OFFICE OF SPECIAL MASTERS
98-103V

Filed: January 30, 2002

CATHLEEN MACRELLI and DONALD MACRELLI on behalf of DAVID MACRELLI, deceased,	*	
Petitioners,	*	
	*	TO BE PUBLISHED
v.	*	
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,	*	
Respondent.	*	

Peter H. Meyers, Washington, D.C., for Petitioners.

David L. Terzian, United States Department of Justice, Washington, D.C., for Respondent.

DECISION ON ATTORNEY'S FEES AND COSTS

French, Special Master.

This matter is before the Special Master on Petitioners' Application for Attorney's Fees and Costs (hereinafter "Application") filed under 42 U.S.C. §300aa-15(e), the National Childhood Vaccine Injury Act of 1986 (hereinafter "the Program") and Vaccine Rule 13 adopted by the United States Court of Federal Claims.[1] The parties seek a ruling on the reasonableness of Petitioners' request for fees and costs incurred during the prosecution of this case. Respondent maintains that Petitioner's request is excessive.

Petitioners in this case engaged the legal services of the George Washington

[1] The National Vaccine Injury Compensation Program comprises Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755 (codified as amended at 42 U.S.C.A. §§ 300aa-1 through -34 (West 1991 & Supp. 1998)). References shall be to the relevant subsection of 42 U.S.C.A. § 300aa.

University Vaccine Injury Law Clinic. The clinic has been operational since 1995 and was established for the principal purpose of representing petitioners in vaccine cases who were having difficulty obtaining counsel. Professor Peter Meyers, a Professor of Law at the George Washington University, supervises the clinic and follows the student practice rule of the U.S. Court of Federal Claims. Under Professor Meyers' supervision, the Clinic has entered appearances in 38 cases to date and brought 27 cases to conclusion. At this time, eleven cases are still pending before the court.

Neither Professor Meyers nor any of his students receive remuneration for their efforts for participation in these cases. The students prepare and participate in the cases, but all funds go to George Washington University to support the ongoing availability of the clinic. Professor Meyers is compensated by George Washington University in his capacity as a professor. That factor does not negate additional fees for lawyering if adequate explanations for such fees are provided. This court has awarded attorney's fees and costs to the Clinic since its inception. Respondent does not object to an award, but challenges the reasonableness of the amount requested in Petitioner's Application for fees and costs.

In the court's effort to ascertain prior policies and practice that might prove useful in guiding the court's ruling, Professor Meyers provided the following information: He states that attorney's fees have been requested in twenty clinic cases. In all 20 cases, the parties have settled the issue of fees. In a majority of the cases in which the clinic has entered into settlement of fees and costs, according to Professor Meyers, the clinic accepted a reduction in the total amounts initially requested. The instant case is the first and only case in which fees and costs have been contested rather than settled. On two separate occasions, the court ordered the parties to discuss the possibility of settlement, negotiation, and/or ADR as alternative means of resolving their disagreements. All such efforts met with bitter failure. Inasmuch as the total amount requested appears to be comparable to amounts in other cases reviewed by the court, the court is disappointed that the parties could not come to an amicable agreement. Other factors appear to be at issue. The court is thus obligated to address each item being contested and has done so.

Factual and Procedural Case Background

On February 9, 1998, Petitioners filed their claim in this court alleging that the death of their infant son, David Macrelli, was the result of a Diphtheria-Pertussis-Tetanus vaccine administered on September 10, 1996. Two hearings were held in this matter. The first hearing was held on February 3, 2000, in Boston, Massachusetts. Petitioners presented the testimony of David's biological parents, Dr. Marcel Kinsbourne, pediatric neurologist, and Dr. John Shane, pathologist. Respondent presented the testimony of Dr. Joel Rutman, pediatric neurologist, and Dr. Virginia Anderson, pediatric pathologist. On March 3, 2000, a second hearing was held in Boston, Massachusetts, to allow Petitioners to present the additional testimony of Dr. Jennifer Lipman, medical examiner for the Commonwealth of Massachusetts who observed the child in death.

On June 8, 2000, the parties attempted to reach a negotiated settlement through an Alternative Dispute Resolution (ADR) proceeding held also in Boston. Settlement efforts were unsuccessful, and on July 14, 2000, this court filed a decision awarding compensation for the vaccine-related death of the the infant David Macrelli. Judgment was entered by the Clerk of the Court on August 15, 2000.

On January 18, 2001, Petitioners filed their Application in accord with statutory provisions, seeking a total award of $56,861.53 ($38,920.00 for fees and $16,683.80 for litigation costs.). Pursuant to General Order #9, Petitioners filed the required affidavits to be reimbursed for $1,257.73 in Petitioners' own litigation costs. This amount is included in the total award.

On March 6, 2001, Respondent filed an Opposition to Petitioners' Application, arguing that the amount claimed was excessive and unreasonable and should be adjusted. On May 2, 2001, Petitioners filed a supplemental petition in support of their claims including a request for an additional $600 for time spent to prepare their May 2, 2001 memorandum. On May 17, 2001, Respondent notified the court that Respondent would not file a reply.

