Graves, any such payment shall be made to the party or parties appointed by a court of competent jurisdiction to serve as guardian/tutor of the estate of Emma Graves 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/tutrix of Emma Graves's estate:	\$ 933,102.43
B.	Lump sum paid to petitioner:	\$ 768.40
C.	Reimbursement for Medicaid lien:	\$ 4,854.64
D.	An amount sufficient to purchase the annuity contract described above in section II. D.	

Respectfully submitted,

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Assistant Attorney General

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Torts Branch, Civil Division

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Dated: November 21, 2011

**Appendix A: Items of Compensation for Emma Graves**

ITEMS OF COMPENSATION	G.R.	*	M	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
				2011	2012	2013	2014	2015	2016	2017	2018
BCBS Deductible	5%			350.00	350.00	350.00	350.00	350.00	350.00	350.00	350.00
Medicare Part B Premium	5%		M								
Medicare Part B Deductible	5%										
Pediatric Care/Internist	5%	*		40.00	40.00	40.00	40.00	40.00	40.00	40.00	40.00
Neurology	5%	*		20.00	20.00	20.00	40.00				
Physical Medicine and Rehab	5%	*									
Medications	5%			100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00
EEG	5%	*		22.50			22.50			22.50	
Computer	4%			1,000.00					1,000.00		
Educational Software	4%			200.00	200.00	200.00	200.00	200.00	200.00	200.00	200.00
ST	4%	*	M	16,398.00	960.00	960.00	960.00	960.00	960.00	960.00	960.00
OT	4%	*	M	3,465.60	2,056.20	2,056.20	2,056.20	2,056.20	2,056.20	2,056.20	2,056.20
Social Skills Group	4%			900.00	900.00	900.00	900.00	900.00	900.00	900.00	900.00
Behavioral Therapy	4%	*					480.00	480.00	480.00		
Neuro-psychological Testing	4%				1,627.01		1,627.01		1,627.01		1,627.01
Adult Therapy	4%	*									
Home Care and Assistance	4%		M	17,472.00	17,472.00	17,472.00	17,472.00	17,472.00	17,472.00	17,472.00	17,472.00
Residential or Home Care	4%		M								
Lost Future Earnings				664,733.27							
Pain and Suffering				228,401.06							
Past Unreimbursable Expenses				768.40							
Medicaid Lien				4,854.64							
<b>Annual Totals</b>				<b>938,725.47</b>	<b>23,725.21</b>	<b>22,098.20</b>	<b>24,247.71</b>	<b>22,558.20</b>	<b>25,185.21</b>	<b>22,100.70</b>	<b>23,705.21</b>

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 the court-appointed guardian/tutrix of the estate of Emma Graves, for the benefit of Emma Graves, for lost future earnings (\$664,733.27), pain and suffering (\$228,401.06), and Yr 1 life care expenses (\$39,968.10): \$933,102.43.  
 As soon as practicable after entry of judgment, respondent shall make the following payment to petitioner, Enoli Graves, for past un-reimbursable expenses: \$768.40.  
 As soon as practicable after entry of judgment, respondent shall make the following payment jointly to petitioner and the State of Louisiana, as reimbursement of the state's Medicaid lien: \$4,854.64.  
 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.  
 Items denoted with an "M" payable in 12 monthly installments at the discretion of respondent.

**Appendix A: Items of Compensation for Emma Graves**

ITEMS OF COMPENSATION	G.R.	*	M	Compensation Year 9 2019	Compensation Year 10 2020	Compensation Year 11 2021	Compensation Year 12 2022	Compensation Years 13-33 2023-2043	Compensation Years 34-Life 2044-Life
BCBS Deductible	5%			350.00	350.00	350.00	350.00		
Medicare Part B Premium	5%		M						1,384.80
Medicare Part B Deductible	5%								162.00
Pediatric Care/Internist	5%	*		40.00	40.00	40.00	40.00	260.00	52.00
Neurology	5%	*							
Physical Medicine and Rehab	5%	*		20.00	20.00	20.00	20.00	125.00	25.00
Medications	5%			100.00	100.00	100.00	100.00	100.00	100.00
EEG	5%	*			22.50				
Computer	4%					1,000.00			
Educational Software	4%			200.00	200.00	200.00	200.00		
ST	4%	*	M	960.00	960.00	960.00	960.00		
OT	4%	*	M	2,056.20	2,056.20	2,056.20	2,056.20		
Social Skills Group	4%								
Behavioral Therapy	4%	*							
Neuro-psychological Testing	4%				1,627.01		1,627.01		
Adult Therapy	4%	*						1,340.00	268.00
Home Care and Assistance	4%		M	17,472.00	17,472.00	17,472.00	17,472.00		
Residential or Home Care	4%		M					61,320.00	61,320.00
Lost Future Earnings									
Pain and Suffering									
Past Unreimbursable Expenses									
Medicaid Lien									
<b>Annual Totals</b>				<b>21,198.20</b>	<b>22,847.71</b>	<b>22,198.20</b>	<b>22,825.21</b>	<b>63,145.00</b>	<b>63,311.80</b>

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 the court-appointed guardian/tutrix of the estate of Emma Graves, for the benefit of Emma Graves, for lost future earnings (\$664,733.27), pain and suffering (\$228,401.06), and Yr 1 life care expenses (\$39,968.10): \$933,102.43.

As soon as practicable after entry of judgment, respondent shall make the following payment to petitioner, Enoli Graves, for past un-reimbursable expenses: \$768.40.

As soon as practicable after entry of judgment, respondent shall make the following payment jointly to petitioner and the State of Louisiana, as reimbursement of the state's Medicaid lien: \$4,854.64.

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.

Items denoted with an "M" payable in 12 monthly installments at the discretion of respondent.