II
Discussion

A. The relevant statutory provision and case law

Under the Vaccine Program, the court may award attorney's fees and costs if a petition is brought "in good faith and if a reasonable basis for the claim exists."[2] The parties do not dispute Petitioners' claim that this case was legitimate, filed in good faith, and had a reasonable basis. The issue here is whether the amount of Petitioners' request is reasonable and appropriate.

The relevant statutory provision reads as follows:

> (1) In awarding compensation on a petition filed under section 300aa-11 of this title the special master or court shall also award as part of such compensation an amount to cover–
> (A) reasonable attorney's fees, and
> (B) costs, incurred in any proceeding on such petition.[3]

Traditionally, this court has employed the lodestar method to determine reasonable

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[2] See, 42 U.S.C. §300aa-15(e)(1).

[3] See, 300aa-15(e).

attorneys fees and costs.[4] "The initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate."[5] The court is given considerable discretion in this matter. For example, the court may adjust the initial estimate if a fee is charged out of time with the nature of the services.[6]

To determine the number of hours reasonably expended in a particular case, the court must "exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice is ethically obligated to exclude such hours from his fee submission."[7] The reasonableness of an attorney's fee, according to Blum, 465.U.S. at 896, is to be calculated "according to the prevailing market rates in the relevant community."[8] Local prevailing rates, however, are not the sole considerations. The court is free to apply other considerations as well, as will be discussed hereafter.

The burden is on the applicant to produce satisfactory evidence–in addition to the attorney's own affidavits–that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.

Award Amounts

B. Hourly Rates

Petitioners request an hourly rate of $200 for attorney Peter Meyers, for a total of $38,920.00 in attorneys' fees. In earlier cases before the undersigned Special Master, the court has allowed Professor Meyers the hourly rate of $175 for his legal services. Respondent objects to a $200 hourly rate for Professor Meyers, arguing that such rate is unreasonable and unsupported.

Respondent argues that no credible evidence of the prevailing market rate in the relevant community for comparable services has been provided, alleging that cases cited by Professor Meyers in support of his requested rate bear little resemblance to proceedings under the Vaccine Act. Respondent maintains further that Professor Meyers offers no evidence that Vaccine cases would merit comparable hourly rates. Respondent submits that

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[4] See, Beck v. Sec'y of HHS, 924 F.2d 1029, 1037-39 (Fed. Cir. 1991); Blanchard v. Bergerson, 489 U.S. 87, 94 (1989); Blum v. Stenson, 465 U.S. 886, 888 (1984); Hensley v. Eckart, 461 U.S. 424, 434 (1983).

[5] Blanchard, 489 U.S. at 94 (quoting Blum, 465 U.S. at 888).

[6] See, Pierce v. Underwood, 487 U.S. 552, 581 (1988)(Brennan J., concurring).

[7] Hensley, 461 U.S. at 434.

[8] Blum, 465 U.S. at 896.

vaccine cases are "less complicated and require less expertise than traditional tort litigation",[9] and urges the court to award an hourly rate of $175 for Professor Meyers. Respondent does not object to the hourly rate of $50 requested for each of the participating student attorneys.

Proof of prevailing market rates may be demonstrated in a number of ways: (1) affidavits of other attorneys or experts; (2) citations to prior precedents showing reasonable rate adjudications for comparable fee applicants in comparable cases; (3) references to fee award studies showing reasonable rates in comparable communities; (4) testimony of experts or of other attorneys in the relevant local community; (5) discovery rates charged by the opposing party; (6) experience and reputation, and (7)[10] reliance on the court's own expertise to recognize applicable prevailing rates[11]

Professor Meyers' own affidavit is the primary evidence supporting his request for an increase in his hourly rate. He argues that he has been practicing law for over 25 years; he has taught continuously at the George Washington University Law School since 1982 in addition to his current teaching responsibilities with the Vaccine Injury Clinic. He proposes that his hourly rate should be based on prevailing rates in Washington, D.C.

The Guidelines for Practice Under the National Vaccine Injury Compensation Program[12] and case, law as well,[13] require Petitioners to bear the burden of proof by providing evidence to support the claimed hourly rate. This evidence should state "what the affiant actually charges and receives on an hourly basis. Vague affidavits merely opining that the claimed rate is reasonable, without giving the factual basis for such opinion, are of no value."[14] Based on these findings, Respondent proposes that Professor Meyers has not adequately supported his request.

Professor Meyers, does not charge fees. His students do not receive remuneration. Inasmuch as Professor Meyers does not charge or receive an hourly rate, this court cannot apply the parties' suggested criterion. The court proposes to follow an alternative method of determining an appropriate hourly rate.

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[9] Respondent's Opposition to Petitioners' Application for Attorneys' Fees and Costs at p. 4 (Filed March 6, 2001)(hereinafter, "Opposition").

[10] Blum at 886.

[11] Newberg, Attorney Fee Awards 198 (1986).

[12] Guidelines for Practice under the National Vaccine Injury Compensation Program, Office of Special Masters, U.S. Court of Federal Claims (September 1996)(hereinafter, "Guidelines").

[13] See, Edgar v. Secretary of HHS, No. 90-711V, 1994 WL 256609, at *2 (Fed. Cl. Spec. Mstr. May 27, 1994), aff'd 32 Fed. Cl. 506 (1994), citing Blum v. Stenson, 465 U.S. 886, 895 (1984); Corder v. Secretary of HHS, No. 97-125V, 1999 WL 1427753 (Fed. Cl. Spec. Mstr. Dec. 22, 1999).

[14] Guidelines at 32.

First, Respondent's characterization of the level of difficulty in Vaccine cases does not comply with the Court's experience. The undersigned is persuaded that cases under the Vaccine Program are no less less difficult than ordinary tort litigation in spite of relaxed rules intended to simplify Petitioner's onerous burden of proof caused by revisions in the Vaccine Injury Table. These changes force petitioners to follow the method of proof commonly described as "Causation-in-Fact. Very few petitioners are able to establish an "on-Table case" nor meet the revised requirements that would allow them a presumption in Petitioners' favor.

As discussed by Chief Special Master Golkiewicz, when considering attorney's fees in another case:

> [D]ifficult issues are encountered in vaccine cases with relative frequency and many claims require as much preparation as traditional tort action. . . . [M]ost claims take several years to resolve and the awards may amount to millions over a Petitioner's lifetime. The effective presentation of these cases requires knowledgeable, able, and experienced counsel. . . While the rules of procedure are relaxed, complex legal and medical issues persist.[15]

The Court in the Erickson case presented an example of a reasonable alternative method for determining fees award and provides a better and more viable way of determining appropriate hourly rates in vaccine cases. The Erickson decision based its analysis on recent case law as it relates to the Vaccine program itself rather than a comparison of prevailing fees charged in the community at large for attorneys' fees. The Chief Special Master awarded attorney Curtis Webb of Twin Falls Idaho, an hourly rate of $175 after determining that Mr. Webb's extensive knowledge of the Program, his considerable skill and expertise, and his unblemished reputation made him one of the most competent attorneys practicing-Program-wide, under this Vaccine act; "he is an advocate at the high end of the spectrum." Id. at 7: The Court explained further:

> While the lodestar analysis using the locality approach generally yields a range of reasonable hourly rates, the data is often unsatisfactory in determining the final rate. Thus the court has resorted to the second avenue of examination, reviewing this lodestar figure in light of the [Vaccine Program bar]. Comparing the fees award to other Program attorneys functions to select the appropriate rate from the range of reasonable rates by objectively comparing attorney's performance, experience, and reputation before this court and the hourly rates awarded to them.[16]

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[15] Erickson v. HHS, No. 96-361v, 199 WJL 12568149 (Fed. Cl. Sp. Mstr. Dec. 10, 1999

[16] Id Slip op. at p. 5. Respondent argues that an hourly rate of $175.00 is reasonable and appropriate for Mr. Meyers based on the hourly fee awarded to Mr. Curtis Webb of Twin Falls, Idaho. This suggestion further reinforces the court's decision that a higher fee shall be awarded to take into account the differences in cost of living between Twin Falls, Idaho and Washington, D.C.

The court finds that the wide range of fees in the local geographic community-- in this case--the District of Columbia-- need not be the sole nor even the predominant arbiter of the attorney's hourly fees in vaccine cases. The Vaccine Injury Clinic at George Washington University is often the last resort for many petitioners. Not only do student attorneys benefit from Professor Meyers' supervision in litigation skills, the court and Petitioners benefit as well from availability of the clinic as an option for clients under circumstances in which private attorneys decline to take their case. The undersigned chooses to follow the Erickson Court in determining fees in this case. Over the twelve years of presiding in Vaccine cases, this court has identified a number of individual Program attorneys throughout the Unites States, in Virginia, New Jersey, the District of Columbia, California and other communities (including Idaho) who demonstrate professionalism, effectiveness, and high quality performance. This court agrees that in addition to the general lodestar method, "the national market," in other words, "the Program-wide approach" as defined by Chief Special Master Golkiewicz, provides a reasonable basis for hourly rates between $175 and $200. The court agrees that Professor Meyers merits a modest increase in his hourly rate based on his years of service, the special services provided under his management, and the level of difficulty demonstrated in this particular case.[17] The court finds that $190 is an appropriate hourly rate.

C. Hours Expended

1. Professor Peter Meyers

Petitioners request reimbursement for 145.8 hours of attorney time for the services of Professor Peter Meyers. According to Professor Meyers' affidavit, this request includes 25.5 hours for time spent meeting with students. To avoid duplicate billing, those hours were included in Professor Meyers' projected claim rather than including them in the student-attorneys' billable hours. Respondent raises objections, arguing that 145.8 hours is excessive, and that this case was not complex, insisting that the total request of attorney hours is *per se* unreasonable. Moreover, Respondent objects to reimbursement for student attorney meetings with Professor Meyers' students and maintains that those hours should be discounted. In reply, Professor Meyers argues that "all such listed student meetings were to discuss issues involved in the litigation, were never used for irrelevant discussions of legal educational matters (emphasis in the original),"[18] and insists that they were careful to avoid double billing.

One District court has provided reasonable guidelines in this matter. The court in Loney v. Scurr[19], held that "professors can recover only those fees that are derived from direct lawyering that the [faculty] supervisors find it necessary to perform in order to ensure that the case is properly litigated." A second [or other multiple counsel, as in this case] does not

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[17] See, e.g. Slay v. Secretary of H. H. S., No 00-289V, 2001 WL 1168103 (Fed. Cl. Spec. Mstr. Sept. 13, 2001)(Court awarded $195 per hour for attorney of comparable credentials.)

[18] Petitioner's Reply to Respondent's Opposition to Application for Attorneys' Fees and Costs at p. 4, para. 4 (Filed May 2, 2001)(hereinafter, Petitioner's Reply).

[19] Loney v. Scurr, 494 F. Supp. 928, 930 n. 2 (S.D. Iowa 1980).

necessarily mean that all such communications would be necessarily compensable. [20] Other cases have held that such meetings could easily be characterized as excessive, and do not support compensation for student/faculty meetings. [21]

Student meetings undoubtedly serve a necessary role. A description of the issues discussed might have assisted the court to assess the litigative value of such meetings as would also a description of the basis for claiming hours requested. Without more information, the court has no way of knowing the process by which Professor Meyers conveys the required supervision for student litigation. Petitioners' Fee Application was deficient in this regard. The outcome of this case reveals that Professor Meyers' judgment was sound. Absent additional details however, the court will reduce the number of compensable hours for student meetings by half.

Respondent objects also to 26.9 hours claimed for "reviewing case files" arguing that such activity is "a vague and ambiguous statement" and that the court should reduce such hours by half. In rebuttal, Petitioners contend that it is sufficient to document time required to review case files without specifying independent documents because case files consist of hundreds of pages of complex medical records, autopsy records, expert reports, and multiple pleadings. This issue of inadequately documented case file review was addressed by the Chief Special Master in Edgar [22] vis a vie the number of hours claimed. In order to determine what was appropriate, the Chief Special Master referred to the amount of attorneys' fees awarded in a number of other cases that involved either significant legal issues, or were prolonged and hard fought [as here]. That method was not necessary in this case. The court's review of the Macrelli activities reveals that most of the hours claimed were, in fact, sufficiently detailed and described. Only a few could conceivably be construed as "broad" or "vague." Because prosecution of this case lagged over a period of three years, more than one review of the case files would have been sound practice.

As to the relative difficulty of this case, contrary to Respondent's characterization, the undersigned considers the Macrelli proceedings to have been exceptionally problematical, protracted, complex, excessively adversarial, and, plagued with unpleasant discourteous incidents affecting negatively the professionalism required in this and any other case. The Macrelli family and Professor Meyers' students complained about a lack of courtesy.

As a result of a review of several cases, the court finds that the total request for attorney hours is comparable to many other vaccine cases of similar difficulty and outcome. The length of time required for resolution added to the difficulty of this case. Litigation took three years from the date of filing to the date of the final award. The proceedings required two hearings, and one attempted but unsuccessful ADR session. Under the circumstances, 26.9 hours to review documents and case files would not have been amiss. The court agrees to a modest

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[20] Id.

[21] Id.

[22] Edgar - S.M. Golkiewicz - No. 90-711V, 1994 WL 256609 (Fed. Cl. Spec. Mstr. May 27, 1994), *aff'd* by 32 Fed. Cl. 506 (1994).

adjustment for student meetings; but no reduction for case file reviews is indicated. The court finds that Professor Meyers should be compensated for 133 hours for legal services.

2) Law Students

a) Tracy Parks

Petitioners request reimbursement for 52.4 hours of student-attorney time for the services of Ms. Tracy Parks. Respondent proposes that 15 hours be deducted because they constituted an unreasonable expenditure of time, to wit, Ms. Parks spent approximately 15 hours drafting a Motion for Partial Sequestration of Witnesses.[23] There was no support in case law, under the program, or under federal law, that would uphold such a motion in proceedings in which witnesses are used not as fact witnesses, but as expert witnesses.[24] In reply, Petitioners contend that the "special master [has] the discretion to exclude experts if the master deems it advisable, and nothing in the rule prohibits a party to argue for exclusion in a particular case."[25]

The court agrees that these hours should be discounted but not for the reasons argued by Respondent. Ms. Parks' motion was not frivolous, but it was irrelevant to the proceedings before this court. Such motions are usually made orally before the hearing begins and are either granted or denied by a bench ruling. A more experienced attorney would have known this and moved by simple motion without spending so much time on the subject. Her request, however will be reduced by 15 hours. The court will allow 37.4 hours for Ms. Park's legal services.

b) Mr. Richard Reiter

Petitioners request reimbursement for 49.2 hours of student-attorney time for the services of Mr. Richard Reiter. Respondent argues that Mr. Reiter's hours should be deducted by a third given that some of his entries are secretarial in nature. The court agrees that time spent performing secretarial tasks is to be subsumed in the overhead costs of practicing law and is not reimbursable. The court acknowledges that those hours very likely represent actual time spent performing the duties claimed. Those hours, however, do not qualify as "lawyering" and will not be reimbursed.[26] An additional 1.1 hour, will also be reduced for time spent in "researching and reviewing a Motion in Limine." The motion was never filed with the court, was unnecessary, and irrelevant to the case.

Respondent maintains also that Mr. Reiter's fee application should be reduced for the

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[23] Motion was filed on December 20, 1999. The motion was denied on January 3, 2000.

[24] Opposition at p. 11.

[25] Vaccine Rules, Analysis of Public Comments Re Vaccine Rules (November 2000).

[26] The entries in questions are the following: 11/19/99-Print and Fax letter to experts (.9hours); 11/20/99-Fax Expert Reports (.1 hours); 11/23/99-Fax Dr. Kinsbourne article to clinic (.1 hours); 11/23/99-Fax draft affidavit for Donald Macrelli to Macrellis (.1 hours); 12/1/99-Case File Maintenance (.8 hours).

amount of time spent learning and practicing his opening statement and revising his closing statements. Mr. Reiter claims18.6 hours performing those tasks. The fact that he read both statements is irrelevant.[27] The court agrees that the program should not bear the burden for fully compensating Mr. Reiter's learning experience. Thus, the low hourly fee of $50 compensates for the expectation that student-attorneys will take more time performing certain tasks than will experienced attorneys. Currently, $50 is less than the amounts paralegals may receive under the program.[28] Accordingly the court finds that Mr. Reiter is entitled to 45.6 hours.

c) Ms. Courtney Johnson

Petitioners are claiming that Ms. Johnson performed roughly the same number of hours (49.2 hours) of legal services as Mr. Reiter claims. Petitioner did not submit contemporaneous time records for Ms. Johnson in the fee Application, and her request is, admittedly, an approximation only. Respondent objects to this request as being inappropriate inasmuch as Ms. Johnson has failed to follow the legal guidelines for substantiating her claim. Ms. Johnson participated in preparation of the original fee Application and participated in the hearings in Boston. Each attorney, however, including student attorneys, bears the burden of providing satisfactory evidence of hours spent and the nature of each activity to substantiate fee requests. Without any evidence or records kept, the court cannot analyze whether or not the request is reasonable. The court requires student attorneys to follow similar guidelines as practicing attorneys, and for this reason, the hours will be omitted from the award.

d) Mr. Kyle Hicks

Petitioners request compensation for 44.4 hours of work performed by Mr. Hicks. Twelve hours of this time were secretarial in nature and are not reimbursable.[29] Analysis indicates that Mr. Hicks spent a considerable time organizing files, compiling documents, and stamping documents, tasks that are not compensable under the Program. Mr. Hicks' hours will be reduced from 44.4 to 32.4.

3) Respondent proposes an alternative for analyzing student services.

The court feels obligated to respond to Respondent's suggestions for an alternative approach to analyzing the hours expended by student attorneys in litigating this matter.

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[27] Opposition at p. 12.

[28] Corder v. Secretary of HHS, No. 97-125V, 1999 WL 1427753 (Fed. Cl. Spec. Mstr. Dec. 22, 1999)(The master found $60-per-hour to be an appropriate rate for a paralegal.

[29] See, infra at p. 9, and Yeoman v. Secretary of HHS, No. 90-1049V, 1994 WL 387855 (Fed. Cl. Spec. Mstr. July 11, 1994).

Relying on Burr v. Sobol,[30] he argues that 40% of the time billed by the student attorneys should be reduced. The court in Burr found that "for the law student attorneys, only the time researching, writing and editing is counted, and this number then should be discounted by 35%."[31] Respondent's proposal, however, does not assist students to develop necessary management skills and leads to an arbitrary reduction. The undersigned prefers to require students to practice the discipline of keeping contemporaneous time records that indicate the date and specific character of the services performed, the number of hours (or fractions thereof) expended for each service, and the name of the person providing such service." [32] This method carries its own benefits, honing organization skills and good habits, and allows the court to review and to determine, as the court has done in the present case, whether such requests are reasonable and appropriate. Petitioners' claim required scrutiny and, as described in previous paragraphs in this decision, the court prefers to make assessments based on evidence rather than being dictated by formula. Discussion of student travel expenses will be addressed hereafter. Students will not be treated differently from practicing attorneys.

D. Costs

1) Petitioners' Costs

Petitioners, Mr. and Mrs. Macrelli, indicate that they have incurred $1,257.73 in out-of-pocket costs while litigating this matter. This includes $748.51 for a trip to Washington, D.C. to prepare for their upcoming hearing. Respondent argues that this trip was unnecessary and that the preparation could have been accomplished telephonically or in Boston immediately prior to the hearing. Petitioners' reply that because Mr. and Mrs. Macrelli were testifying in person and extremely anxious about their testimony, it was prudent for them to meet in person. Furthermore, Petitioners argue that it is reasonable for counsel to conduct pre-hearing preparations in advance rather than on the morning or day immediately prior to the hearing.

Following the purpose of General Order #9, this court agrees that Petitioners may be reimbursed for the documented costs advanced in trying this case. The court will not interfere unduly with the manner in which attorneys prepare their clients for trial. The undersigned has previously held that the court "cannot second guess the judgment of an attorney unless there is a clear basis to believe that the preparation or communication was unnecessary in dealing with a client..."[33] Petitioners' one-time trip to Washington does not strike the undersigned as an excessive or unreasonable expense.

In addition to the costs mentioned above, Petitioners seek reimbursement for $115 worth of phone calls made to Washington, D.C. to speak to their counsel. Respondent objects

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[30] Burr v. Sobol, 748 F. Supp. 97, 101 (S.D.N.Y. 1990)

[31] Id.

[32] Guidelines at p. 31.

[33] Haugh v. Secretary of HHS, No. 90-3128V, 1999 WL 525539 (Fed. Cl. Spec. Mstr. June 30, 1999).

to this request because the telephone records provided show only $14.84 spent in phone calls to Washington, D.C. Once again, Petitioners bear the burden of providing the court with a complete explanation of all costs. The amount claimed by Petitioners, which they describe as a "conservative estimate," is merely a guess as to what they think they spent without receipts or valid evidence required by law. The court will not reimburse undocumented claims. Petitioners will be reimbursed for those costs that have been justified by contemporaneous records.[34] Petitioners, therefore, are eligible to receive a total of $1157.57 for their validated personal costs.

2) Costs to Petitioner's Counsel

a)Expert Witnesses

Respondent objects to the rates charged by Petitioners' medical experts, Dr. Marcel Kinsbourne and Dr. John Shane, based on certain cases in which the experts have been awarded an hourly rate of $200. This court is not bound by awards allowed in other cases and declines to agree that $200 per hour is the maximum hourly rate acceptable for qualified experts.[35] Each case must be considered on its own merits. The court in Hayden v. Sec'y of HHS,[36] rejected a $200 cap on hourly rates and increased it to $300 per hour. The medical expert in that case, as well as in this one, was Dr. Kinsbourne. The hourly rate claimed for each of the two doctors in this case is is $300.00. The exceptional expertise and persuasive testimony of Drs. Kinsbourne and Shane were critical to the outcome of this case. The court finds no justification for reducing the requested fees. Both doctors are extremely competent and have testified always professionally, reasonably, and eloquently in several other cases before the undersigned special master. Their services have benefitted Vaccine Program petitioners for many years. The fees claimed in the present case are reasonable[37] and the court finds no justification for a reduction. Based on the number of hours expended by each expert, the court awards the amount of $7,275 for Dr. Marcel Kinsbourne, and the amount of $5,043 for Dr. John Shane for services in this case.[38]

b) Student Travel and Subsistence Costs (Lodging and Meals).

Most of the foregoing issues are relatively routine. The following issue is far from

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[34] Long v. HHS, No. 91-236V, 1995 WL 774600 (Fed. Cl. Spec. Mstr. Dec. 21, 1995).

[35] See, Scoutto v. Secretary of HHS, No. 90-3576V, 1997 WL 588954 (Fed. Cl. Spec. Mstr. Sep. 5, 1997); Wilcox v. Secretary of HHS, No. 90-991Vm 1997 WL 101572 (Fed. Cl. Spec. Mstr. Feb. 14, 1997).

[36] Hayden v. Secretary of HHS, No. 91-643V, 1998WL 430081 (Fed. Cl. Spec. Mstr. July 10, 1998). See also, Berry v. Secretary of HHS, No. 997-01801V, 1999WL 525539 (Fed. Cl. Spec. Mstr. July 27, 1998).

[37] See, Haugh v. Secretary of HHS, No. 90-3128V, 1999 WL 525539 (Fed. Cl. Spec. Mstr. June 30, 1999).

[38] This amount includes reimbursement for $543.00 round trip airfare.

routine, and to the court's knowledge, has never been challenged nor addressed directly in relation to the Vaccine Program. Respondent objects to the number of students for whom reimbursement for travel and subsistence costs are requested. Respondent petitions the court to rule on the matter of reasonableness of multiple student attorneys under the circumstances of this case.

Petitioners request reimbursement for airline tickets for students in this case who attended and participated in the Macrelli hearings in Boston. Three students participated in the first hearing in February, 2000; two student attorneys participated in the second Macrelli hearing in March.[39] Respondent maintains that costs claimed for student participation in the hearings should be denied for two reasons: First, the Fee Application itself, is notably deficient and fails to submit adequate receipts or documentation for travel and subsistence costs relating to the February and March hearings. Second, and more importantly, Respondent maintains that the Vaccine Program should not bear the travel and subsistence costs for multiple student advocates. [40]

This court has ruled on occasion, that multiple attorneys and or legal staff appearing and participating in a hearing, more likely than not, present the risk of redundancy and, only one attorney is reimbursed in most cases. Respondent maintains that in like manner, it is imprudent for the court to allow multiple students to incur the costs of travel and subsistence (lodging and meals) to attend and participate in hearings when such participation requires the expense of travel outside the Washington, D.C. metroplex. Respondent suggests that it would be reasonable to provide funds for one student only in addition to Professor Meyers, and that the George Washington School of Law should bear the travel costs of additional student attorneys.[41] The option of transferring the costs to the George Washington School of law, at the present time, is unlikely. Professor Meyers clarified that the law school does not cover these costs, but merely "fronts" or "allows" such costs on the expectation of being reimbursed by the Vaccine Program. The issue, however has been raised, and must be addressed.

Generally, allowing fees and costs for a single attorney only is applied primarily in cases prosecuted by private attorneys and their law firms to avoid redundant and unreasonable fee requests.[42] The policy simply does not apply when student-attorneys are involved. Other criteria must be sought.

In response to the court's inquiry, the Department of Justice informed the court that the Department had concluded at the outset, as a matter of policy, that it would be appropriate for

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[39] In June, 2000, an unsuccessful attempt to settle this case by the process of alternative dispute resolution (ADR) was held also in Boston. Professor Meyers was not accompanied by any students on this occasion.

[40] Opposition at p. 17.

[41] Respondent does not challenge the hourly rate of $50 for student attorneys.

[42] See, Potter v. Secretary of HHS, No. 90-2V, 1992 WL 35788, 3 (Cl. Ct. Spec. Mstr. Feb. 7, 1992)(Costs incurred by Petitioners in connection with a legal assistant's travel and participation in hearing were disallowed as unnecessary.)

petitioners, represented by students associated with the George Washington University School of Law Clinic, to be reimbursed for reasonable fees and expenses by funds from the Vaccine Injury Fund. (Emphasis in the original). The Department of Justice maintains that issues now being raised are related, not to an objection to that policy, but to the reasonableness of student reimbursement claims for the number of hours and expenses incurred by the students representing petitioners in this case. (Emphasis in the original).

No policy exists therefore, to suggest the maximum number of student participants that might be accommodated reasonably in any one case. The court has no guidelines or precedence. This issue appears to have been negotiated on a case-by-case basis in all other cases involving the clinic with the exception of this one. The court will not attempt to establish a policy and will address the issue on the basis of this case only.

Having been excessively prolonged over a period of three years, the Macrelli case is a *fait accompli*-- with the exception of the determination of fees and costs incurred. The following considerations apply. First: The court is unaware of any evidence that Professor Meyers was given prior notice--no complaints-- nor criticisms about the manner in which Petitioners presented their case. If questions were raised, they were not brought to the attention of the court until after Petitioners' Fee Application was filed and Respondent filed its objections. Second: This case is not the first case involving multiple student attorneys. Professor Meyers claims that in five of his cases, students have traveled outside the Washington, D.C. area, evidently without complaint. Third: He believes that there have been only two other clinic cases involving student teams of three persons, and these were cases of unusually complex medical and legal issues as was true in the instant case. [43] Fourth: In reiteration, inasmuch as the Department of Justice settled those cases in the past, counsel had no notice of any objections to the team of students and none was expected in this case.

The initial Fee Application of January 18, 2001 was deficient. In filings of May 2, 2001, November 14, 2001, and November 30, 2001, however, Professor Meyers, provided reasonable explanations for most of his claims and the for manner in which he chose to pursue his case, albeit with some gaps that merit reduction. The additional information provided tends to justify many, though not all, of his requests. For example, the court agrees that this case was unusually complex and prolonged, involving four experts, two neurologists, two pathologists, and an fifth expert, a medical examiner, who discussed the circumstances of the infant's death. The case involved complex medical and scientific issues. Professor Meyers concluded that two students would not be able to handle the multiple issues. The evidence is clear, also, that the students in this case did not merely "attend" the hearings but virtually did all the talking.

Rather than set an arbitrary standard for future cases, the court concludes that the number of students in any single case should be determined on a case-by-case basis depending upon the circumstances of the case and the weight of evidence justifying additional

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[43] Affidavit and Notice of Filing of November 14, 2001, at p. 5 (That number is in addition to the Macrelli case. In other words, the maximum number to date appears to have been 3 student-attorneys.)

student participation.[44]

The parties here were either unable or unwilling to engage in the courtesy of settlement discussions. After careful review of the parties' arguments, the court concludes that use of extra students in this particular instance was reasonable, supportable and prudent. The court will not challenge counsel's decision and will allow a portion of Petitioners' request for reimbursement for student travel and subsistence in this case.[45] Exceptions and amounts were identified and reduced elsewhere within this decision.

The parties are cautioned that the court's ruling applies to this specific case. In all cases brought before the undersigned Special Master, close scrutiny will be applied as to the issue of "reasonableness" and the number of students. Multiple student attorneys will be subject to detailed explanations justifying travel and subsistence costs determined on the circumstances of the case.

c) Other Costs

Petitioners seek reimbursement for pens and legal pads bought in Boston for the February hearing. This court has been consistent in disallowing costs that are generally considered to be part of the overhead costs of practicing law.[46] The court will not reimburse Petitioners for the aforementioned articles. Among the costs claimed, Petitioners submitted a receipt for $25.11 for alcoholic beverages bought during the February trip to Boston. Alcoholic beverages are not reimbursable. This amount will be deducted.

In addition to the fees and costs requested, Professor Meyers seeks an additional $600 for three hours spent writing his reply to Respondent's Opposition. The court will honor his request in part. Petitioner's initial Application was deficient and could have been improved greatly by a careful final review. With greater attention to detail, the additional three hours would not have been required. Petitioner's supplemental reply to Respondent's Opposition, however, was ably and appropriately focused, offering detailed explanations in a difficult case, and was effective. The court cannot dismiss that effort as unnecessary. The court will allow the amount of $150 for hours spent on Petitioner's Reply.

Petitioners will be reimbursed $1709.16 for traveling costs to both hearings.[47]

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[44] The court's ruling in this case is specific to the Macrelli case. The court, however, urges the Department of Justice to consider establishing a policy, inasmuch as possible, relating to the reasonableness of multiple student attorneys for all cases in which the Vaccine Clinic is involved. Such policy would benefit both petitioners and the court by treating similar cases in a similarly consistent manner.

[45] For a full explanations of amount reductions and reimbursements please see Appendix A.

[46] See, Guy v. Secretary of HHS, 38 Fed. Cl. 403 (1997), Arbuthnott v. HHS, No. 90-1796V, 1994 WL 17926 (Fed. Cl., 1994), Roedhl v. Secretary of HHS, No. 1995V, 1993 WL 534740 (Fed. Cl. 1993), Plott v. Secretary of HHS, No. 92-633V, 1997 WL 842543 (Fed. Cl. 1997).

[47] See, Appendix A.

CONCLUSION

The court has carefully reviewed all the documents submitted by the parties and it was surprised with the deficiencies in the original fee application. Moreover, the undersigned believes that student-attorneys should be held to the same high standards as the court hold other attorneys and this fee application does not represent sound lawyering. Although the fee application was lacking in many respects, the above captioned matter was extremely complicated in which many student-attorneys had to participate to ensure a successful outcome. This was a difficult case where two hearings and an ADR session were necessary to see this matter to a close. When compared to other cases brought before the court, the fee application was within the range of reasonableness. The court took that into consideration when analyzing the reasonableness of Petitioners' request. The fact that the court has not decided how many student-attorneys should participate in a hearing does not give carte blanche for Petitioners to send every student that wishes to participate in an out-of-town hearing. Travel to hearings should be measured by necessity and effectiveness not by learning experience or observation.

Pursuant to the aforementioned reductions, the total amount of attorneys' fees awarded is $31,190.00. The total costs awarded amount to $ 15,407.44.

A check for in the amount of **$45,439.87** shall be paid to Petitioners and Petitioners' counsel jointly and a check in the amount of **$1,157.57** shall be paid solely to Petitioners.

IT IS SO ORDERED.

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E. LaVon French
Special Master

APPENDIX A

A. Attorney's Fees

	Amount Claimed	Actual Reimbursement
Prof. Peter Meyers Hourly Rate Hours expended Total:	 $200.00 x 148.8 $ 29,160.00	 $190 x 133.79 $ 25,420.00
Student-Attorney Tracy Parks Hourly Rate Hours Expended	 $50.00 x 52.4 $2,620.00	 $50.00 x 37.4 $1,870.00
Student-Attorney Rick Reiter Hourly Rate Hours Expended Total:	 $50.00 x 49.2 $2,460.00	 $50.00 x 45.6 $2,280.00
Student-Attorney Courtney Johnson Hourly Rate Hours Expended Total:	 $50.00 x 49.2 $2,460.00	 $0.00
Student-Attorney Kyle Hicks Hourly Rate Hours Expended Total:	 $50.00 x 44.4 $2,220.00	 $50.00 x 32.4 $1,620.00
Fee Total:		$31,040.00

B. Petitioner's Expenses

	Amount Claimed	Actual Reimbursement

Postage and Shipping	$28.81	$28.81
Obtaining Medical Records	$317.51	$317.51
Travel from Boston to Washington, D.C.	$748.41	$748.41
Parking and tools to Courthouse	$48.00	$48.00
Long Distance Phone Calls	$115.00	$14.84
Petitioner's Expenses Total:		**$1,157.57**

C. Litigation Costs

	Amount Claimed	Actual Reimbursement
Dr. Kinsbourne Fee	$7,275.00	$7,275.00
Dr. John Shane Fee Round Trip Airfare Total:	$ 4,500.00 + $ 543.00 $ 5,043.00	$ 4,500.00 + $ 543.00 $ 5,043.00
Filing Fee	$ 120.00	$ 120.00
Two Hearing Transcripts	$849.25	$849.25

Expenses for February 2, 2000 Hearing: Round Trip Air Fare Hotel Rooms for two nights Meals Parking and Cab Fares Supplies Total:	 $ 828.00 for four people $ 657.16 $ 470.25 $ 193.00 + $ 15.16 $ 2163.57	 $ 621.00 for three people[48] $ 657.16 $ 304.00[49] $ 193.00 + $ 0.00[50] $ 1,175.16
Expenses for March 22, 2000 Hearing Round Trip Airfare Parking, Cab Fares and Meals Total:	 $ 651.00 + $ 170.59 $ 821.59	 $ 434.00[51] + $ 100.00[52] $ 534.00
Expenses for June 8, 2000 ADR Round Trip Air Fare Parking, Cab Fares and Meal Total:	 $297.00 + $114.00 $ 411.00	 $297.00 + $114.00 $ 411.00
Costs Total:		**$15,407.44**
GRAND TOTAL:		**$ 46, 597.44**

[48] Petitioner failed to submit all receipts for the four airfares requested. See, Long v. HHS, No. 91-236V, 1995 WL 774600 (Fed. Cl. Spec. Mstr. Dec. 21, 1995).

[49] Pursuant to the court's belief that the amount requested was unreasonable, reimbursement shall be calculated at $38.00 per person per day.

[50] Decision on Attorneys' Fees and Costs, p. 15.

[51] Petitioner failed to submit all receipts for the three airfares requested. See, Long v. HHS, No. 91-236V, 1995 WL 774600 (Fed. Cl. Spec. Mstr. Dec. 21, 1995). The court followed Respondent's suggestion of allowing only two tickets even without the required documentation.

[52] The court found the request of $131.24 for lunch for three people to be excessive. Twenty dollars per person is more reasonable.